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ASSIMILATION OF NATIONAL LAWS AS A FUNCTION OF EUROPEAN INTEGRATION

BY ERIC STEIN *

Of the Board of Editors

INTRODUCTION

In more than one sense the European Communities are a frontier land of modern international organization. One aspect of the work of the European Economic Community which has thus far escaped the attention lavished on other facets is the multi-pronged effort to reduce the differences among the national laws of the member states. Stated more affirmatively, this is an effort to make the national legal systems of the member states more similar, to "assimilate" them. This effort has much in common with the "uniform law" movement in the United States and with the "unification-of-law" movement which has flourished on the Continent in this century. But it differs from these "uniformity" and "unification" movements in at least two respects:

First, assimilation of national laws in the Community is an integral part of an intricate plan for a progressive coalescence of the national economies of the six member states. Its special function in that plan is to remove those differences among national laws which impede the process of coalescence. This function not only controls the direction of the effort but also supplies it with a motive force.

* Professor of Law and Co-Director, International and Comparative Legal Studies, University of Michigan Law School.

Portions of this article, which is a part of a more extensive study, were used in a lecture before the Centre Interuniversitaire de Droit Comparé at Brussels on June 5, 1963, and at a conference sponsored by the British Institute for International and Comparative Law at Ditchley Park, Eynstone (Oxfordshire), on June 14, 1963. I am most grateful to M. Michel Gaudet, Director General at the Legal Service of the European Executives, and Mr. Verlooren van Themaat, Director General of the Directorate General for Competition at the Commission of the European Economic Community, for having read and commented in detail on the text. Similarly, I am indebted to Dr. Gerhard Bebr, legal adviser at the Commission of the European Economic Community, Prof. Alfred F. Conard of the University of Michigan Law School and to Prof. John P. Dawson of Harvard University Law School for their helpful suggestions concerning the manuscript. The responsibility for the text, and particularly for the concluding remarks, is of course entirely my own. I am indebted to the John Simon Guggenheim Memorial Foundation and to the Ford Foundation for their financial support of the study. To my knowledge, the term "assimilation of laws" was coined for the first time with reference to the European Economic Community by Thomas L. Nicholson in a statement before the Foreign Law Association (9 A. J. Comp. Law 358 (1960)).

Second, the assimilation takes place within a new and unique institutional framework; the institutions of the Community have the legal power to order the national governments to make the adjustments in their legal systems necessary for the accomplishment of the assimilation. Only when a proposed assimilation measure exceeds the limits of the lawmaking power of the Community do the member governments resort to a traditional international law device, a treaty, to effect the desired changes in their national laws.

This phase of the Community's activities provides two tempting opportunities for study. First, one may study the new techniques for achieving assimilation of laws. Second, one may observe the interaction among the new Community institutions, the national governments and national and trans-national interest groups in a lawmaking process which immediately affects powerful economic interests and which may in the long run affect the cohesion of the people of Western Europe.

In the first years of its existence the Community has pursued the following priority objectives: first, the removal of governmental obstacles to the movement of goods, labor, capital and services; second, the setting up of a common tariff frontier against the outside world; third, readying an armory of rules for freeing competition from private and government restrictions; and fourth, the organization of agricultural markets.

A. Activities in Public and Private Law Distinguished

The legal devices for the achievement of these objectives fall primarily within the area of public law.¹ It is therefore not surprising that the work of the Community in the field of assimilation of laws has also centered primarily on public law. Private international law, some aspects of company law, and patent law have been the major exceptions. Logically any major increase in economic intercourse across national frontiers is bound to increase the chances of a conflict of competence among courts of different states and the need for the recognition and execution of judgments of foreign tribunals. Similarly, when companies extend their business activities across national frontiers, differences in national company laws give rise to such problems as the recognition of their legal personality and the protection of their creditors. Finally, the Common Market cannot function as a single economic arena without a common patent system. In these three fields of private law the Community has done some considerable preparatory work toward assimilation.

Suggestions have come from governments and from the Bar seeking to encourage the Community "executive," the Commission, to venture into other fields of private law—other aspects of company law, the law of sales, the law governing commercial representatives and protective devices for

¹ The division between public and private law is helpful only if one paints a picture in broad strokes. What is public law in one legal system may be private law in another. Hallstein, "Angleichung des Privat- und Prozessrechts in der EWG," Lecture before the Max Planck Institute for Foreign and International Private Law, Hamburg, June, 1963.

the benefit of the seller in installment sales of movables. But these suggestions have not been followed thus far.²

As the Common Market becomes more integrated, the activities of the Community in the private law field may increase, although the experience in other integrated markets such as the United States has shown that the need for assimilation may not be as acute from the purely economic viewpoint as it would appear on first thought. Moreover, substantial uniformity exists already in some sectors of commercial and maritime law.³

B. Approximation of Laws as a Phase of Community Lawmaking

Lawmaking, which aims at the assimilation of national laws of the member states, cannot be discussed in isolation from other lawmaking activities in the Community, particularly since in a number of instances assimilation is conceived as a supplementary device to these other lawmaking processes.⁴ We may think of three basic categories of lawmaking in terms of the objectives of the Community scheme:⁵

1. The first category is aimed at assuring a "national treatment" throughout the Community territory for the nationals and companies of the member states, their goods and services and capital. Or, expressing it in a negative way, the objective is to remove all restrictions which discriminate on the basis of nationality.

2. The second category of lawmaking serves to put into effect the common treaty rules (as in the field of competition) and common Community policies. The treaty authorizes and requires the Community institutions to evolve common policies on agriculture and transport, and a common commercial policy toward third states.

It is useful to keep in mind when examining this category that integration has been conceived from the very beginning as a progression, an evolutionary process. Even within a nation-state, a legal norm is the ultimate expression of the will and values of the society; only after the conflicting economic and social forces have been composed may the resulting consensus crystallize into a general norm. In the Community we note a

² *E.g.*, Colloque organisé par l'Association des Juristes Européens: "Les garanties du vendeur à crédit d'objets mobiliers dans le Marché Commun," 1962 *Revue du Marché Commun* 269 (No. 49, July-August, 1962); also "Compte rendu des travaux du congrès international pour la création d'une société commerciale du type européen," 1960 *ibid.* (Supp. to No. 27, July-August, 1960).

³ Halld Kema Elbir, "L'idée d'un droit civil européen," *Annuaire de la Faculté de Droit de l'Université de Bordeaux, Série Juridique* 79 (1955); Jean Limpens, "L'étude du droit comparé envisagée comme moyen de rechercher les matières susceptibles d'unification sur le plan international," *Rapports généraux du Ve Congrès International de Droit Comparé* 193 (1960).

⁴ On the lawmaking activities generally see Stein, "The New Institutions," 1 Stein and Nicholson, *American Enterprise in the European Common Market—A Legal Profile*, Ch. II, p. 33 (1960).

⁵ Gaudet, "Incidences des Communautés Européennes sur le droit interne des états membres," *Annales de la Faculté de Droit de Liège* 5 (1963).

multitude of activities directed toward what the Rome Treaty calls "co-ordination"—co-ordination of economic and monetary policies,⁶ social, regional and energy policies of the member states. With a few exceptions these confrontations of national policies have not progressed far enough to affect national laws or do so only very indirectly. When the Council of Ministers decides to undertake a Community-wide inquiry into the wage rates within certain sectors of industry,⁷ or when the Commission plans for a co-ordinated use by the member governments of the national devices to cope with the vagaries of the business cycle,⁸ the effect on national laws is, if anything, incidental. The same is true if, for instance, the Council decides, as it did on July 20, 1960, that all commercial agreements between the member states and non-member states must include the so-called European Economic Community clause.⁹ But if we assume that the process blocked out by the Rome Treaty will continue to take its course at a pace determined by the prevailing political and economic conditions, we must expect that the lawmaking activities in this category will expand as agreement is reached on common policies in the various fields.

In both these categories the desired legal objective is achieved either directly by a self-executing provision of the Rome Treaty,¹⁰ or by a federal-type Community "regulation" which changes national laws directly, or by a Community "decision" or "directive" which compels the national lawmaker to adjust national law through the national lawmaking processes.¹¹

⁶ The Treaty Establishing the European Economic Community (hereinafter referred to as the Rome Treaty), *e.g.*, Art. 105 (1): "In order to facilitate the attainment of the objectives stated in Article 104, Member States shall co-ordinate their economic policies. They shall for this purpose institute a collaboration between the competent services of their administration departments and between their central banks. The Commission shall submit to the Council recommendations for the bringing into effect of such collaboration."

The recent Commission's proposal for monetary and financial co-operation as well as the suggestions for economic projection (or "programmation") are based on this article.

⁷ Regulation of the Council of Ministers No. 10, 1960 Journal Officiel des Communautés Européennes 1199, hereinafter cited as Journal Officiel.

⁸ Bulletin "Europe," Euratom and Common Market, No. 1457, item 14082, Jan. 17, 1963 (hereinafter referred to as "Europe").

⁹ Fourth General Report on the Activities of the Community, Ch. IV, par. 192.

¹⁰ *E.g.*, Art. 85 as interpreted by the Court of Justice in Case 13-61, *de Geus en Uitdenbogerd against Bosch and Van Rijn*, 8 Rec. de la Jurisprudence de la Cour 89 (1962), 57 A.J.I.L. 129 (1963); and Art. 12 as interpreted in Case 26-62, *van Gend en Loos against Tariefcommissie*, 9 *ibid.* 1 (1963); digested below, p. 194; also reproduced with a comment in 1963 Journal des Tribunaux 185 (No. 4897). See also comment by Riesenfeld and Buxbaum, below, p. 152.

¹¹ The various forms of the acts of the Council of Ministers and the Commission are defined in Art. 189 of the Rome Treaty which reads as follows:

"The Council and the Commission shall, in the discharge of their duties and in accordance with the provisions of this Treaty, issue regulations and directives, take decisions and formulate recommendations or opinions.

"Regulations shall have general application. They shall be binding in every respect and directly applicable in each Member State.

3. The third category of lawmaking is aimed at what the treaty calls "approximation" of national laws of the member states "to the extent necessary for the functioning of the Common Market" (Article 3(h)). We must look to the various provisions of the Rome Treaty to determine the potential scope of this approximation and the procedure through which it is to be achieved.

A word about the terminology may be useful. The treaty employs three different terms, all of which connote the reduction of differences among the laws of the various members. These are "approximation," "harmonization," and "co-ordination." But the treaty does not employ them consistently to connote three different concepts. A comparison of the four official texts of the treaty leads to the perhaps surprising conclusion that there is no meaningful difference between the three terms.¹² Each term implies a process which may lead as far as the creation of a uniform rule, but which may stop short of such result. As was suggested above, the concept of "co-ordination" is used also in a non-normative context, such as "co-ordination of economic policies," which may not involve any change in the law.

It is inherent in the Community system that the Community institutions may not act except on the basis of a more or less specific grant of power. This principle holds true also for the approximation-of-laws activities. Grants of power for the purpose of approximation of national laws appear in two types of provisions of the treaty which we might call general and specific. The conditions under which the institutions may act and the procedures which they must follow differ widely from one provision to the other.

"Directives shall be binding, in respect of the result to be achieved, upon every Member State, but the form and manner of enforcing them shall be a matter for the national authorities. Decisions shall be binding in every respect upon those to whom they are directed.

"Recommendations and opinions shall have no binding force."

¹² Only the French text of the Treaty Establishing the European Coal and Steel Community (E.C.S.C.) is authoritative. An English translation was published by the E.C.S.C. High Authority. The Dutch, French, German and Italian texts of the Rome Treaty and of the Treaty Establishing the European Atomic Energy Community are equally authoritative. Two different English translations were published: one in 1958 by the Interim Committee for the Common Market and Euratom, Brussels (subsequently reprinted by the Publishing Services of the European Communities), and the other in 1962 by Her Majesty's Stationery Office. There is no authoritative English text of any of the three treaties. Löchner examined the texts of the three treaties and concluded that there was no fundamental difference between the following terms used in the German text: Angleichung, Annäherung, Anpassung, Harmonisierung, Abstimmung, Koordinierung, gemeinsames Vorgehen, enge Zusammenarbeit. He attempted, however, to find some differences in the "gradation of intensity." Löchner, "Was bedeuten die Begriffe Harmonisierung, Koordinierung und gemeinsame Politik in den Europäischen Verträgen?", 118 *Zeitschrift für die gesamte Staatswirtschaft* 85 (Jan., 1962). See also Polach, "Harmonization of Laws in Western Europe," 8 *A. J. Comp. Law* 148 (1959); cf. Strauss, *Fragen der Rechtsangleichung im Rahmen der Europäischen Gemeinschaften* 18 (1959).

APPROXIMATION MEASURES (ENACTED OR PROPOSED) AND THEIR
LEGAL BASIS IN THE ROME TREATY

The writer would like to discuss these treaty provisions and indicate what approximation work has thus far been undertaken under each. It should be kept in mind that the Community institutions may have an option to base an approximation measure either on a specific or on a general treaty provision or they may decide to invoke both such provisions as a legal basis for a measure.

A warning, however, is in order: to an outsider only a fraction of this work is visible either in the form of the texts which have actually been adopted—and these are few—or in published drafts. The greater part of the work is submerged in a labyrinth of preparatory activities which are more or less invisible from the outside.

A. Measures under General Approximation Provisions

Significantly, the treaty chapter on "Approximation of Laws," which includes the so-called general approximation provisions, forms a part of the treaty title dealing also with rules on restraints of trade, governmental subsidies and other impediments to competition. Article 101 in this chapter gives the Council of Ministers the power, on the proposal of the Commission, to issue directives designed to remove a discrepancy between legislative or administrative provisions of the member states which "is interfering with competition within the Common Market and consequently producing distortions which need to be eliminated." Since the beginning of the second stage of the transitional period, that is, since January 1, 1963, such directives no longer require unanimous consent in the Council and may be issued by a "qualified majority" vote.¹³ Article 102 establishes a procedure before the Commission aimed at preventing the occurrence of new distortions from changes in national legal systems.

Although the concept of "distortion" loomed large in the economic imagery surrounding the origins of the treaty and underlies some other provisions, the treaty does not define this term. It is one of the many economic terms which have found their way into modern law. Other terms of the same origin, for instance "subsidy" or "enterprise," have a more or less defined meaning in the national laws of the member states, even though the definition may vary in the several national laws. But this does not seem to be the case with the term "distortion." The Spaak Report, an important part of the *travaux préparatoires*, suggests that the

¹³ The Council of Ministers, in which each member state is represented by one Minister, votes by a simple majority in a few instances only. As a rule it votes by a "qualified majority" based on a weighted voting formula: the Big Three (France, Germany and Italy) have four votes each, The Netherlands and Belgium two votes each, and Luxembourg has one vote. A majority of twelve votes is required (Art. 148). For an analysis of this formula, see Stein, "The New Institutions," 1 Stein and Nicholson, *American Enterprise in the European Common Market—A Legal Profile*, Ch. II, pp. 86-88 (1960).

term "distortion" does not apply to disparities arising from different levels of productivity, differences in natural wealth or over-all tax burden or other basic conditions of national economy. On the contrary, there is a "distortion" where the differences in the basic economic conditions are nullified or inverted and competition is impaired by a disparity in national legislation or regulations, as a result of which an industry in one state is placed with respect to its cost of production in a favorable or unfavorable position in relation to the rest of the economy, without compensating measures having been taken with respect to the same industry in the other states. According to the Spaak Report, a "distortion" may be caused, for example, by disparities arising from differences in tax laws, in the methods of financing social benefits (contributions by employers and employees as against appropriations from public funds), in the laws determining working conditions such as the number of hours of the work week, overtime pay and paid vacation, in the credit policies and price regulations.¹⁴ The Court of Justice of the Communities grappled with a somewhat similar concept under the European Coal and Steel Community Treaty,¹⁵ and very likely the meaning of the term "distortion" will have to be evolved by the Commission with the Council and the Court of Justice on a case-by-case basis.

Although the Commission has been considering the possibility of invoking Article 101 against recent Italian and German tax legislation favoring selected national industries, it has not taken any formal steps as yet, and the two articles have thus far remained a dead letter for all practical purposes. However, progress has been made in the application of Article 100, which is the remaining article in this treaty chapter.

Article 100 provides for the "approximation of such legislative and administrative provisions of the Member States as have a direct incidence on the establishment or the functioning of the Common Market." Only if such "direct incidence" can be shown, may the Council of Ministers enact the necessary directive, and it can do so only by unanimous agreement. Moreover, if the directive should require even a single member to modify its legislation as distinguished from mere administrative regulations, then the Council must in addition consult both the European

¹⁴ Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères, Comité intergouvernemental créé par la Conférence de Messine at 60-64 (1956). Do disparities affecting costs of distribution or transportation also create a "distortion"? Can this term be applied to disparities in technical regulations also? See Poujade, "Harmonization of Conditions of Competition," Aspects of Economic Integration 88 (PEP 1962); Sprung, "Die Bestimmungen über die Beseitigung von Verzerrungen des Wettbewerbs im Vertrag über die EWG," 20 Finanzarchiv 201 (1960).

¹⁵ Cases 27 to 29-58, *Compagnie des Hauts Fournaux et Fonderies de Givors and Others against the High Authority*, 6 *Recueil de Jurisprudence de la Cour de Justice* 501, particularly at 532 (No. 1, 1960). See also Cases 32-58 and 33-58, *Société nouvelle des usines de Pontlieu-Acieries du Temple (S.N.U.P.A.T.) against the High Authority*, 5 *Recueil de Jurisprudence de la Cour de Justice* 275 (1958-1959); Case 42-58, *Société des Aciers Fins de l'Etat (S.A.F.E.) against the High Authority*, *ibid.* 381; and Case 14-59, *Société des fonderies de Pont-à-Mousson against the High Authority*, *ibid.* 445.

Parliament, to obtain a political judgment on the proposal, and the Economic and Social Committee, in which are represented the various interest groups likely to be affected by the directive. Unanimity in the Council is a permanent requirement and will not be removed in this instance in the course of or after the expiration of the transitional period. The procedural prerequisites prescribed in this article are substantially more stringent than those in the companion Articles 101 and 102, but this is understandable because the authority conferred by Article 100 is so much broader and more general.

How does the Commission decide which national laws or regulations have a "direct incidence" on the Common Market within the meaning of Article 100 and thus should be approximated by a directive? It was understandable that the Commission's staff turned in the first place to the studies and experience accumulated by other international bodies, particularly the Organization for European Economic Cooperation (O.E.E.C.) and its successor, the Organization for Economic Cooperation and Development (O.E.C.D.), for the purpose of selecting the areas of laws and regulations which required attention as well as the working methods.

1. Technical and Administrative Regulations Obstructing Trade and Competition

The Commission's staff, in co-operation with officials assigned by member governments, has chosen three broad areas of laws and regulations: first, laws and regulations concerning foodstuffs, veterinary and phytosanitary matters, seeds and forestry; second, technical regulations on motor vehicles and agricultural tractors; and third, laws and regulations on pharmaceuticals. The earlier work of the O.E.E.C. established that substantial disparities exist between the laws and regulations in these areas as regards the quality, content and treatment of products, packaging, storage, inspection and testing, and that these disparities cause delay and hamper trade across frontiers. As direct measures of protection—tariffs and import restrictions—are reduced, these regulations tend to become the readiest substitute for the protection of domestic markets. The O.E.E.C. and numerous special committees of government representatives, engineers and industrial personnel struggled with these barriers with limited success,¹⁶ and the Commission staff decided to continue where the O.E.E.C. left off. Work is done in working groups, each chaired by a Commission staff member and composed of expert officials drawn from the national administrations and appointed by the member governments—a pattern followed generally in the entire field of approximation. Not less than forty such working groups and an advisory committee of scientists have been active alone in the first of the three areas described above.¹⁷

¹⁶ See, for instance, O.E.E.C. doc. IV/1057/51 of May 8, 1951, *Deuxième enquête sur les réglementations techniques formant obstacle au développement des échanges intra-européens*.

¹⁷ Steiger, "Massnahmen zur Harmonisierung des Rechtes der Land- und Ernährungswirtschaft in der EWG," 31 *Archiv der deutschen Landwirtschaftsgesellschaft* 89 (1963).

In the field of technical regulations the Commission staff first adopted the O.E.E.C. method of "mutual accusation": each member government was asked to report all regulations of any other member which obstruct its own exports. The Union des Industries du Marché Commun (UNICE), which groups together the national associations of industries in the six member states, was asked to co-operate with a view to completing this inventory, but the process has been slow and the results not entirely satisfactory. Consequently the Commission staff has resorted to a pragmatic approach in setting the work priorities. It took into account requests and complaints against individual regulations which came from member governments, members of the European Parliament, and particularly from industry, which has organized itself most effectively by forming not only a general top organization—the UNICE mentioned above—but also a multitude of specialized organizations grouping together various branches of industry in the Common Market. Some consumer quarters have complained that, because of the weakness of the consumers' organizations in Europe, the setting of priorities for approximation has been unduly influenced by interested industries.¹⁸

The first and only directive which has thus far been adopted by the Council of Ministers under Article 100 was published in November, 1962.¹⁹ It falls within the foodstuffs area and lists the only colorants which may be employed in the production of foodstuffs to be consumed in the Community. This directive applies also to products imported for consumption within the Community, and it contains the first delegation of power from the Council to the Commission under Article 100: the Commission was given the authority to determine by its own directives the methods of analysis which the members must adopt with a view to supervising the observance of the criteria of purity laid down in the basic Council directive.

It became clear at an early stage that, although the basis for the approximation of laws was economic—differences in national laws have a "direct incidence" on the Common Market because they interfere with free intra-Community commerce in goods and may cause competitive inequalities, other interests must be taken into account: the protection of the consumer against fraud and misrepresentation, and, above all, the protection of his health. The treaty offers no guidance on how to deal with these interests, and the problem has been to assure high standards of protection of the public and at the same time to avoid unnecessary burdens upon industry and commerce. Some consumer quarters pointed to the significant differences in the national systems and in the scope of the national regulatory powers in such matters as the protection of the con-

¹⁸ Statement entitled "Les disparités et les insuffisances des réglementations alimentaires dans les pays de la Communauté," made by M. Paul Richely, Director of the Women's Union for Information and Defense of the Consumer on the occasion of the Days of Study of Common Market Consumers, March 19-20, 1963, Brussels.

¹⁹ Directive of the Council of Ministers on Approximation of Rules of the Member States Concerning Colorants Which May Be Employed in Foodstuffs for Human Consumption, 1962 Journal Officiel 2645.

sumer's right to full information, and urged the Commission to write a systematic European food and drug law, comparable to United States legislation, which would provide the necessary general principles and legal framework, rather than to deal with individual products and problems on a piecemeal basis. The Commission, however, concluded that its limited facilities and the sheer magnitude of the task called for a step-by-step approach and the directive on colorants was the first step. The directive has set the pattern and resolved some questions of principle, and it is likely that several other directives, which are now in various stages of preparation, will be adopted in the foreseeable future. These proposals include a directive listing the permissible food preservatives,²⁰ in which the normative power of the Commission is extended one step further, that is, the Commission is to have the authority not only to specify the approved methods of analysis but also to lay down detailed and specific criteria of purity within the general criteria prescribed by the Council. In addition, the European Parliament, anxious to assure maximum health protection, proposed that the Commission be given the further power to exclude from the list, with immediate effect, any preservative agent which subsequently proves harmful, but this decision would be subject to reversal by a unanimous Council of Ministers acting upon advice of the scientific committee.²¹ The next directive which is also ready for consideration by the Council is designed to protect the product-designations of cocoa and chocolate; it prescribes minimum weights and information on packaging and limits the use of chemical methods for extracting cocoa butter.

Because of the wide use of colorants and preservatives in a large variety of products, there has been little criticism of the Commission for giving priority to laws and regulations dealing with these agents. However, it has been pointed out, first, that the Community list contained a greater number of permissible colorants than the most liberal national list and, second, that the failure to specify the products in which colorants and preservatives may be used and the quantities and conditions for such use may, if anything, stimulate the employment of additives. The Council has indicated that it proposes to deal with the second aspect at a later stage.²² Again, the question has been raised whether the regulations on cocoa and chocolate, which have predominantly if not exclusively an economic purpose, were selected for priority consideration because they had particularly adverse effects on trade expansion, or rather because the

²⁰ Press Release IP (63) 34, Feb. 8, 1963. Text of the draft is contained in Bundesrat Drucksache 96/63 and in 1963 Bulletin de la C.E.E., No. 4, Supp., p. 2.

²¹ Commissioner Levi-Sandri raised a technical problem in connection with this proposed amendment of the Commission's draft and it is not known whether the Commission will accept it in a modified form. *Parlement Européen, Débats, Compte rendu in extenso des séances*, No. 12, June 28, 1963, p. 581. For the proposed text of the directive with modifications proposed by the Parliament, see 1963 *Journal Officiel* 1928.

²² See preamble to the Directive cited in note 19 above.

well-organized trade association was able to supply readily the necessary information and press its case with particular skill.²³

In the pharmaceutical field also the staff drew upon the work done by the O.E.E.C.-O.E.C.D. and by the World Health Organization. One directive is now before the Council.²⁴ It is the first of a series and deals with the prerequisites for placing pharmaceuticals on the market and labeling them. The second will deal with problems of testing and supervision, and the third with professional and trade advertising of pharmaceuticals.²⁵ Work is being done also on the use of colorants in pharmaceuticals and on the difficult and important subject of their patentability. Pharmaceuticals are a prime example of a product where a striking disparity in national legislation has been an obstacle to intra-Community trade expansion. Italy, for instance, alone among the Six, refuses to allow patents for either pharmaceuticals or processes for manufacturing pharmaceuticals. There is an important difference between the Franco-Italian preventive control system requiring prior authorization, inspections and tests, and the German "repressive" approach, allowing the producer considerable freedom but holding him criminally responsible for violations of the law. There are also variants of attitudes within national governments between the ministers of public health and those concerned with trade and economics. The industry, whose representatives participate directly in the O.E.C.D. working group, has been demanding a more direct rôle in the preparation of the Community's directives. However, on the whole the industry has supported the effort. The fact that the membership of the Commission's working group has been limited to government officials may have accelerated its work, but there is some feeling that at times disagreements within the working group are "solved" simply by omitting the controversial aspects.

The groups working pursuant to Article 100 on the approximation of technical regulations have been concentrating on three draft directives of rather limited significance: one dealing with the dimensions and location of motor vehicle license plates, another with the direction indicators for motor vehicles, and the third with the maximum speed of agricultural tractors.²⁶ But these directives are not ready for adoption because two basic problems remain unresolved. The first, on which there are three conflicting views, concerns the scope of the directives. Some governments would like the directives to lay down only the principle that, if a manufacturer complies with his own national technical requirements,

²³ The approximation work in the field of veterinary regulations is discussed below in connection with the common agricultural policy.

²⁴ For the text of the draft, see 1962 Bulletin de la C.E.E., No. 12, Supp., p. 4. See also Doc. 25, Parlement Européen, May 13, 1963, Rapport fait au nom de la Commission du Marché intérieur sur la proposition de la Commission de la Communauté économique européenne au Conseil (Doc. 122/1962-1963) concernant une directive relative au rapprochement des dispositions législatives, réglementaires et administratives relatives aux produits pharmaceutiques, Rapporteur M. René Tomasini.

²⁵ Press Release IP 500/63, Jan. 14, 1963.

²⁶ Press Release IP (62) 233, Nov. 28, 1962.

his products must be admitted to all member states; others would want the Community to prescribe "European" uniform rules which would have to be met by all the manufacturers in respect to all products they manufacture. Between these two extremes is the view that the observance of the rules set forth in the directives would ensure that the product would be entitled to free circulation throughout the Community, but the member states would not be compelled to impose these standards on the manufacture of any and all products made in their territory, including those made for local consumption or export to third states. The second general problem involves again the question of how much power the Council should delegate to the Commission. The Commission takes the position that a flexible procedure must be designed through which the Council directives in this field may be readily modified in order to assure that they correspond at all times to the latest technical developments and do not inhibit progress. Since the procedure under Article 100 for lawmaking by the Council is too burdensome and slow, the Commission has demanded that it be given the power to make the necessary adjustments. Thus far there seems to be no indication that the Ministers are ready to accept this position when the matter comes before them. Again, there is reason to believe that, once these problems of principle are resolved, a series of directives will become law.

2. Public Tender Procedures for Public Works

A very special problem arises in connection with assuring access for all Community nationals and companies to contracts for the supply of goods and services awarded by governmental departments, municipalities, provinces and other public entities. Since the rôle of governments in national economies has been steadily on the uptrend, important portions of economic activities would be excluded from Community-wide competition unless free access to, and participation on an equal basis in, the public tender procedures are assured. The Commission has been working on two directives: one will be based on the Rome Treaty provisions concerning the right of establishment and supply of services, and its purpose will be to ensure that specific restrictions discriminating against the nationals and companies of the member states on the ground of nationality are removed. This complex of treaty rules is examined more fully below. The working group dealing with this problem concluded that a removal of discriminatory legal restrictions would not be enough to achieve the removal of discrimination in practice, and as a result a second directive is in preparation which will list the procedures which may be employed in awarding contracts for public works, fix the conditions under which the members will apply one or the other of these procedures, and provide a consultation procedure in case of complaints. In terms of the economic impact, this might prove to be one of the most important steps in the approximation of laws, since the national public markets have been tra-

ditionally more or less closed to outsiders. This directive will also be based on Article 100.²⁷

The approximation work in the industrial property law field started originally under Article 100, but when it appeared that a new patent system was needed rather than a mere approximation of the national patent laws, the legal basis was shifted and for this reason the results will be discussed in another context.

Since the "direct incidence" criterion of Article 100 is so broad and general, the selection of further subjects for approximation will depend in the first place upon the initiative of the Commission and ultimately upon the readiness of all six governments to accept the Commission's proposals.

B. *Measures under Specific Approximation Provisions*

The provisions specifically envisaging approximation of laws on particular subjects are scattered throughout the chapters of the treaty. They are in a sense *leges speciales* to Article 100: unlike Article 100, these provisions do not require a finding that the national laws to be approximated have a "direct incidence" on the Common Market; they reflect an agreement among the authors of the treaty that in these specified instances an approximation will be necessary, although they leave a degree of discretion to the member states and to the Community institutions regarding the scope of the approximation.²⁸ The procedures for approximation prescribed in these provisions are on the whole less stringent than the prerequisites in Article 100, but they differ from one provision to another as do the powers of the Community institutions.

1. *Customs Procedures*

Article 27 in the chapter dealing with the customs union places an obligation upon the member states themselves to "approximate" their legislative and administrative provisions on customs matters "insofar as may be necessary," and authorizes the Commission to make recommendations to that effect. The burden is placed on the member states and they must, in the first place at any rate, make the judgment as to what is necessary. This approximation was to be completed before the end of last year, but this treaty deadline has proved to be wishful thinking. The article has caused considerable difficulty because it gives the Commission power of recommendation only in an area which is of great importance for the basic task of building a customs union.

²⁷ Press Release IP (62) 231, Nov. 21, 1962; Sixth General Report on the Activities of the Community, par. 54. On the problem generally, see de Grand Ry, "L'harmonisation des législations au sein du marché commun en matière de marchés publics," 1961 *Revue du Marché Commun* 247 and 282 ff. (No. 37, June, 1961, and No. 38, July-Aug., 1961).

²⁸ It would seem, however, that where the general and more stringent prerequisites of Arts. 100 and 101 are present, action could be taken under these articles.

Paradoxically, the treaty takes away from the national parliaments the vital power of control over the external tariff and places it in the hands of the Council of Ministers;²⁹ but the complex of the legislative and administrative rules governing the procedure for the application of the tariff is left essentially in the hands of the member states. The Brussels Convention of 1950 (amended in 1955),³⁰ which all six members have accepted, does contain certain common principles, but these have proved inadequate to prevent, for instance, very substantial differences in customs valuation and in defining the origin of goods. The absence of the power on the part of the Community to do more than recommend under Article 27 has proved a handicap. It may be argued that, to the extent that there is a "direct incidence" on the Common Market, action could be taken under the general provisions of Article 100, but the procedure, as we have seen, is burdensome and the only result in any event is a directive. In this field precise and detailed common rules are necessary. A directive, however, must leave to the member states discretion as to the form and manner of implementation. How wide this discretion must be has not been determined as yet, although there seems to be no obstacle to specifying the objectives of the directive in great detail. Under the circumstances, a directive may not be precise and compelling enough to meet the exigencies in this situation. The Commission staff, in collaboration with the customs administrators from the member states, chose a series of aspects of the customs procedure, and this work resulted in the adoption by the Commission of some eight recommendations regarding, for instance, the customs treatment of merchandise which was temporarily exported for processing or improvement and is re-imported in the Community,³¹ customs treatment of containers,³² and the date as of which customs duties are computed on a specific shipment.³³ These recommendations were negotiated quite laboriously, but even though they had been agreed to by the national customs officials in the working group, the degree of compliance is not very clear. The understandable reflex on the part of the Commission staff has been to categorize the proposed measures in this field as "modification or suspension" of the external tariff so that action could be taken by the Council under Article 28 in the form of *binding* acts and, after the expiration of the transitional period, by qualified majority. This effort, of course, raises legal as well as political problems, since the governments,

²⁹ Arts. 18-29; for the procedure concerning the progressive erection of the common external tariff, see Ouin, "The Establishment of the Customs Union," (Appendix: The European Free Trade Association), 1 Stein and Nicholson, *American Enterprise in the European Common Market—A Legal Profile*, Ch. III, p. 101 (1960).

³⁰ Convention on Nomenclature for the Classification of Goods in Customs Tariffs; Convention on the Valuation of Goods for Customs Purposes; Convention Establishing a Customs Co-operation Council, all signed in Brussels on Dec. 15, 1950; for the text, see 1952 *Bundesgesetzblatt*, Pt. II, No. 1, p. 1. For the text of the Protocol of Amendment to the Convention on Nomenclature, signed on July 1, 1955, see 1960 *ibid.*, Pt. II, No. 11, p. 470.

³¹ 1962 *Journal Officiel* 19.

³² 1961 *ibid.* 880.

³³ 1962 *ibid.* 1545.

or at least some of them, having completely lost control over the tariff, desperately cling to the letter of the treaty in order to retain control at least over the customs procedures.

2. Access to Non-Salaried Activities

As a part of building the Common Market the Rome Treaty requires each member state to adjust its laws progressively so that nationals and companies of the other member states will be treated the same way as local nationals and companies when they wish to establish themselves locally in non-salaried independent activities or when they wish to supply services from their home base to customers or clients across national frontiers.³⁴ To provide a concrete framework for the implementation of this part of the treaty, the Council has adopted two so-called general programs prescribing the steps for freeing access to specified occupations and professions to be taken within certain time limits.³⁵ Two directives, enacted in accordance with this program, have come into effect and are on the books. They deal with the right of aliens, nationals of other member states, to settle on abandoned farms and with the right of alien farm-workers to go into independent farming business.³⁶ Eight more directives dealing with a cross-section of economic activities are ready for Council action, three more are in the final drafting stage and ten more are in various stages of preparation.

This complex of treaty provisions aimed at "national treatment" includes "co-ordination" of national laws and regulations in three different respects. In the first place, the treaty implies that the differences between national rules governing access to certain occupations or professions may be of such character that a removal of restrictions on aliens (that is nationals or companies of other member states) would create difficulties unless these differences are reduced through "co-ordination" of the national rules. More specifically, restrictions upon access by aliens to medical and pharmaceutical professions may be eliminated only *after* the approximation, or, as the treaty says, the "co-ordination," of the conditions for access to these professions by local nationals has been completed. This exceptional requirement reflects the interest in preserving the highest possible standards for the qualifications of doctors and pharmacists. As far as other occupations and professions are concerned, the treaty leaves it up to the Council with the Commission to decide in which cases the approximation should precede or follow or come simultaneously with the removal of the discriminatory restrictions on aliens.³⁷ Thus far the Commission has prepared two directives, both of temporary nature: one

³⁴ Arts. 52-66. Gaudet, "Rechtliche Aspekte der Niederlassungsfreiheit im Gemeinsamen Markt," 124 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* 66 (Nos. 2/3, 1961).

³⁵ 1962 *Journal Officiel* 32-46.

³⁶ 1963 *ibid.* 1823, 1826.

³⁷ General Program for the Removal of Restrictions on Free Supply of Services, Sec. VI, 1962 *Journal Officiel* 32-35; General Program for the Removal of Restrictions on the Right of Establishment, Secs. V and VI, *ibid.* 36-39.

dealing with access to wholesale trade and commercial representation³⁸ and the other with admission to crafts and small industries.³⁹ The problem is that some member states do not require from their own nationals any prerequisites for admission to these activities, while others do. Thus, on one hand, nationals of states which do not require any prerequisites may have difficulties in proving their qualifications in those states where such proof is required. On the other hand, there may be a danger that people of doubtful qualifications, who do not meet the prerequisites required in their own country, would turn to the countries which do not have any prerequisites. For that reason the Commission proposes certain temporary arrangements which would eliminate these difficulties pending a definitive co-ordination of the national rules.

Still in the same treaty chapter we find a provision calling for "co-ordination" of national laws concerning the special treatment of aliens which are based on reasons of public order, public safety and public health (Article 56). In recognition of the basic national interests involved, the treaty allows the members to continue to apply these special "police power" laws to the nationals and companies of the other member states even after all the other restrictions based on nationality have been removed with respect to them. But these national "police laws" of the member states must be "co-ordinated" so that the differences between them are reduced. A directive which seeks to assure a measure of protection through legal remedies for individuals affected by these laws is one of the series ready for Council action.⁴⁰

The last and, in some respects, the most interesting provision in this group focuses on the differences in national company laws concerning the protection of shareholders against the company management and the protection of company creditors and other third parties vis-à-vis the company. These differences, the treaty assumes, cause problems when companies of one member state become active in other states. The treaty requires co-ordination, "to the extent that is necessary and with a view to making them *equivalent*," of the "guarantees" demanded in the laws of the member states from companies for the purpose of protecting the interests of the shareholders on one hand and third parties on the other (Article

³⁸ For the text, see 1963 Bulletin de la C.E.E., No. 2, Supp., p. 3. Résolution portant l'avis du Parlement européen relatif à la proposition de la Commission de la C.E.E. au Conseil concernant une directive relative aux modalités des mesures transitoires dans le domaine des activités professionnelles non-salariées du commerce de gros et des auxiliaires du commerce et de l'industrie (professions d'intermédiaires), 1963 Journal Officiel 1578.

³⁹ 1963 Bulletin de la C.E.E., No. 5, Supp., p. 17. Because of the temporary nature of the proposed arrangements the Commission refers expressly only to Arts. 54(2) and 63(2) rather than 57(2) and thus does not seem to consider this a true "co-ordination" directive.

⁴⁰ Doc. 102, Parlement européen, Nov. 21, 1962, Rapport fait au nom de la Commission du Marché intérieur sur la proposition de la Commission de la C.E.E. au Conseil (Doc. 69), relative à une directive pour la coordination des mesures spéciales aux étrangers pour le déplacement et le séjour, mais justifiées par les raisons d'ordre publique, de sécurité publique et de santé publique, Rapporteur M. Edoardo Martino.

54 paragraph 3(g)). Again, following the step-by-step approach, the working group organized by the Commission staff decided to deal first with the protection of third parties and to postpone the co-ordination of provisions regarding the protection of the shareholders. Secondly, the Commission concluded that the first step in this direction should be limited to those forms of companies which are most likely to go into Community-wide business, that is stock companies and limited liability companies. The Commission staff prepared a questionnaire designed to elicit from the member governments detailed information on the relevant provisions of national company laws, and a directive was drafted after a study and discussion of the replies. The draft of the directive would require the member states to include in their company laws provisions which would assure creditors certain specified minimum standards of protection in three respects: first, provisions for adequate publicity—through publication or deposit—of the articles of incorporation and any modifications thereof, and of the balance sheets and statements of profit and loss; secondly, rules which would enable any third party to satisfy himself readily that the person acting for the company has the necessary authority (for instance, the company directors and officers would always bind the company as long as they act within the limits of the corporate purpose and within the limits imposed by law); and finally, rules which would make it possible for any third party to find out without undue difficulty whether or not a company has been validly organized, and which would reduce the number of reasons for which a company is considered as non-existent. The co-ordination is aimed substantially toward German law which is the most modern system among the national laws in the Community. Other important aspects of national company laws could be co-ordinated in accordance with Article 54, paragraph 3(g), if it is interpreted broadly enough; in fact a new questionnaire has been addressed to the governments as the first step toward the preparation of a second co-ordination directive. Moreover, portions of company laws which do not deal with the protection of shareholders or third parties could be approximated pursuant to Article 100, if it is agreed that the differences between these laws have a "direct incidence" on the Common Market.⁴¹ However, it may well be that, in view of its limited resources, the Commission would prefer to move only as far and as fast as the differences in national company laws prove to be real obstacles to business activities within the Community. On the other hand, the General Program of the Council requires that the co-ordination of the company laws to the extent envisaged by Article 54, paragraph 3(g), is to be completed by the end of this year. It is questionable whether this deadline is realistic, considering the present state of preparatory work. It should be noted that in this instance the Council already has the power to act by qualified majority even in the likely event that a directive should require changes in company laws of one or more member states.

⁴¹ Thiesing, in 1 von der Groeben und von Boeckh, *Kommentar zum EWG-Vertrag* 332-333 (1958).

3. *Tax Laws*

Under Article 99, the Commission is directed to consider in what way the laws of the member states concerning indirect taxes can be "harmonized" in the interest of the Common Market, and to make proposals to the Council which, however, can act on them by unanimous vote only. It is noteworthy that the specific authority extends to indirect taxes only.

The very important differences in the tax structures among the member states obviously have an impact on the achievement of the treaty objectives, including the free flow of goods, services and capital, and the play of competition. The Commission has been exploring what it could do in this field, considering the limited scope of its powers under Articles 95-99. The Commission staff concluded that direct taxes, important as they may be in the sense just mentioned, are so closely linked to aspects of economic policy, such as investment, budgetary and business cycle policy, as well as social policy, that they cannot be dealt with on the Community level unless and until some progress is made in the co-ordination of these fundamental policies. Thus the Commission has limited itself to studying the national direct tax structures and considering whether some of the rules which determine the bases and methods of tax assessment, such as amortization and valuation of stocks, could be made the subject of "harmonization."⁴² Responding to the intent of the treaty, the Commission has concentrated its efforts on indirect taxes in view of their direct and immediate impact on prices and on the flow of trade within the Community.

The treaty prohibits any internal taxes which affect only imported products, and these hidden tariffs actually were to be removed not later than January 1, 1962.⁴³ But one of the problems has been that the treaty, following the General Agreement on Tariffs and Trade, allows member states to refund internal taxes on goods which are exported as long as these refunds do not exceed the actual levels of the internal taxes. Again, members may impose compensatory charges on imported products in the amount of the indirect taxes levied on the same or similar products produced locally.⁴⁴ If these refunds and compensatory charges were not allowed, distortions would arise, since the tax rates differ from product to product in the member states.⁴⁵ Because of the difficulties in calculating these refunds and compensatory charges in each individual instance, the member states have adopted formulae based on flat average rates. The treaty specifically authorizes this method with respect to the cumulative, multi-stage or cascade-type turnover tax.⁴⁶ These formulae make

⁴² Sixth General Report on the Activities of the Community, Ch. II, par. 60.

⁴³ Art. 95.

⁴⁴ Arts. 95(1), 96.

⁴⁵ Masoin et Morselli, *Impôts sur transactions, transmissions et chiffre d'affaires. Problèmes du Marché Commun et de l'intégration internationale* 3(1959); Mesenberg, *Die umsatzsteuerliche Behandlung der Ein- und Ausfuhr in den Staaten der Europäischen Wirtschaftsgemeinschaft*, *Deutscher Industrie- und Handelstag* (Heft 63, 1960); Sprung, note 14 above; Reboud, *Systèmes fiscaux et Marché Commun* (1961); Schmölders, *Steuerliche Wettbewerbsverzerrungen beim grenzüberschreitenden Warenverkehr im Gemeinsamen Markt* (1962).

⁴⁶ Art. 97.

it extremely difficult to determine with any degree of assurance whether the refunds, as actually paid, do not hide export subsidies—whether they really are not higher than the internal taxes which are to be refunded; and similarly, whether the compensatory charges imposed on imports are in fact not higher than the corresponding tax on domestic products. The difficulties are striking in connection with the cumulative multi-stage turnover tax, which exists in all member states except France. An added defect of this type of turnover tax is that it gives an unfair advantage to vertically concentrated enterprises and this effect might also run counter to the competition policies of the Community. Finally, this tax, and any indirect tax system envisaging refunds on exported goods and compensatory charges on imported goods, has the very fundamental disadvantage of requiring a continuation of tax frontiers within the Common Market even after the customs frontiers shall have disappeared—a situation that some believe would prevent the formation of a truly single Common Market.

As a temporary first step the Commission succeeded in getting the member states to agree not to change the existing rates of the refunds and compensatory charges, except under specific circumstances, and at any rate to consult prior to such change. But there apparently was no real meeting of minds and the arrangement did not work very well. The Commission then sought to develop a common method for calculating the average flat refunds and compensations, but this also was not acceptable. Apart from these provisional measures, the Commission concluded, upon advice of an expert committee,⁴⁷ that in any definite solution the cumulative multi-stage turnover tax will have to go. The proposed directive,⁴⁸ based on Articles 99 and 100, which is now before the Council, would require as the first step that the five members concerned replace this tax within a period of four years by a non-cumulative tax of their own choice covering all the transactions up to and including the wholesale stage. Before the end of this period the Council would work out a common added-value turnover-tax system which, however, would not at that stage impose uniform rates and exemptions. Only during the third stage, some time in the future, would the common system be completed by a substantial approximation of rates and exemptions. Thus far, the Italian and the Dutch governments have been quite vocal in criticizing this approach; they have argued, among other things, that it is impossible to manipulate an important single tax in isolation from other taxes without endangering the flow of the necessary revenues into the treasury. The critics on the other side have argued that the scheme will not be effective, since it allows too much leeway to the governments, particularly during the proposed first stage.⁴⁹

⁴⁷ Rapport du Comité fiscal et financier (the so-called Neumark report) (1962); Rapport général des Sous-Groupes A, B et C créés pour examiner différentes possibilités en vue d'une harmonisation des taxes sur le chiffre d'affaires (1962).

⁴⁸ The text of the draft directive was published in 1962 Bulletin de la C.E.E., No. 12, Supp., p. 3.

⁴⁹ Mesenberg, "Harmonisierung der Umsatzsteuer in der Europäischen Wirtschaftsgemeinschaft," 1963 Der Betriebsberater 51 (Heft 2, Jan. 20, 1963); Antal,

4. *Social Policy*

Still among the specific approximation provisions are the treaty rules dealing with approximation of laws in the field of social policy. In the curious and cryptic Article 117 the member states

... agree upon the necessity to promote improvement in the living and working conditions of labor so as to permit the equalization of such conditions in an upward direction.

They consider that such a development will result not only from the functioning of the Common Market which will favor the harmonization of social systems, but also from the procedures provided for under this treaty and *from the approximation of legislative and administrative provisions.*

If interpreted literally, this last clause seems to be little more than an expression of hope or expectation or, at the most, a conclusion that the approximation will have to play some rôle in the process of the "harmonization" of the social systems along with the so-to-speak automatic harmonizing effect of the Common Market and the application of other treaty procedures. But the clause does not disclose what the rôle of the approximator is to be, nor does it contain any specific procedure or grant of power to the Community institutions. It is therefore necessary to refer not only to the other provisions in the chapter on "Social Provisions" but also to the Spaak Report, mentioned earlier, because the interpretation raises some basic questions with respect to the economic assumptions underlying the treaty and the objectives and powers of the Community in the field of social policy.⁵⁰ The treaty text is something of a compromise between France, which insisted during the negotiations that social benefits, wages and other working conditions must be equalized *before* the Common Market is put into effect, and those who believed that such equalization was not a necessary pre-condition. The latter view has prevailed, and the Community institutions have not been given the power to legislate away—as a part of building the Common Market—the differences among the member states in the cost-of-labor factor of the production cost. But the Community institutions were given a limited rôle in helping the equalization process along.

In the first place, this treaty chapter brings in one way or another a few aspects of social policy expressly within the scope of the Community. Thus the Council may assign to the Commission functions "relating to the implementation of common measures, particularly with regard to the social security of migrant workers" (Article 121). It was under this provision that the Council adopted a series of regulations ensuring that migrant

"Harmonisatie van de omzetbelasting in de Euromarkt," 1963 Sociaal-Economische Wetgeving 1 (No. 1); *idem*, "Harmonization of Turnover-Taxes in the Common Market," 1 Common Market Law Review 41 (June, 1968).

⁵⁰ Rapport des Chefs de Délégation aux Ministres des Affaires Etrangères, Comité intergouvernemental créé par la Conférence de Messine 60-66 (1956); Kahn-Freund, "Labor Law and Social Security," 1 Stein and Nicholson, *American Enterprise in the European Common Market—A Legal Profile*, Ch. VI, at pp. 305-310 (1960).

workers retain their social security benefits when they migrate from country to country⁵¹ as the freedom of movement of labor becomes assured throughout the Community.⁵² In the same chapter an obligation is imposed upon the member states to ensure the application of the principle of equal pay for men and women (Article 119) and to "endeavour to maintain the existing equivalents of paid holiday schemes" (Article 120). In a special protocol, France was given assurances with respect to an equalization of overtime pay.⁵³ It is significant that the first step toward implementing the equal pay principle was not taken by the Council as an organ of the Community. The six Ministers, sitting in "an international conference" of the six governments, adopted a resolution outlining in a general way the procedures and deadlines for the equalization of salaries of men and women.⁵⁴ Apparently the member governments refuse to recognize that the Community has a normative power in this matter, since Article 119 is phrased in terms of an obligation imposed on each member and does not contain any specific grant of power to the Community institutions.

Again, Article 118 in the same chapter contains a broad and general mandate directing the Commission to promote "close collaboration" between the members in the social field, particularly in certain enumerated branches, including social security. The Commission is to exercise this function through studies, opinions and by organizing consultations. The Commission took the initiative in organizing a Conference on the Social Aspects of the Common Agricultural Policy in Rome and, together with the executive bodies of the other two Communities, the Brussels Conference on Social Security.

This latter conference, held in December, 1962, brought together spokesmen for the Community-level organizations of employers and workers in industry and agriculture. Independent experts from universities and private institutions also participated, and high officials from member governments attended as observers. The reports which were prepared for the conference contained detailed comparative syntheses of national legislative and administrative provisions in the field of social security.⁵⁵ But behind the technical discussions was an important contest of interests. Labor sought to obtain an agreement from employers and governments on the establishment of tripartite groups which would study in detail the

⁵¹ Regulations of the Council of Ministers No. 3 and No. 4, 1958 *Journal Officiel* 561, 597.

⁵² Regulation of the Council of Ministers No. 15, 1961 *ibid.* 1073.

⁵³ Protocol Relating to Certain Provisions of Concern to France, annexed to the Treaty Establishing the European Economic Community. See also Art. 128 on common policy of vocational training.

⁵⁴ Resolution of the Conference of the Member States of Dec. 30, 1960, published as Annex I to Doc. 46, *Parlement Européen*, June 25, 1963.

⁵⁵ *Conférence Européenne sur la Sécurité Sociale*, Bruxelles-Palais des Congrès, Dec. 10-15, 1962, mimeographed; *Tableaux comparatifs des régimes de sécurité sociale applicables dans les Etats membres des Communautés européennes*, Service des publications des Communautés Européennes, 8053/2/VII/1962/5.

various types of social legislation with a view to determining the gaps in the national systems and suggesting improvements; on the basis of the results of these studies the Commission would then make recommendations for "harmonization" in the sense of Article 117. In the final communiqué of the conference the employers agreed in principle with labor representatives that subsequent meetings were desirable, and joined in an invitation to the governments, but the governmental representatives refused to commit their governments.⁵⁶ The Ministers, or at least some of them, are afraid that this and similar efforts will lead to an increase in government contributions to social security. The national civil service is concerned lest too much power in this field be shifted from national authorities to the Community institutions and Community-level organizations of workers and employers.

Finally, the Commission was able to adopt three recommendations of a fairly limited scope and varying degrees of importance on social services for migrant workers,⁵⁷ industrial medicine,⁵⁸ and a list of diseases recognized as occupational in origin.⁵⁹ The Commission had to issue these recommendations under its general power to recommend (Article 155), rather than under Article 118, which, although it clearly includes the subject matter of the recommendations, does not specifically mention recommendations as a means through which the Commission may act.

5. *Aids to Export to Third Countries*

To the extent that governmental devices for subsidizing exports to third countries are still allowed under the international obligations of the member states, they are to be "harmonized" progressively before the end of the transitional period in order to prevent distortion of competition between Community enterprises in the export trade (Article 112). The harmonization is one facet in the development of a common commercial policy toward third states. An export aid which affects the competitive position of enterprises in the *intra-Community* trade, either because of its magnitude or the way it is applied, will be prohibited by the Commission pursuant to another set of treaty rules dealing with state subsidies (Articles 92 and 93). This is an interesting example of interaction between the enforcement of the treaty and approximation of national measures, which at times gives rise to policy problems and conflicts of competence. Both the Commission and the Council have organized working groups in this field.⁶⁰ The "harmonization" will be based on an inventory which is to include all direct and indirect export aids such as special credit facilities and guarantees of export risks. The "harmonization" will take into account "the state of the economy, the necessity of

⁵⁶ Déclaration commune des représentants des employeurs et des travailleurs, Dec. 14, 1962.

⁵⁷ 1962 Journal Officiel 2118.

⁵⁸ *Ibid.* 2181.

⁵⁹ *Ibid.* 2188.

⁶⁰ The Decision of the Council of Ministers Instituting a Group for the Co-ordination of Policies on Credit Insurance of Guaranties and Financial Credits, 1960 *ibid.* 1339.

the foreign commerce of the European Economic Community as well as the policies of third states.”⁶¹ Thus far the Council group has been instrumental in instituting a procedure according to which member states must consult if they wish to deviate from certain agreed export credit terms. Again, an agreement has been reached in principle on a uniform system of export-credit-insurance premiums as a step toward a general uniform system of export credit insurance.⁶²

C. Measures Not Based on General or Specific Approximation Provisions

The approximation work has expanded in two directions beyond the effort based on the general and specific provisions discussed above.

1. Approximation Based on Provisions for Common Policy

(a) Agriculture

In the process of evolving a common agricultural policy the Commission encountered situations where it appeared either unnecessary or impractical to devise a new federal-type substantive rule which would replace national rules, but where the continuation of the existing differences in national rules would render the achievement of the common policy difficult, if not impossible. The need was then for approximation of the national laws to the extent necessary for the achievement of the policy objective. The question first arose in connection with the Commission's proposal for a directive which would require the member states to adopt certain rules to be observed in fighting a disease of the tobacco plant, the so-called tobacco mildew.⁶³ The proposed rules themselves were entirely acceptable to all six member states, but the legal basis proved controversial. The Commission insisted that it had the power to propose this directive and that the Council had the power to adopt it on the basis of Article 43 dealing with common agricultural policy. Five governments agreed, but the German Government insisted that approximation may be undertaken in this field, and in any other field where it is not expressly authorized by the treaty, pursuant to Article 100 only. The European Parliament supported the Commission.⁶⁴ The ever-present problem of distribution of power between the Community on one hand and the national governments on the other is at the root of the controversy. From the beginning of the third stage of the transitional period, the Council acts by qualified majority under the common agricultural policy article, while action under Article 100 will always require unanimous consent and cannot be taken over the opposition of even a single Minister. This controversy held up a series of significant approximation directives dealing with sanitary-veterinary regu-

⁶¹ Action Program in the field of Common Commercial Policy, Decision of the Council of Ministers, 1962 *ibid.* 2353 at 2357.

⁶² Sixth General Report on the Activities of the Community, Ch. V, par. 267.

⁶³ The text of the draft directive is contained in 1961 Journal Officiel 1579.

⁶⁴ See the preamble of the advice of the European Parliament in 1961 *ibid.* 1579.

lations which bear upon trade in fresh meat⁶⁵ and live pigs and cattle.⁶⁶ In at least two member states administration officials concerned with public health strongly support these measures as a means of overcoming domestic opposition to the necessary improvements. After many months of intermittent negotiations the Council reportedly broke the deadlock by agreeing to omit the references to any treaty article, thus in effect postponing the decision with respect to the legal basis for the directives and embarking upon a path of deliberate ambiguity reminiscent of the practice in the political organs of the United Nations.⁶⁷

(b) *Transport*

In the transport field, as in agriculture, the Community has the authority to evolve a common policy. To be politically acceptable, a common transport policy will have to satisfy in part the interest groups which press for "the organization of a single transport market" through government intervention, as well as those who desire a widening competition among the three modes of transport (road, railroad, and river transport) across national frontiers. It is generally conceded that the reconciliation of these conflicting approaches will be possible only if the common policy includes approximation of national regulations affecting the cost of production in the transport industries. Only if some of the disparities among national regulations which distort competition are removed and the differences in the cost of production are reduced, would the member states be prepared to accept more competition. Even if Article 100 should be considered a proper legal basis for such a far-reaching approximation, the requirement of unanimity would make progress in this controversial area even more difficult. There is no specific authorization for an approximation of national transport laws in the treaty articles concerning common transport policy. Apart from a few general guidelines, these articles in effect leave it to the Council, on proposal from the Commission, to determine the content of the policy.⁶⁸ The approximation proposals which the Commission recently submitted to the Council are based on Article 75 which, among others, authorizes the Council to make "any appropriate provisions" which are necessary for the enactment of common transport policy. It is of more than incidental significance that, under this article, the Council will be able to act by a qualified majority after the end of the second stage

⁶⁵ For the text of the draft directive see Parlement Européen, Doc. 94, Nov. 14, 1962, Rapport fait au nom de la Commission de l'Agriculture sur la proposition de la Commission de la C.E.E. au Conseil (Doc. 64) sur le projet de directive concernant certains problèmes sanitaires en matière d'échanges intracommunautaires de viandes fraîches, Rapporteur M. Dante Graziosi.

⁶⁶ For the text of the draft directive see 1963 Journal Officiel 1255.

⁶⁷ "Europe," No. 1615, item 15705, July 30, 1963. On the U. N. practice, compare e.g., the resolution proposed in the U.N. Security Council on the Indonesian question with the resolution as finally adopted. U. N. Security Council, 2d year, Official Records, No. 67, 167th Meeting, July 31, 1947, at p. 1626, and *ibid.*, No. 68, 173rd Meeting, Aug. 1, 1947, at pp. 1698-1710.

⁶⁸ Arts. 74-84.

of the transitional period. The Commission's proposals in the first place call for a detailed inquiry into the costs of the transport infrastructure to provide the necessary data.⁶⁹ In the second place, they set a timetable for the gradual "harmonization" of taxes on vehicles and fuel, of certain aspects of social legislation relating to transport personnel, and certain insurance requirements.⁷⁰ In most cases further action by the Council will be required to make the scheduled steps actually effective. In a separate proposal the Commission has submitted a rather controversial draft directive prescribing common standards for weights and measurements of utility road vehicles, which bears upon the competitive position of transport enterprises as well as road safety. These proposals constitute the first step on what has been a thorny road toward a common policy. They are still disputed, but eventually may lead to a far-reaching approximation.⁷¹

2. Approximation Through International Conventions

(a) *International Conventions on Industrial Property Law and on Certain Penal Rules*

A legal situation opposite to that in the agricultural and transport field has led to another undertaking outside the confines of the general and specific approximation provisions of the treaty. The working group of experts on patent law first concluded that the differences in the national patent laws were such as to bear a "direct incidence" on the operation of the Common Market and required approximation within the meaning of Article 100. In the process of study, however, the group became convinced that a mere approximation of national laws would not suffice because a national patent would still remain limited to the territory of the grantor state. The limited territorial scope of the national patent impairs the unity of the Common Market and facilitates market division through patent licenses contrary to the competition policy. What was needed therefore was a "European" patent which would be valid throughout the territory of the member states. The experts felt that Article 100 could not provide a sufficient legal basis for what in fact would be a new system of patent law; since no other authorization could be found in the treaty, they proposed that a new international convention should be the legal instrument. Thus, although the need for a new "federal-type" rule was established, the Community had no authority under the present treaty to enact such rule and in that situation the member states fell back upon the traditional device of public international law, a multilateral interna-

⁶⁹ 1963 Bulletin of the E.E.C., No. 6, Supp., p. 5.

⁷⁰ *Ibid.*, p. 6. Another proposal provides for unification of procedures for issuing licenses for transport of goods by road between the member states, *ibid.*, p. 3. These proposals, along with a proposal relating to the establishment of rate brackets and with a proposal introducing a Community quota for transport of goods by road (*ibid.*, pp. 9 and 18), were submitted to the Council and released by the Commission in May, 1963. Information Memo P-12/63, May, 1963.

⁷¹ "Europe," No. 1534, item 14889, April 22, 1963.

tional treaty. The drafting has been done in a three-level hierarchy of working groups composed of national and Community officials. The Draft Convention on the European Patent was published in 1962,⁷² the second convention on trademark law was to be completed in 1963, and the third one on models and designs, in 1964. A fourth convention of a general character is to define in detail the structure and functions of the new industrial property institutions and their relationship to the Community.⁷³ The draft of the patent convention has not been officially considered and approved by the governments as yet, and it is by no means certain whether all governments are ready at this juncture to accept the concept of a single patent without crippling qualifications.⁷⁴ If the patent convention is adopted substantially in the form proposed by the majority of the experts, it no doubt will be the most important piece of European lawmaking. It represents the culmination of decades of efforts in a variety of groups of governmental representatives, heads of patent offices, industrial and practicing patent attorneys. A European patent office is to be established with authority to grant patents effective throughout the territory of the Community. A European patent court, or possibly the Court of Justice of the Communities, would have the last word with respect to the validity of a European patent, and, while infringement suits would remain within the jurisdiction of national courts, these courts would have to refer to the European patent court questions of interpretation of the patent convention. A provisional patent would be granted after summary examination and submission of a report on the novelty of the invention by the Hague International Patent Institute, and it could be converted into a final patent within a five-year period upon further application. The procedure was termed a novel and truly creative act by a leading German scholar, but it has been criticized as impractical in some professional circles.⁷⁵ The present draft leaves open the question whether nationals

⁷² *Avant-Projet de Convention relatif à un Droit Européen des Brevets élaboré par le groupe de travail "brevets"* (1962); Froschmeier, "The Draft Convention on Patents in the Common Market," 11 *Int. and Comp. Law Q., Supp.* No. 4, p. 50 (1962); Froschmeier, "Some Aspects of the Draft Convention Relating to a European Patent Law," 12 *ibid.* 886 (1963).

⁷³ The Commission also contracted with the Munich Institute for Foreign and International Patent, Copyright and Trademark Law for a comparative study of the law of unfair competition which is to serve as a basis for its proposals in that field.

⁷⁴ See the two alternative texts of Art. 20 and the disagreement noted in the draft in connection with Arts. 29 and 136.

⁷⁵ Ulmer, "Europäisches Patentrecht im Werden," 1962 *Gewerblicher Rechtsschutz und Urheberrecht* 537 at 543 (Nov./Dec., 1962); for a criticism see A.I.P.P.I. (Association Internationale pour la Protection de la Propriété Industrielle), Berlin Congress, Minutes of the Presidents' Conference on the Study of the Draft Proposal for the European Patent by P. Mathely, General Reporter.

In the process of applying common policy on a different subject, the Commission had another occasion to review the disparities of the applicable national laws, but this time it concluded that on the point in question these laws were sufficiently similar so that no approximation was required. In a communication concerning the treaty rules on competition, the Commission took the view that the much discussed prohibition of restrictive practices (Art. 85, par. 1) did not apply to exclusive dealership contracts

and companies of states not parties to the convention will be able to obtain a European patent. However, third states which are members of the Paris Union (or at least the European members of the Union) might become parties to the convention upon approval of their application and on the basis of a special agreement.

As a compromise, the national patent systems would "co-exist" with the new European system at least until the Common Market becomes full economic reality, and would remain available for inventions suitable for local exploitation; the national systems presumably would be approximated in due course.

The scheme for an all-Scandinavian patent which is presently under discussion by the Scandinavian states is also based on the "co-existence" idea: an inventor desiring a "Scandinavian" patent protection would file his patent application with one of the national patent offices and receive through it "a bundle of patent rights" derived from the national patent laws of the Scandinavian states and giving him protection in all these states.⁷⁶

Finally, situations have arisen where an approximation directive could perhaps be sustained under an approximation provision such as Article 100 but where the Commission staff was inclined to propose an international convention instead, because the approximation would require adjustments in national laws which might be more acceptable politically if imposed as a result of a treaty approved in national parliaments than in response to a directive. This is the case with the proposal now in the form of a preliminary draft convention, according to which a resident of a member state who violates a national law enacted in response to a Community directive would be prosecuted in the court and under the law of the state of his residence, even if the violation occurred on the territory of another member state and a prosecution did not take place there. The member states would thus undertake, in the interest of a more effective enforcement of the economic law in the Community, to curtail the application of the principle of territoriality which prevails in their penal law systems.⁷⁷ The next step would be the approximation of the penalties imposed by national laws for these violations.

(b) *International Conventions under Article 220*

Article 220 of the treaty obligates the member states, "in so far as necessary," to enter into negotiations with a view to ensuring for the

concluded with commercial representatives; it noted that the status of commercial representatives was defined in a more or less concordant manner in the national laws or court decisions of all the member states, so that the question as to whether or not a party to the contract was a commercial representative would not be hard to answer. *Communication relative aux contrats de représentation exclusive conclus avec des représentants de commerce*, 1962 *Journal Officiel* 2921.

⁷⁶ For the text of the proposed common Scandinavian patent law, see 1962 *Gewerblicher Rechtsschutz und Urheberrecht* 610.

⁷⁷ Van Binsbergen, "Aanpassing der Wetgevingen van de E.E.G.-Landon ook op Strafrechtelijk Terrein," 1962 *Tijdschrift voor Strafrecht* 208.

benefit of their nationals the "protection of persons" and national treatment, elimination of double taxation, recognition of companies and the maintenance of their legal personality in case of transfer of their registered office from one country to another, the possibility of mergers of companies subject to different national laws, and the simplification of formalities governing the recognition and execution of judgments and arbitral awards. Although the article is silent on the matter, it is generally assumed that the results will be embodied in international agreements which will be subject to national constitutional processes. No particular rôle in the negotiations is allocated to the Community institutions; in fact, however, the Commission has taken the position that in this field also it has the right of initiative.

As a result of a preparatory study undertaken with the assistance of university professors, a working group in this field concluded tentatively that a new convention would be desirable which would be based on, but in some respects go beyond, the Hague Convention of June 1, 1956, concerning Recognition of Companies.⁷⁸ This, however, is music of the future, since staff work is at a preliminary stage only. Nevertheless, Article 220 has inspired important work in another direction which was mentioned earlier, that is, the drafting of a significant convention concerning the competence of national courts of the member states, recognition and execution of their judgments and judicial assistance throughout the Community. Unlike other international agreements in this field, the proposed convention prescribes detailed rules of competence for national courts, which apply to all persons residing in a member state and to all companies which have their seat and the registered office or principal establishment there. Some benefits of the convention, particularly the exemption from the rather outrageous assertions of competence under French, Belgian and Luxembourg law based solely on the nationality of the plaintiff, accrue not only to the nationals of the member states but to all residents in the Community regardless of nationality. The defendant's residence in the state is accepted as the primary basis for national judicial competence, and a judgment rendered in conformity with the convention's rules must be given effect by other courts without any inquiry into the merits.⁷⁹

In the process of work on this convention it became apparent that a special convention was needed to deal with bankruptcy proceedings. The convention is to determine which court has competence to institute a single bankruptcy proceeding with effect upon all the debtor's property, wherever located, within the territory of the member states. Another difficult prob-

⁷⁸ Conférence de La Haye de Droit International Privé, Actes de la 7e Session tenue du 9 au 31 octobre 1951 (La Haye, 1952).

⁷⁹ A portion of this draft is discussed in Weser, "Bases of Judicial Jurisdiction in the Common Market Countries," 10 A. J. Comp. Law 323 (1961); see also articles by the same author on "Les Conflits de Juridictions dans le Cadre du Marché Commun," 48 Rev. Crit. de Droit Int. Privé 613 (1959); 49 *ibid.* 21, 151, 313, 533 (1960); 50 *ibid.* 105 (1961).

lem is to decide what law should govern such matters as privileged claims upon property located in different states, and the validity of transactions undertaken during the so-called critical period prior to bankruptcy. The bankruptcy convention is in a very early stage of study.⁸⁰

BASIC ISSUES OF METHOD AND POLICY

A. Approximation Distinguished from Unification Efforts

In any critical assessment of the activities sketched in the preceding pages it is important to keep in mind that the function of approximation of laws in the Community and the institutional framework within which it takes place distinguish it from the unification-of-law work undertaken in other international organizations and contexts.

1. The Rome Treaty conceives of the Community as a coherent economic system. To assure the working of this system, the treaty provides for a coherent legal order which penetrates the national legal orders and breaches their integrity more deeply than does the legal order of any other international organization. This is one reason why law plays such an important part in the life of the Community. In specified limited segments the Community legal order supersedes the national legal orders; in other segments it requires that those national rules which continue in existence must be adjusted so as not to interfere with the construction and working of the new economic system. Approximation of laws plays a vital rôle with respect to this latter aspect, and is included in the introductory chapter of the Rome Treaty, under the heading "Principles," as one of the basic activities in the construction of the Common Market. The function of approximation is to reduce or eliminate disparities in national laws, regulations or administrative practices where they constitute obstacles to economic intercourse which cannot be removed through other legal devices in the armory of the Community, such as the provisions for the removal of direct measures of protection (tariffs, quantitative import restrictions and measures with equivalent effect), barriers to free movement of factors of production and discriminations on the basis of nationality in general, subsidies, dumping and restrictive practices. Where disparities in national laws contribute to disparities in the cost of production and competitive conditions generally, approximation of these laws in selected spheres is to act as a catalyst in the automatic leveling-off process inherent in the Common Market, and thereby make it easier for the governments to accept common Community-wide policies. Presumably any type of obstacle to economic intercourse, including legal uncertainty arising from the disparities of complex national laws, is a proper basis for approximation of these laws, and the rôle of approximation will grow as the unity of the Common Market becomes reality. It has been suggested that the long-range objective should be "the achievement of a coherent legal system, at

⁸⁰ On the problem generally see Massin, "Exécution des jugements de faillite," 34 *Annuario di Diritto Comparato e di Studi Legislativi* 36 (1960).

the highest possible level of unification in all fields which are relevant to intra-European intercourse."⁸¹ Whether or not such extensive unification is desirable or necessary, it is not likely to be achieved without a prior substantial advance toward integration of national policies.

2. We have seen that in most instances where the Rome Treaty contemplates approximation, the Commission has the legal authority, if not the duty, to propose, and the Council is to enact, directives which are legally binding on the member states. The Commission must see to it that the governments adopt the necessary national measures implementing the directives and, if they should fail to do so, the Commission must institute a proceeding which culminates in a declaratory judgment by the Court of Justice of the Communities against the delinquent member. The Court of Justice has the final authority to interpret the directive and to say whether a national measure corresponds to it. Although the treaty is silent on the subject, we may assume that a national court will interpret the national implementing measure in the light of the directive, and, if a question arises in a national judicial proceeding as to the scope or meaning of the directive, the national court of last resort will be bound to refer this preliminary question to the Court of Justice of the Communities for a binding determination in accordance with Article 177 of the Rome Treaty. To this extent uniform interpretation of the approximation directives and of the national implementing measures is assured. This institutional mechanism, which provides for an "organized impulse"⁸² toward approximation as well as a measure of enforcement and uniform interpretation, constitutes another important difference from other international fora engaged in unification.

It is too early to say whether, as a result of these significant differences, the Community will accomplish more in this field than other international organizations such as the Nordic Council of the Scandinavian states.

B. Policy Choices in the Approximation Process

Among the several institutions of the Community it is the Commission that first confronts the varied policy choices when it elaborates its proposals for submission to the Council.

1. The treaty gives the Commission a substantial margin of discretion in setting priorities for the approximation work. The Commission has thus far followed a pragmatic approach based on the rationale that disparities among national rules which have the most immediate adverse effect on the Common Market should be dealt with first. Since it has been often difficult to measure the impact of the disparities of individual regulations without extensive studies, the Commission, conscious of its limited resources, has responded to outside requests or, in the hope of reaching prompt results, has sought to carry forward approximation work

⁸¹ "Die Rechtsfragen der europäischen Einigung," 16 Europa Archiv 595 at 600 (Oct. 25, 1961).

⁸² Hallstein, note 1 above.

instituted earlier in other international organizations. In some instances the sharp contrast between modern legislation existing in some states and an antiquated legal structure in others has demanded priority action. At times the Commission has chosen an insignificant subject where national laws were quite similar, and proposed a non-controversial measure which, however, would establish a precedent for the settlement of an important issue which will arise in measures on other subjects. With some significant exceptions, the measures proposed thus far have dealt with only some aspects of national regulations regarding a specific product or group of products, the assumption being that, once a pattern is set, the remaining aspects will be approximated step by step with growing ease and speed. This gradualist approach was perhaps the only feasible method at the outset when it was necessary to establish good working relations with the governments and when the Commission had no independent sources of information. In the long run, however, a more systematic treatment will be necessary in such areas as customs laws and food laws as is foreshadowed in the Commission's Action Program for the Second Stage.⁸³ When, for instance, it comes to approximation of company laws, the national parliaments may be reluctant to entertain piecemeal reforms in such a vital area of private law and may insist on comprehensive legislation. In setting priorities, the Commission may be expected to pay particular attention to those technical and administrative regulations usually applied by customs officials, which would necessitate the maintenance of national frontiers within the Community for purposes of inspection and other formalities even after the internal customs frontiers are completely removed.

2. The approximation process requires value judgments which are not limited to economic interests. The health of the people, the safety of the worker and his welfare, the safety of the public and the protection of the consumer against fraud must be weighed in devising an approximation rule. The Rome Treaty is said to have embodied the philosophy of the so-called social market-economy in which the free play of economic forces is tempered by basic social interests of the Community, and this philosophy is likely to influence the process of balancing the various interests.

The social welfare interest enters into play in the approximation not only of social legislation but also of technical regulations, and in the development of common agriculture and transport policy. Of necessity the treaty standards for social welfare are very general; they are likely to be evolved most immediately in the agricultural and transport fields because the Community institutions are specifically charged with designing Community policies in these two areas.

The treaty says nothing on the subject of health and safety standards, but it is understood that in a modern society they should conform to the most advanced scientific and technological findings. The economic interests involved in an approximation measure can frequently be defined in precise

⁸³ Action Program of the Community for the Second Stage (1962).

terms of the impact on the price of a product and revenue of the producer or merchant. On the other hand, the impact of a proposed approximation measure on non-economic interests, such as public health, cannot be calculated with similar precision and for that reason it is more difficult to assert these interests when they compete with significant economic interests, unless they are pressed by well-organized groups, as in the case of safety rules for workers. The common agricultural policy as evolved thus far serves essentially the economic interests of the producer-supplier; on the other hand, the approximation measures in the field of food and veterinary regulations which are being proposed as a part of the common agriculture policy are designed in large measure to benefit the consumer, and this adds to their importance;⁸⁴ as a result of the insufficient organization of consumer groups, most national laws provide what some consider only an inadequate protection of the consumer against fraud. National regulations which are the subject of approximation already reflect a composition of competing interests on the national level. If the approximation measure is to reflect more than the outcome of a political compromise or power contest of pressure groups, the Commission, with the national experts, will have to help design a new balance based on a composite Community interest, which is a formidable task indeed.

A related problem concerns the degree of governmental intervention in the economy and life of the people and the ever-present tendency of large bureaucracies toward excessive regulation. Where intervention appears necessary, the question arises whether it should be undertaken by the national governments or by the Community institutions or by joint action of the national governments with the Community institutions. In principle, the Community is strengthened when power is transposed from the national to the Community level.

3. In the process of selecting the approximation formula, decisions are made on all levels, from the lowest technical detail to problems of legal policy. Choices must be made between rules found in the German-Netherlands systems on one hand and in the Latin systems on the other; substantially different rules often exist even within the two families of systems. Experience has shown, however, that the number of disparities which raise questions of principle dwindles when the matter is realistically and intelligently appraised in the privacy of a working group. This has been the case, for instance, in the working group on the competence of courts and recognition and execution of judgments. On the other hand, differences among the national bankruptcy laws have proved so fundamental that one can expect in the near future only an agreement on a series of uniform choice-of-law rules. In a discourse on approximation of food and agricultural regulations a member of the Commission staff stressed the need for understanding the reasons why a rule on a given matter differs from one member state to another: Is it because of the differences in climatic conditions, land cultivation techniques, consumer habits (which are becoming increasingly assimilated), administrative structure or the nature of the

⁸⁴ Steiger, note 17 above.

legal systems; or is it because one member predominantly exports, while the other imports, the commodity or product in question?⁸⁵

Although different subjects may require different methods, there is a general question whether approximation should be directed toward a rule which is most widely accepted in the national systems of the members, or toward the most modern rule (as, for example, the French turnover-tax law), or toward a rule which contains a compromise or a mechanical synthesis of the different national rules, or, finally, whether a new solution should be sought which is unknown in the national systems. Compromise solutions at times simply broaden the scope of regulation and produce over-complex formulae where simplification and rationalization should be important objectives. The Rome Treaty, if properly interpreted, supplies a guideline on this problem. A prime objective of the treaty is to accommodate and to stimulate the economic evolution toward the "post-maturity stage" marked by harmonious economic growth with social progress, and based on mass production, mass markets, intensive scientific development, outward-looking foreign economic policy and greater economic freedom. This treaty objective dictates the selection of the most modern and most progressive rule which would be conducive to the structural changes taking place in the European societies.

4. There is an inherent ambiguity and contradiction in the Rome Treaty as there is in the United Nations Charter or, for that matter, in the Constitution of the United States. All these instruments, on one hand, bow to the "sovereign" component states, or, in Professor Quincy Wright's words, accept "the demands of groups based on power, prestige and tradition."⁸⁶ But, on the other hand, these instruments provide also for the protection by the broader community of values shared by that community and prescribe the community solution of problems which cannot be dealt with effectively on the component state level. Since the dividing line between the two spheres of competence is necessarily uncertain and fluctuating, competing assertions of power by the component states on one hand and the broader community's institutions on the other have caused constant tensions and outright conflicts. In the European Community we have observed this tension in almost every area of approximation of laws discussed in this article. It comes to the fore when a member insists that approximation in a given field must be undertaken under a treaty provision which requires unanimity in the Council of Ministers, rather than under an alternative provision which provides for qualified majority vote. Again it is manifest in the frequent disagreements over how much of its normative authority the Council, controlled by the member states, should delegate to the Commission, which represents Community interests and loyalties.

A member state's unwillingness to surrender a part of its power may be due to its desire to preserve what it considers to be the basic balance of

⁸⁵ *Ibid.*

⁸⁶ Wright, "Toward a Universal Law for Mankind," 63 Columbia Law Rev. 435 at 444 (1963).

power prescribed by the Rome Treaty; or a member may fear that its national standards—health, safety, welfare—will be diluted if it submits to majority decisions, or it may doubt the Commission's ability or willingness in the long run to protect its legitimate interests; again, a member may be apprehensive of precedents leading ultimately to undue public intervention in the private sector of the economy or undue centralization of administrative power in the hands of the national executive or of the Commission; since in Germany the Federal Parliament claims broad preventive control over the Government's policies in the Council of Ministers,⁸⁷ the German Government appears reluctant to limit its veto and seeks to preserve its freedom of action so as to be able to respond to the wishes of the Parliament; last, but not least, a member government, sensitive to national interest groups, may seek to retain control over its national regulations, which it hopes to manipulate in order to protect the domestic market against import of foreign goods or to stem an influx of non-nationals into certain occupations. It is important for the Commission to develop its attitude with full appreciation of the motives underlying the positions of the member governments as well as of the relative importance of each instance where the conflict arises. In some situations, rather than demanding power which normally is exercised by the member governments, the Commission might organize pilot projects designed to develop new and superior technical or social solutions which then would be accepted by the member states without any question. The problem for the Commission is to strike a balance between politically unrealistic assertions of power and easy political compromise which could disturb, to the Commission's own prejudice, the redistribution of power achieved in the Rome Treaty. The rôle of the European Parliament comes also into question where the Council is asked to delegate to the Commission the authority to modify the Council's directives, which, under the treaty, must be submitted by the Council itself to the Parliament prior to adoption.⁸⁸

C. Some Organizational Problems

1. The Commission as a collegiate body must have a coherent over-all policy embracing the entire approximation field and based on long-range programs, if it is to exercise wisely the policy choices and value judgments suggested above. The Commission staff is so organized that the approximation activities cut across a number of departments, each supervised by a different Commissioner, from the department dealing with competition to that for social affairs, from the department for external affairs to those dealing with the internal market, agriculture and transport.

⁸⁷ Art. 2, Gesetz zu den Verträgen vom 25. März 1957 zur Gründung der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft vom 27. Juli 1957, 1957 Bundesgesetzblatt, Pt. II/1, No. 23, p. 753.

⁸⁸ This would be the case, *e.g.*, in connection with directives adopted under Art. 100, when their implementation would involve amending legislation "in one or more" member states, or in connection with directives in the field of veterinary and phytosanitary regulations adopted under Art. 43.

Some such distribution of work is probably necessary, but the Commission can perform its rôle only if policy issues are considered in the broadest context and if the organizational structure allows for systematic review to insure consistency and progress. An approximation rule, for example, adopted in the tax or company law or patent law, which facilitates industrial concentrations, may run squarely against the Commission's policy in the competition field.

2. An outside observer cannot but be impressed by the competence and sense of responsibility of the Commission staff. Considering the magnitude of the task that is being attempted, the available human resources are limited even if one counts the officials in the national ministries who participate in, and backstop, the working groups. Above all, the present resources are not sufficient to carry on the necessary comparative legal research on a systematic basis. The Commission's experience with seeking assistance from outside sources has not been uniformly satisfactory. Yet the law faculties and the numerous research institutes on the Continent would seem to offer admirable opportunities. Should not the Commission take the leadership in forming these institutions into a vast network of laboratories in which European comparative studies would be carried on within the framework of regular research programs? The research product may often be too theoretical or diffuse to serve directly as a basis for decisions, and often the Commission may not be able to delay action until a study is completed. Nor does the Commission wish to turn into a dispenser of largesse to scholars or a center for supervision of research. However, if co-operation with academic institutions is put on a continuing basis, and if the problems in which the Commission is interested are presented carefully, the Commission might derive great benefit from such relationship. In any event, a flowering of comparative research and extensive cross-fertilization of ideas would enrich the Continental academic scene. As an important by-product, the legal profession, and particularly the budding European lawyers, would become aware in the course of their professional training of the growing interdependence of the national legal systems and of the economic, social and political factors which work toward unity in the Community. The success of the Community enterprise depends in large measure on the understanding and co-operation of the legal profession within and outside the governments.

D. The Rôle of Executives and Parliaments

Approximation of law, as we have seen, has been essentially the function of the executive branches on the national and Community levels. The legal instruments are evolved in working groups of national and Community civil servants and approved by the executive Commission, which forwards them to the Council of Ministers. They are then re-examined by the officials of the permanent national missions to the Community stationed in Brussels. Unresolved issues are decided by the Ministers in the Council mainly through a compromise of national interests, but since many

approximation measures are extremely technical, the Ministers must rely on the judgment of the expert civil servants, and it is often they who, in effect, "make the law." In most cases, particularly where national legislation (as distinguished from administrative regulations) is to be changed, the Council is required to obtain formal advice from the interested groups organized in the Community's Economic and Social Committee and from the national parliamentarians assembled in the Community's European Parliament at Strasbourg; although advice from the two bodies is obligatory, it is in no way binding on the Ministers and its actual impact on them cannot be reliably measured. Again, the Commission staff and the national officials consult informally with interested groups organized on Community and national levels, respectively, but no formal uniform consultation procedure has been established. Moreover, a fear that a premature disclosure of a proposal will create premature and perhaps irresistible pressures from influential circles has worked at times as a brake on sustained contacts between the Commission staff and outside groups.

As far as the national parliaments are concerned, they have no part in the process where the approximation involves changes in administrative regulations only, and that seems quite understandable, although the differences in the extent of the normative power of the executive in the member states present a problem. However, even where a change in national legislation is involved, for instance, in company laws, in theory at least the national parliament is presented with a directive which already represents an inescapable commitment on the part of the government, and the parliament has only a choice as to the form and means of implementing it. Only in Germany is the Government obligated by law to inform the Federal Parliament before it commits itself in the Council of Ministers.⁸⁹ In those rare cases where approximation takes place through a "regulation," national parliaments do not participate at all because the regulation becomes law in the member states automatically upon its adoption by the Council and publication in the Official Journal of the Communities.⁹⁰ Obviously an international convention containing approximation provisions must be dealt with as any other international treaty by national parliaments in accordance with national constitutions.

Professor Rivero's investigations of federalism led him to conclude that a union of states is not likely to result from a spontaneous popular demand, but is imposed by governments which are prepared to incur temporary unpopularity caused by a short-term threat to vested local interests.⁹¹ In a sense this conclusion is confirmed by the events which led to the birth of the Communities, and it may well be that, in the early stage, lawmaking must be left in the hands of the executives, who are presumably more likely to take unpopular action than the parliamentarians, who constantly face their constituents. Many believe, for instance, that the

⁸⁹ See note 87 above.

⁹⁰ Art. 191.

⁹¹ Rivero, "Introduction to a Study of the Development of Federal Societies," 4 *International Social Science Bulletin* 5 at 24 (No. 1, 1952).

Community's agricultural regulations would never have been adopted if they had required prior approval in the national parliaments or even in a true Community legislature, if one had existed. But Professor Rivero also shows—and his findings are supported by the history of the United States—that, once the new institutions are imposed, public opinion tends to accept them. This raises the question whether, in the long run, the rôle of the European Parliament, which is apt to reflect public opinion in the Community more effectively than any other institution, should not be increased in the lawmaking process generally and in the approximation process in particular. One may conceive of a scheme under which the European Parliament would be given the additional power to approve or disapprove any approximation measure which would require, according to the national constitution of one or more member states, modification of national legislation (as distinguished from mere administrative regulations). Such a scheme would go a long way toward transferring the lawmaking from the Council of Ministers to the European Parliament—a move fraught with implications not only for the approximation process but for the over-all integration process as well.

B. Geographic Scope of Approximation

Approximation affects laws which are predominantly economic, but these laws concern the relationship between the individual and his state or between the individual and the Community, that is, between the individual and the new polity which is finding its expression in the Community. It is in this sense that we may speak of the political effect of approximation of laws. This does not mean of course that approximation, no matter how far-reaching it may be, will in and of itself bring about a political union or determine its eventual form. Political unification of the Six, which at this juncture seems little more than an uncertain aspiration, can become reality only through a new concerted act by the member governments, and there are no indications that such an act will be forthcoming in the near future. However, approximation does advance the elements of homogeneity and similarity within the Community. Experience has shown that these elements are necessary prerequisites for political unification, and it is in this sense that we may speak of the political function of approximation. There is no reason to believe that the approximation will be pressed too far so as to affect adversely the rich diversity of European culture.

When the construction of the customs union is completed and the common agriculture policy becomes fully operative in the Community, it may well be that for some time to come, in the absence of major new moves toward integration, approximation of laws will be one of the more important lawmaking activities in the Community. The fact that membership in the Community has not been enlarged and that no common-law or Scandinavian country has been brought in, may well accelerate the rhythm of approximation, even though there is a feeling in some quarters

that, as an aftermath of the breakdown of the negotiations with Great Britain, the spirit of Community solidarity has been substantially weakened and some member states may not be willing to make the concessions necessary for an agreement on important approximation measures.

The Community is and must remain free to take advantage of its particular homogeneity and institutional framework and to set its own pace and direction in the approximation field as in other fields. Moreover, the Community must be expected to employ approximation along with the other instrumentalities made available by the Rome Treaty toward preserving the cultural identity of Europe and advancing its economic independence as well as the economic interests of the member states. In law, the Community is limited only by whatever international obligations the member states have assumed toward third countries. However, the increased opportunity for progress among the Six calls for an increased attention to what Professor Meyer-Cording calls "the social distance"⁹² between the Community on one hand and third countries on the other.

First, the final word has not been spoken on the subject of the Community's membership, and the possibility of the adherence of other states with different legal systems must be kept in mind; no one can foresee the ultimate shape of "Europe" and its relationship to the Atlantic Allies. Second, a citizen of the Community may see the modern world as a series of concentric circles with the Community area circle at the center, enveloped by circles of progressively increasing diameter, each circle representing a broader community of values and interests whose cohesion decreases with the distance from the center. In a measure, international organizations such as the Council of Europe, the Organization for Economic Co-operation and Development and the United Nations system of specialized agencies are an outward manifestation of these communities of values and interests. The law as an expression of values of these communities is an important element of cohesion which is influenced by significant measures of approximation.

We have seen that the European Community's Commission has drawn heavily upon the work of the Organization for Economic Co-operation and Development aimed at an assimilation of regulations concerning pharmaceuticals: where the O.E.C.D. employed the form of non-binding recommendations limited to commerce in drugs, the Commission has been able to prepare more detailed directives which will be binding upon the member states and extend beyond commerce to production controls. The Commission's proposed directive on registration and labeling of pharmaceuticals is in substance identical with the O.E.C.D. recommendations adopted in 1962 and 1963. Both the Commission and the O.E.C.D. have taken advantage of the studies of the World Health Organization of the United Nations. Again, the Commission has relied on the International Labor Organization of the United Nations in the safety and social welfare fields; on the Food and Agriculture Organization of the United Nations,

⁹² Meyer-Cording, "Die europäische Integration als geistiger Entwicklungsprozess," 10 *Archiv des Völkerrechts* 42 at 64 (1962).

the U. N. Economic Commission for Europe, the Council of Europe, and numerous non-governmental groups, in health and quality control matters; on Benelux, in the fields of recognition of foreign judgments and bankruptcy; and on the Hague Conferences in the field of company law. Some fifty laboratories in thirteen European states have rendered assistance to the Commission on scientific problems.⁹³ Commission representatives have participated in the work of a number of international organizations and thus an interaction exists in these matters.

The Community's approximation directive listing the approved food preservatives will apply to food products in intra-Community trade and to imports into the Community, but not to exports from the Community to third states, which remain subject to the divergent national regulations of the member states. When the European Parliament debated the proposed directive, it was pointed out that the list of approved preservatives included agents prohibited in the United Kingdom and in the United States, and it was urged that, particularly in the interest of less developed countries, the directive should ensure that exports from the Community to third states should not contain any prohibited agents. In his reply to this suggestion, the Commissioner concerned raised the legal question whether Article 100, which authorizes approximation of regulations only if they have a "direct incidence" on the Common Market, would permit such broadening of the directive.⁹⁴ Whether or not the Community's authority is so limited, it would seem in the interest of both the Community and of third states to deal with this and similar problems on a systematic basis in appropriate common fora such as the O.E.C.D. with a view to assuring that, in the first place, existing divergencies are not further increased, that economic and administrative frictions are reduced, and that national rules and standards are brought closer together. The resulting measures would take the form germane to the chosen forum and they would be parallel with, but independent of, the Community's directives. The Commission's work may provide a new impulse for a modernization of legislation on a broader basis.

An approximation measure in the form of an international convention offers greater flexibility in relation to third states than a Community directive, but the basic policy choices remain:

(a) Should the convention be limited to the Six or should it be open to any third state or to a specified group of states for adherence either by a simple act of accession or upon application and approval by the Six?

(b) Should the benefits of the convention, such as the right to a European patent, be available to nationals of third states, not parties to the convention, on an equal basis with Community nationals, or only upon a special quid-pro-quo arrangement with the governments concerned, or not at all?

The answer to the first question depends in some measure upon the

⁹³ Steiger, note 17 above.

⁹⁴ Parlement Européen, Débats, Compte rendu in extenso des séances, No. 12, June 28, 1963, pp. 532-533.

resolution of still another problem: Should the existing Community institutions be given responsibility in the administration of the proposed conventions and, particularly, should the jurisdiction of the Community Court of Justice be extended so as to embrace fully or in part the new instrument?

From the viewpoint of the Community's cohesion it is desirable to integrate any new economic machinery such as the proposed complex of "European" industrial property institutions, including the European Patent Office, with the Community's own institutions, and at least to entrust the Community Court of Justice with the task of ensuring a uniform interpretation. Similarly, from that viewpoint it would be desirable to have the Community Court decide conflicts of competence among national courts and render interpretations binding on these courts, in connection with the application of the conventions dealing with the competence of courts, recognition and execution of their judgments, bankruptcy proceedings and prosecution of violations of certain national rules described above. On the other hand, the closer the relationship between the new conventions and the Community institutions, the more difficult it will be for states which are not members of the Community and do not participate in its institutions to accede to the conventions unless special arrangements are evolved, such as the addition of *ad hoc* judges to the Community Court. Important economic interests may be at stake in addition to the other considerations suggested earlier, and it is for the Commission to provide the statesmanship required for the resolution of these issues.

If tariffs and other measures of direct protection are further reduced under the auspices of the General Agreement on Tariffs and Trade and by other arrangements, and if the competitive arena expands beyond the confines of the Community, obstacles to trade across national frontiers and distortions of competition caused by disparities in national economic laws and technical-administrative regulations will come increasingly to the fore and will require approximation in progressively wider geographic circles. It is difficult, however, to prognosticate any future trends in view of so many uncertain factors, including the orientation of the Community's commercial policy and the posture of the major third states.

STATE SUCCESSION AND PROBLEMS OF TREATY INTERPRETATION *

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It is sometimes stated that the question of state succession to treaties is a question more of treaty interpretation than of the existence or otherwise of general rules of law concerning the fate of treaties upon change of sovereignty. In general terms the proposition is true: a customary rule favoring or negating devolution would tend to be either excessively comprehensive or excessively restrictive with respect to the category of treaties whose fate is in issue. Many treaties, upon interpretation, might be found to be inapplicable under the new circumstances, while many others might be deliberately drafted in anticipation of a change of sovereignty, and might incorporate a clause providing for the solution of the problem. A study of concrete issues is thus, generally, more instructive in determining the effect of change of sovereignty upon treaties than is the enunciation of general principles of succession.

However, recognition of the importance of treaty construction, and of the need for caution in approaching concrete instances, must not obscure the fact that in many situations the solution cannot lie in the canons of interpretation, and must be sought in a more extensive frame of reference which customary law alone can provide. For example, many British treaties predicate action or advantages upon the relevant individuals being "British subjects," "British nationals," or "Her Majesty's subjects," or upon the relevant territories being "British dominions, colonies, protectorates or dependencies," or "British possessions," or "Her Majesty's dominions." The Anglo-Siamese treaty of 1937,¹ for example, gains advantages for the subjects of the high contracting parties (the treaty was in Head of State form), and Thailand, in response to overtures from India to secure these advantages for Indian citizens, has taken the position that Indian citizens are no longer "His Majesty's subjects."² There

* Although the implications of this article are more general, the specific problems of interpretation discussed are those which arise in connection with the independence of states which were formerly dependent territories of the United Kingdom or British Dominions.

¹ Treaty of Bangkok, Cmd. 5731, 141 Brit. and For. State Papers 406; 188 L.N. Treaty Series 333.

² By exchange of notes dated Dec. 28 and 31, 1948, India and Thailand agreed to apply this treaty pending the conclusion of a treaty between Thailand and India. The Indian note in reply contemplates a more formalized exchange of notes, but none was actually completed, owing perhaps to the formal agreement between Thailand on the one part and the United Kingdom and India on the other, dated Jan. 2, 1946, which renders a further agreement unnecessary.

was a protocol defining "subjects" as "His Majesty's subjects and protected persons." The same attitude has been adopted with respect to the citizens of Malaya.

This approach from the position of literal interpretation has its obvious attractions, but it begs the question of state succession to treaties. If the treaties are heritable, then the reference to "His Majesty's subjects" or to "His Majesty's territories" is immaterial, for it must be regarded as a denomination of the individuals or the territories, and not a classification of their legal status. For these expressions there would have to be substituted the expression "Indian citizens" or "Malayan citizens" just as, in the event of the United Kingdom becoming a republic, these expressions would have to be read as meaning "citizens of the British Republic" or whatever title the United Kingdom might adopt.³ When France became a republic, the expression "subjects of His Most Christian Majesty" was interpreted, without quibble, to mean citizens of the French Republic, on the basis that succession of government has no effect upon treaty commitments. If the rules of international law respecting the fate of treaties are identical in the cases of succession of states and succession of governments, then the same process of reconstruction of the relevant expressions is mandatory. Therefore, non-succession to the treaty cannot be deduced from a literal interpretation of the legal status of the persons and territories designated, and interpretation is decisive only when the general inapplicability of the treaty provisions, as distinct from the inapplicability of the legal description of the actors or beneficiaries, is established.

This becomes clearer if the examination commences with the problem of description of the contracting parties themselves. In treaties in head-of-state form, the Crown is the contracting party. Various articles may refer to the "subjects of the Contracting Parties." To argue that an ex-British territory which has become a republic is not a party to the treaty because it is not the same person as the signatory is manifestly to beg the question, but surely it is no less question-begging to exclude the treaty from devolution because the persons favored in it are "subjects of the Contracting Parties." If the drafting of the treaty fortuitously substitutes "His Majesty's subjects" for "subjects of the Contracting Parties," interpretation is surely no more relevant to the solution of the problem of the fate of the treaty, and the same must be true of the expression "His Majesty's possessions."

At the same time, it must also be recognized that the interpretation of the treaty to establish its susceptibility for devolution cannot be too sharply separated from these semantic issues, for it could be argued that a treaty

A new commercial treaty was signed with Pakistan at Bangkok on Aug. 28, 1958, ratified at Karachi on Dec. 9, 1957. It is not regarded as a replacement for the treaty of 1937, which Thailand has never regarded as affecting Pakistan.

³ The problem of the treaty of 1937 vis-à-vis India and Pakistan, is that the majority of Indian denizens were not "His Majesty's subjects," but British-protected persons. To translate His Majesty's subjects as Indian or Pakistani citizens would be to include millions of people to whom the treaty never applied.

which gains commercial advantages or judicial assistance, in virtue of the relevant territory being part of the Crown's dominions, is likely, because of changes wrought in the economic, judicial or fiscal situation, to cease to be applicable when the territory concerned ceases to form part of the Crown's dominions. While the emphasis in this approach is clearly from a consideration of the operation of the treaty as a whole under the changed circumstances, the extent and significance of the change is in some measure related to the designation of the categories of persons and territories to be affected.

It may be that the solution in many instances lies neither in literal interpretation nor in the establishment of general principles of international law relating to succession, but in the institutional situation dominating treaty performance. For example, the fact that a country is a member of the British Commonwealth may be more decisive in establishing that it remains the beneficiary of United Kingdom treaties than is the distinction between the monarchies and the republics of the Commonwealth (the former, perhaps, remaining literally "Her Majesty's dominions") or the fact that it has gained its independence and is theoretically at liberty with respect to its policy, for, even though the Commonwealth is a construction of dubious legal interest, it does achieve a factual situation which may bear upon the question of the intended extent of treaty operation. In other words, in a commercial treaty, the decisive factor favoring devolution upon an independent country may be the economic situation brought about by continued Commonwealth connection, rather than the status of the citizens of that country as "British subjects" or otherwise; and the argument would favor Thailand's position less vis-à-vis India or Malaya than vis-à-vis Burma.

RELEVANCE OF THE QUESTION OF STATUTORY INTERPRETATION

The same question of interpretation arises in the case of statutory law. Many pieces of legislation within the British Commonwealth predicate action upon persons being "British subjects," "Her Majesty's subjects," or upon territory being a "British possession" or part of "Her Majesty's dominions." Two of the statutes containing these expressions which have given rise to issues of interpretation in the courts of the Commonwealth after independence are the Fugitive Offenders Act, 1881,⁴ and the Copyright Act, 1911.⁵ Although the tradition of British statutory interpretation is more favorable to the literal construction of these expressions than is that of treaty interpretation, in fact, except in one instance,⁶ the circumstance that the individuals concerned had ceased to be "Her Majesty's subjects" has been regarded as irrelevant, and the statutes have been held to remain operative in virtue of the general principle of continuity of the legal system.

Although an Indian court has held that an Indian citizen cannot be

⁴ 44 & 45 Vict., c. 69.

⁵ 1 & 2 Geo. 5, c. 46.

⁶ *Madras v. Menon*, A.I.R., 1954, S. Ct., 517; 1954 Int. Law Rep. 46.

returned to another Commonwealth country for trial, on the ground that India has ceased to be a "British possession" within the meaning of the Fugitive Offenders Act,⁷ rendition has been successfully claimed by or from India,⁸ Pakistan,⁹ Ghana,¹⁰ Cyprus,¹¹ Nigeria¹² and the United Kingdom, and by Australia in Ceylon,¹³ without the defense being successful that, in virtue of independence, the Act could no longer apply. (However, it must be noticed that, at the time of rendition, Pakistan, Nigeria and Ceylon were still monarchies, and the United Kingdom statutorily maintained the Fugitive Offenders Act in relation to India and Cyprus.)

In an action to restrain infringement of the Imperial Copyright Act, 1911, in the courts of Madras, the defense was raised that, since India had ceased to be a "British possession" and copyright protection is reciprocally predicated upon original publication in a "British possession," the Act could not apply. The court rejected the defense,¹⁴ without necessarily contradicting the opinion that the Fugitive Offenders Act could no longer apply to India, for copyright is a matter of private law affecting rights of property, whereas rendition is a matter of public law affecting relations between governments. The distinction that emerges in the judgment is between the types of subject-matter of the statute, and the solution of the problem is based upon substantive law and not literal statutory construction.

In British statutory law, the expression "British possession" means "any part of Her Majesty's dominions exclusive of the United Kingdom,"¹⁵ and this last expression means all "the territories under the sovereignty of the Crown."¹⁶ Where necessary, courts have construed these expressions to include territories which have gained republican status, but which have retained British legislation.

INTERPRETATION OF MOST-FAVORED-NATION CLAUSES

The most-favored-nation clause in commercial treaties is a device for ensuring that, if one state grants commercial favors to the citizens of a third state, it must grant similar favors to its contracting partner. The object, in other words, is an equalizing of commercial advantages between the latter's citizens and their competitors. It has both positive and negative aspects: positively, it implies the obligation to grant to the favored nation all favors, rights and liberties which have been, or may in the future be, granted to any other nation, and negatively it means that no special disadvantageous measures may be taken against the favored nation. This does not mean that the grantor state may not at some future time

⁷ *Ibid.*

⁸ *In re Government of India and Mubarak Ali Ahmed*, [1952] 1 All E.R. 1060.

⁹ *E. M. Bhaba v. The Crown*, (1954) 2 All Pakistan Legal Decisions, Sind, 101.

¹⁰ *R. v. Governor of Brixton Prison, ex parte Otchere*, *The Times*, Oct. 11, 1962.

¹¹ *Zacharia v. Republic of Cyprus*, [1962] 2 All E.R. 438.

¹² *R. v. Governor of Brixton Prison, ex parte Enahoro*, [1963] 2 All E.R. 477.

¹³ *R. v. Bradley* (unreported).

¹⁴ *Blackwood & Sons v. Parasuraman, A.I.R.*, 1959, Madras, 410.

¹⁵ 52 & 53 Vict., c. 63, s. 18 (2).

¹⁶ 5 Halsbury 433.

reduce its favors to the favored state, provided that it reduces its favors similarly towards other states. It follows that the clause itself only operates contingently upon favors being granted or restricted, and, should no such changes of policy occur, it remains a dead letter.

The drafting of the clause may achieve a reciprocity of favors between the contracting states, or merely an equalizing of favors granted by one party to other states. Until 1923, the policy of the United States was to extend most-favored-nation privileges on a basis of equality with favored states, only if the United States received the same treatment in return.¹⁷ Again, the nature of the favors granted will depend upon the drafting. Generally, an equalizing of tariffs or quantitative restrictions, and of commercial liberty, are the basic achievements of the clause. Needless to say, disequilibrium can be achieved in fact when it does not exist in law, and whether a factual, as distinct from a legal, equality may be demanded in virtue of the clause is controversial.

Most-favored-nation clauses appear not only in commercial treaties, but have been introduced into peace treaties, treaties of alliance, and even extradition treaties.¹⁸ The oldest peace treaty embodying it is the Treaty of the Pyrenees, 1639.

The question arises whether the clause is independent of the treaty itself, so that it may be unilaterally denounced on notice as a commercial treaty may be terminated, or whether it endures for the duration of the treaty, which, in the case of a peace treaty, means in perpetuity. Authors have paid little attention to the question, save to admit that the most-favored-nation clause may be tacitly terminated by the parties.¹⁹ The benefits of such clauses are usually granted only by one party to the treaty, and that the weaker, so that justice would seem to invite revision. During the 19th century the Porte, Siam and China were all pressured into granting the European Powers and the United States most-favored-nation preference, without gaining such preference for themselves in return. The "Open Door" policy was also pursued in the case of Morocco, and the privileges granted were co-ordinated in the Act of Algeciras in 1906.²⁰

Few authors have discussed the effect of state succession upon most-favored-nation provisions as such, and separately from commercial treaties.²¹ Hatschek,²² deducing the fate of the clause from the fate of the treaty itself, and postulating that the treaty is not of a dispositive character, concludes that, in case of annexation, most-favored-nation advantages lapse. Other authors, while not discussing the clause specifically, imply its continuity, either in the restricted instances of independence or

¹⁷ 5 Hackworth 272.

¹⁸ Italian Peace Treaty, 1947, Art. 82 (1) (a); Versailles Peace Treaty, Art. 267; Treaty between Argentina and Spain, 1863; Peace Treaty of Frankfort, 1871, Art. 11.

¹⁹ Basdevant, "Clause de la nation la plus favorisée," 3 *Répertoire de Droit International* 481 *et seq.* (1929); McNair, *The Law of Treaties* 505 (1962).

²⁰ 99 Brit. and For. State Papers 141.

²¹ R. Binz, *Staatsukzession und Meistbegünstigung* (unpublished dissertation, Munich, 1961).

²² *Völkerrecht als System rechtlich bedeutsamer Staatsakte* 263 (1928).

in cases of cession or annexation, where the privilege is localized in respect of the territory, or generally in virtue of the alleged "non-political" character of commercial arrangements.²³

The correct commencement point is consideration of the function of the most-favored-nation provision. It must be remembered that it is a dynamic provision, capable of vast ramification upon the occurrence of the predicated events. It might, in respect of the predecessor state, be a dead letter, should that state offer no commercial advantages, but it might suddenly and drastically modify economic relationships if it is held to bind a successor state which is already subject to a complete system of preference, and hence its catalytic impact upon the economic structure would seem to preclude any presumption of devolution. Therefore, in cases of annexation, cession, or wherever the predecessor and successor states have already enmeshed their commercial systems in treaty relationships, it becomes evident that the most-favored-nation clause ceases to affect the relevant territory. The deduction of the lapse of the treaty itself from the lapse of the preferential clauses seems more logical than the reverse.

However, it is possible to contemplate a devolution of a most-favored-nation clause when this is "localized" in the sense of governing the commercial relations of an autonomous area or province. The presumption here is that the clause works to the advantage of a region, and since regional preferences are normally given only in respect of neighboring countries whose economies are complementary, lapse of the provision could achieve a greater disruption of commerce than its continued and extended operation in virtue of the more ramified preferential system of a successor state. It would be rash, therefore, to generalize from theories of succession or non-succession to the conclusion that most-favored-nation provisions always lapse, and it is preferable to treat the question as one of treaty interpretation, which permits concrete instances to be examined.

In this context it may be recalled that the clause is sometimes drafted designedly to secure continuity upon transfer of the territory to another country. This occurred in the case of the Brussels Treaty between Germany and the International Association of the Congo in 1884, the relevant clause of which reads:

Bei Abtretung des gegenwärtigen oder zukünftigen Gebietes der Gesellschaft, gehen alle von der Gesellschaft dem Deutschen Reich gegenüber eingegangenen Verpflichtungen auf den Erwerber über. Diese Verpflichtungen und die dem Deutschen Reich und seinen Angehörigen von der Gesellschaft eingeräumten Rechte bleiben auch nach der Abtretung einem jeden neuen Erwerber gegenüber in Gültigkeit.

Although it could be argued that to Belgium this was *res inter alios acta*, and the attempt to write succession into the instrument itself was therefore ineffective, in fact Belgium did not question the continuity of German privileges.²⁴

²³ Cf. Huber, *Die Staatensukzession* 43 (1898); Schönborn, *Staatensukzessionen* 42 (1913).

²⁴ 2 Hold-Ferneck, *Lehrbuch des Völkerrechts* 116 (1932).

When a dependent territory is the successor state, the problem presented by most-favored-nation preference is radically different from what it is in the case of annexation or cession. The successor state is new, and therefore it can have no more commitments, by hypothesis, than had its predecessor state. Therefore no alteration is effected in the ramification of most-favored-nation privilege in virtue of pre-existing advantages which the treaty partners might claim for themselves, and hence there is no catalytic impact upon the economic and commercial structure. Indeed, if the clause is of such character that it secures reciprocal advantages—either identical privileges, or an exchange of most-favored-nation privileges—it works to the benefit and maintenance of commercial relations rather than to their disruption, and the conclusion favors a presumption of continuity. If the question, again, is approached from the position of treaty interpretation, it is arguable that burdensome preferences designed for exploitation might be construed as non-continuous, and those founded on the contractual equality of the parties might be construed to the contrary.

Owing to the uncertainty to what extent existing most-favored-nation privileges are absorbed in and modified by G.A.T.T., the specific question of their fate upon independence has not given rise to much coherent practice. As for G.A.T.T. itself, the resolution of the contracting parties of November 1, 1957, has achieved a *de facto* continuity of the G.A.T.T. system in relevant instances, and the reciprocal most-favored-nation device in G.A.T.T. has thus continued to operate. This suggests that there is no necessary presumption against continuity of most-favored-nation preference in the case of independence.

Article I (2) (a) and (b) of G.A.T.T. exempts from most-favored-nation operation preferences in force between two or more of the members of the Commonwealth, as they were in 1947, and the dependent territories of the United Kingdom, and preferences between two or more territories which were on July 1, 1939, connected by common relationships, including all the French, Belgium, Netherlands and United States Territories. Article I (3) provides that the margin of preference so permitted shall not exceed the difference between the most-favored-nation and preferential rates permitted in the Schedule to G.A.T.T., or the preferential or most-favored-nation rate, if not fixed in the Schedules, in force on April 10, 1947. The independence of the relevant dependent territories has not, apparently, withdrawn them from this exemption, since, upon construction, the relevant provisions continue to apply to nominated territories in the Annexes, irrespective of their changes in status.

While in some respects G.A.T.T. has superseded other most-favored-nation arrangements, many of the latter provide for automatic advantages which are in excess of those which G.A.T.T. provides. The Treaty of Bangkok, 1937,²⁵ for example, extends privileged treatment to entry, travel, residence, departure, commerce, manufacture, professions, occupations, acquisition, inheritance, exportation, duties, taxes, imports, fees, protection, security, national service, contributions, requisitions and in-

²⁵ Cmd. 5731; 141 Brit. and For. State Papers 406; 188 L. N. Treaty Series 333.

violability of property. These benefits accrue to all British subjects, including, on the face of the texts, citizens of Commonwealth countries which remain monarchies but are not themselves parties to the treaty.

1. *Specification of Beneficiaries of Most-Favored-Nation Preference*

The most-favored-nation clause has taken many different forms, specifying sometimes that the advantage shall accrue to subjects or citizens, at other times to products, and at others to the countries concerned. The difference in drafting raises different questions of construction.

The earlier British commercial treaties contained an elementary form of most-favored-nation preference, which referred specifically to the advantages accruing to individuals as well as territories. For example, the Treaty of Upsala, 1654,²⁶ between Cromwell and Queen Christina of Sweden provided that the "Protector and Commonwealth of England," their "People and Subjects," should have and enjoy as large and ample privileges in each other's Dominions as any other foreigner then or thereafter. Since the beneficiaries were the Protector, the Commonwealth, and their people and subjects, the question arose, upon the Restoration of Charles II, whether the treaty had lapsed with the disappearance of one party, and the termination of the relationship of subjection to that party of the inhabitants of England. Accordingly, negotiations were immediately opened between Charles II and the King of Sweden for a renewal of the treaty, which was signed in 1661, and reiterated the provisions of the treaty of 1654.²⁷ At that time, however, treaties were personal compacts between sovereigns, and there was room for contention that a change of sovereigns otherwise than in accordance with the law of succession did not occasion succession in treaty obligations. Therefore the precedent is of dubious value for an examination of the effect of change of sovereignty upon a treaty whose beneficiaries are described as British subjects.

Other forms of the most-favored-nation clause appeared in the 19th century. The Anglo-French treaty of 1826,²⁸ for example, referred to "British vessels" not being subject to higher dues or customs duties in French ports, and enjoying most-favored-nation preference treatment. The treaty was specified to apply to all French and British colonies. Does it now operate between ex-British and ex-French colonies? Does the answer depend upon whether the ships registered in these ex-colonies can still be described as "British" or "French" ships? The Anglo-Liberian treaty of 1849²⁹ referred to the "subjects of Her Majesty" and "vessels from British dominions," and specified that the "Parties" should treat each other on the footing of most-favored-nation, and that any favor granted to citizens of other states should be extended to the citizens or subjects of the parties.³⁰ Does this mean that, if the inhabitants of ex-British territories cease to be "subjects of Her Majesty," the treaty cannot

²⁶ 1 Brit. and For. State Papers 691. ²⁷ *Ibid.* 701.

²⁸ 13 *ibid.* 3, Art. 1. The Anglo-Swedish treaty of 1826 uses the same formula, *ibid.* 12.

²⁹ 36 *ibid.* 394, Art. 1.

³⁰ Art. 4.

apply to those territories? Conversely, is Costa Rica entitled under its treaty of 1849³¹ with Great Britain to claim for inhabitants the same "liberty" in Ghana as the "liberty" granted them "in Her Majesty's dominions"? And does this expression now include Nigeria? The problem in this case is that the treaty goes on to specify that the "Parties" intended to treat each other on a most-favored-nation footing, though the favors are guaranteed, as in the case of Liberia, to "the citizens or subjects" of the parties.

In the Anglo-Peruvian treaty of 1850,³² the expression "Her Majesty's subjects" is not employed, but favors are granted to the citizens of the parties in matters of commerce and navigation, in return for equivalent compensation. In the Anglo-Moroccan treaty of 1856,³³ reference is made to freedom of commerce from "British dominions," though the most-favored-nation clause refers to "merchandise imported by British subjects." In the following year the Anglo-Persian treaty³⁴ introduced a change in formula, referring to the parties being placed in each other's dominions on the footing of the most-favored-nation, and then going on to refer to the treatment of subjects and their trade also being placed on the same footing. With modifications this formula became standard in English treaties for the remainder of the century.³⁵

In the early twentieth century yet another formula appears, reference being made to articles the produce of one party, or of its "dominions" or sometimes "territories," being imported on a basis of most-favored-nation preference, though references to privileges being granted to subjects of third states also being granted to "subjects" of the parties continued to be made.³⁶

The variety of expressions used in these clauses demonstrates that the solution of the problem of continuity cannot lie exclusively in construction. The treaties themselves were in head-of-state form, so that one of the parties was the British Crown. It cannot be concluded that these treaties cease to affect territories lost to the Crown, without begging the question of succession. If it is theoretically possible for treaties to devolve, it is surely impermissible to distinguish those treaties which designate the parties as the beneficiaries of most-favored-nation treatment, from those which designate the "subjects" of the parties, or synonymously "British subjects" or "subjects of Her Majesty"; and it is no less impermissible to predicate survival of the treaty upon the hazard of its referring to the "dominions" or "territories" of the parties, or, synonymously "Her Majesty's dominions," or to "products" of such dominions or territories,

³¹ 37 *ibid.* 20, Arts. 1, 4. Arts. 5, 6, and 7 were denounced by Costa Rica in 1897: 20 *Hertslet* 244.

³² 38 *Brit. and For. State Papers* 20, Art. 3. The treaty has been interpreted as benefiting all British Dominions, but as not requiring them to accord privileges to Peru.

³³ 46 *ibid.* 176, Art. 1.

³⁴ 47 *ibid.* 42, Art. 9.

³⁵ Switzerland, 1855, 45 *ibid.* 21, Art. 6; Colombia, 1868, 56 *ibid.* 13, Art. 4.

³⁶ *E.g.*, Portugal, 1914, 108 *ibid.* 869, Cd. 8402, Art. 5; Bolivia, 1911, 104 *ibid.* 182, Cd. 6267, Art. 5; Lithuania, 1922, 116 *ibid.* 500, Art. 1; 24 L. N. Treaty Series 174. Cmd. 1711.

as distinct from the "Parties" themselves, or the subjects of the parties. It is logically and sociologically compelling that all apposite most-favored-nation preference treaties devolve upon independence, or none at all, and the more the question is studied the more the irrelevance of literal interpretation becomes evident.

The Anglo-Siamese Treaty of Bangkok, 1937,⁸⁷ has a protocol annexed which defines the beneficiaries of the most-favored-nation preference as "all the subjects of His Majesty and all persons under His Majesty's protection," and then goes on to state that

the most-favoured-nation treatment provided for in Article 2 of this treaty in favour of the subjects of each high contracting party is accorded to such subjects whether or not they are resident in the territories of the other high contracting party.

Under Articles 23 and 24, dependent territories become affected by the treaty only upon notice of extension, and British Commonwealth members become parties to it only by accession. It is clear, however, from the protocol that the denizens of these territories or members are beneficiaries of the most-favored-nation provisions, irrespective, on literal construction, of the fact that they have since acquired a citizenship other than that of the United Kingdom, provided they remain "Her Majesty's subjects." Therefore, all citizens of the Commonwealth monarchies remain beneficiaries. Also, the protocol refers to ships benefiting from the treaty as being "all ships registered under the law of any part of the British Commonwealth of Nations, including any territory under the sovereignty, protection, suzerainty or mandate of His Majesty." Again, upon literal construction, there is no doubt that a ship registered in India is the beneficiary of the treaty, even if India's accession, as Thailand contends, has lapsed because Indian citizens can no longer be described as "Her Majesty's subjects." If Thailand insists upon literal construction, then, to avoid the treaty vis-à-vis India, it must allow India the benefits of literal construction with respect to Indian ships. On the other hand, if Thailand argues that the expression "British Commonwealth of Nations" as used in 1937 bears so different a connotation from the expression as used today as to have no application in the context, it must permit the solution of the treaty's fate as a whole to depend upon the law of succession and not the canons of interpretation. Independence has thus introduced contradictions into the treaty itself which pose a real dilemma.

2. The Effect of Independence on the "nevertheless" Clause

The policy of not including British Dominions, colonies and dependencies automatically in commercial treaties which developed in the late nineteenth century, gave rise to two devices, apart from that of separate accession, used jointly⁸⁸ or separately, to secure for these territories the benefits of the most-favored-nation clause. The first was an undertaking by the

⁸⁷ Cmd. 5731; 188 L. N. Treaty Series 333; 141 Brit. and For. State Papers 406.

⁸⁸ E.g., Germany, 1924, 119 Brit. and For. State Papers 369; Cmd. 2520, Arts. 31, 32.

other party to accord most-favored-nation treatment in its territory to the goods of any British colony, protectorate or mandated territory on a basis of reciprocity.³⁹ The second was by means of the "nevertheless" clause,⁴⁰ which first appeared in modern form in the Anglo-Lithuanian treaty of 1922. This dealt with the privileges of "British subjects" and "goods the product or manufacture of the United Kingdom," and went on to state that the foregoing stipulations would not be applicable to India or any dominions, colonies, possessions or protectorates beyond the seas, unless notice of accession to this arrangement would be given on their behalf, but "nevertheless, goods, the produce or manufacture of India or any dominions, colonies, possessions or protectorates beyond the seas will enjoy in Lithuania complete and unconditional most-favored-nation treatment" on a basis of reciprocity.

Some older treaties are interpreted as conveying a "nevertheless" implication. For example, the Anglo-Swedish treaty of 1654, as confirmed in 1661,⁴¹ refers to advantages to both the "territories" and the "subjects" of the Crown. In virtue of the reference to "territories," Southern Rhodesia claims that the entire treaty extended to it when it became a Crown colony, and that it is therefore a party to it. Australia withdrew from the treaty separately in 1915,⁴² but still lists it as gaining advantages for Australian citizens in virtue of the reference to "subjects."

The problem of interpretation is sometimes complicated by variations in draftsmanship. For example, in the Treaty of Bangkok, 1937,⁴³ Article 23 provides for its extension by the King and Emperor "to any of his colonies, overseas territories or protectorates, or to any mandated territory," and, under Article 24, accession may be made by any member of the British Commonwealth. Article 25 reads:

³⁹ *E.g.*, Brazil, 1931.

⁴⁰ *E.g.*, Portugal, 1914, 108 Brit. and For. State Papers 369; Cd. 8402, Art. 21; Bolivia, 1911, 104 Brit. and For. State Papers 132; Cd. 6267, Art. 15; Austria, 1924, 119 Brit. and For. State Papers 328; Cmd. 2411; 85 L. N. Treaty Series 175, Arts. 24, 25; Bulgaria, 121 Brit. and For. State Papers 750; Cmd. 2556; 43 L. N. Treaty Series 165; Czechoslovakia, 1923, 117 Brit. and For. State Papers 254; Cmd. 2254; 29 L. N. Treaty Series 378, Arts. 9, 10; Estonia, 1926, 123 Brit. and For. State Papers 483; Cmd. 2709; 48 L. N. Treaty Series 209, Arts. 28, 29; Finland, 1923, 117 Brit. and For. State Papers 282; Cmd. 2243; 29 L. N. Treaty Series 130, Arts. 23, 24; Guatemala, 1928, 128 Brit. and For. State Papers 309; Cmd. 3429; 97 L. N. Treaty Series 229, Art. 13; Latvia, 1923, 117 Brit. and For. State Papers 326; Cmd. 1995; 20 L. N. Treaty Series 395, Arts. 26, 27, Lithuania, 1922, 116 Brit. and For. State Papers 500; Cmd. 1711; 18 L. N. Treaty Series 25; Panama, 1928, 128 Brit. and For. State Papers 326; Cmd. 3322; 90 L. N. Treaty Series 311, Art. 12; Roumania, 132 Brit. and For. State Papers 309; Cmd. 3945; 123 L. N. Treaty Series 307, Art. 36; Spain, 1922, 117 Brit. and For. State Papers 353; Cmd. 2188; 23 L. N. Treaty Series 339, Arts. 5, 6, 24, as notified in 1927, 176 Brit. and For. State Papers 297; Cmd. 2855; 63 L. N. Treaty Series 189 and 192; 128 Brit. and For. State Papers 347; Cmd. 3074; 78 L. N. Treaty Series 457; Thailand, 1937, Cmd. 5731; 188 L. N. Treaty Series 333, Art. 25; Yugoslavia, 126 Brit. and For. State Papers 276; Cmd. 3065; 80 L. N. Treaty Series 165, Arts. 30, 31.

⁴¹ See notes 26 and 27 above.

⁴² 1 Brit. and For. State Papers 696; 27 Hertslet 1062.

⁴³ Cmd. 5731; 141 Brit. and For. State Papers 406; 188 L. N. Treaty Series 333.

So long as in any territory referred to in articles 23 and 24, to which the provisions of the present treaty are not applicable, either by virtue of accession under article 24 or by notice of extension under article 23, goods produced or manufactured in Siam are accorded treatment as favourable as that accorded to goods produced or manufactured in any other foreign country, goods produced or manufactured in such territory shall likewise enjoy in Siam treatment as favourable as that accorded to goods produced or manufactured in any other foreign country.

Various questions of interpretation arise with the independence of the territories which benefited from this clause. The first question is whether citizens of Commonwealth countries other than the United Kingdom enjoy the benefits accruing to "British subjects" under the treaty, or whether, now that these countries are independent, and British nationality has been qualified by citizenship in the relevant countries and exists only in virtue of the "common clause," the expression "British subjects" should be read as restricted to citizens of the United Kingdom. The problem here is different from that normally raised by the expression "British subjects," inasmuch as the treaty itself was never applied to Commonwealth countries, and therefore no succession to it is possible. The relevant question, then, is not whether the Commonwealth countries may claim the benefits of the treaty for these citizens, but whether the United Kingdom can claim the inclusion within the designated category of persons those who have, since the signature of the treaty, been substantially lost to the jurisdiction of the United Kingdom.

The second question that arises is whether the benefits of the "nevertheless" clause can be claimed by the United Kingdom for territories which, while remaining within the Commonwealth, are in fact independent. Literal construction of the "nevertheless" clause again begs the question, for "India" is still India, and the Dominions, meaning Australia, New Zealand and Canada, may still be comprehended under this title, though in fact no different in status from other Commonwealth members, whereas the latter cannot be described as "dominions, colonies, possessions or protectorates" any more. Since it is obviously impermissible to distinguish India from Nigeria, the interpretation of the clause must favor all Commonwealth members, at least the monarchies, or none at all.

The problem becomes more perplexing if one examines the cases of Ireland and South Africa, both of which were beneficiaries of the "nevertheless" clause. It would hardly be argued that since their withdrawal from the Commonwealth, coupled with their becoming republics, they remain beneficiaries. The same is clearly the case with Sudan, Burma, Kuwait, and the Somali Republic, all of which also benefited from the clause. But wherein does the difference lie between these countries and Ghana, Tanganyika, Pakistan, Malaya and Uganda, except that these are Commonwealth members? Does Commonwealth membership, then, constitute the test of continued benefit, or retention of the monarchical form of government? To distinguish the republics from the monarchies of the Commonwealth seems an awkward solution, even if justified by literal con-

struction. But to exclude all the Commonwealth countries from the operation of the clause does violence to the practice of Australia and New Zealand and the other parties to these types of United Kingdom treaties, which regularly accord the relevant advantages. It may be that the Commonwealth membership is to this extent legally significant, even if thereby a new dynamic has been introduced into the working of the "nevertheless" clause.

3. *The "Commonwealth exception" Provision*

The recognition of the implications of the Balfour Declaration on Commonwealth status in 1926 proceeded only slowly, and it was not until the Ottawa Conference of 1931 that the possible effect of a conventional system of Commonwealth, as distinct from a domestic system of imperial preference, upon the operation of most-favored-nation advantage was studied. If the Dominions and the United Kingdom, as equal partners, exchanged privileges, could these privileges then be claimed by the beneficiaries of commercial treaties? There seems to have been no occasion when an already existing most-favored-nation clause was invoked in this way, but the draftsmen of post-1931 treaties sought to exclude the argument by appropriate textual exception. In the Anglo-Brazilian treaty of 1931⁴⁴ the technique adopted was to exclude membership of a customs union from the operation of the most-favored-nation provision, but, although the official British attitude was that the Commonwealth is a customs union, there was room for quibble, if its inclusion in this category was only by implication. Accordingly, in the Anglo-Finnish treaty of 1933,⁴⁵ which dealt with quantitative restrictions, a new device was introduced, known as the Commonwealth exclusion clause. Referring to the most-favored-nation advantage given any foreign country, the provision reads:

In this Article the term "foreign country" means a country not being a part of the British Commonwealth of Nations nor a territory under British protection or suzerainty, in a mandated territory in respect of which the mandate is exercised by a Government of a part of the British Commonwealth of Nations.

While the inclusion of this clause in United Kingdom treaties was not consistent, it did become standard practice in the treaties made by other Commonwealth countries.⁴⁶

⁴⁴ 184 Brit. and For. State Papers 224; Cmd. 4002, Art. 8. In the same year the Canadian-Brazilian Commercial Agreement expressly reserved Commonwealth preference. Canadian Treaty Series, No. 6 (1931); 134 Brit. and For. State Papers 459; Cmd. 4250. This was adopted in the Brazilian-Indian treaty of 1931, Cmd. 4168.

⁴⁵ Cmd. 4472.

⁴⁶ The exception of Commonwealth preference from most-favored-foreign-nation treatment first appears in a United Kingdom treaty with Finland in 1933 (Cmd. 4472), although earlier examples are to be found in the Brazilian agreements with Canada in 1931 (Cmd. 4250) and with India in 1932 (Cmd. 4168).

Other United Kingdom trade agreements incorporating this express reservation are with the following countries: U.S.S.R. (1934, Cmd. 4567), Lithuania (1934, Cmd. 4680), Brazil (1936, Cmd. 5267), Cuba (1938, Cmd. 5867), Thailand (1938, Cmd.

The question that arises upon independence is whether the territory concerned falls within the expression "foreign country" as defined by exclusion in this clause. The answer appears to be straightforward: Membership of the Commonwealth, by definition, excludes the operation of the clause, even if the territory affected has ceased to be under British protection or suzerainty, or to be a mandated territory. The implication that the Commonwealth constitutes a legal institution, the existence and character of which is a determinative factor in the interpretation of commercial treaties, favors the conclusion that the "nevertheless" clause should be construed to gain advantages for Commonwealth members, irrespective of their status as monarchies or republics.

INTERPRETATION OF THE EXTRADITION ACT, 1870

Section 2 of the Extradition Act, 1870⁴⁷ provides that, where an arrangement has been made with any foreign state with respect to the surrender to such state of any fugitive criminals, Her Majesty might, by Order in Council, direct that the Act shall apply in the case of such foreign state. Section 17 provides that the Act, when applied by Order in Council, shall extend to "every British possession," which means that it extends automatically in virtue of the Orders in Council nominating the states which have an arrangement. The Orders do not remain in force for a longer period than the arrangement.⁴⁸

If the expression "whether an arrangement has been made with any foreign State" is construed literally, the tendency would be for the Act not to continue in force in virtue of a presumed lapse of the relevant Order. This, however, would be to beg the question in the same way as the literal construction of the expression "British possession." In *Westerling's Case*⁴⁹ the Supreme Court of Singapore accepted the certificate of the Crown that Indonesia had succeeded to the Anglo-Netherlands Extradition Treaty, and, on the basis of that, held that Indonesia was a state with which an arrangement had been made. However, the court also held that, as a matter of statutory construction, it was required to ascertain if there was an Order in Council directing that the Act should apply in the case of Indonesia *eo nomine*. Finding that there was no such Order, and refusing to construe the Order nominating The Netherlands as an Order nominating Indonesia, the court found that the Act had not been applied in the case of Indonesia.

5731), U. S. A. (1938, Cmd. 6158), Denmark (1950, Cmd. 7986) and Norway (1950, Cmd. 8363).

No express reservation, or definition of the word "foreign" as used in the expression "most-favored foreign country" appear in the following United Kingdom agreements: Iceland (1933, Cmd. 4331), Sweden (1933, Cmd. 4421), Denmark (1933, Cmd. 4424), Chile (1937, Cmd. 5650), Chile (1938, Cmd. 5972), Salvador (1945, Cmd. 6816) and Chile (1947, Cmd. 7178). Presumably, the contracting parties in these cases did not deem it necessary that the understanding be made explicit in the agreements.

⁴⁷ 33 & 34 Vict. c. 52.

⁴⁸ Sec. 2.

⁴⁹ 1950 Int. Law Rep., Case No. 21.

- . It appears that the Crown had been taken by surprise when the judge made this point, for the judgment refers to the Crown's efforts to avoid or dismiss the argument, and this surprise may be shared by any commentator. The provisions of the Act establish such an intimate connection between the "making of an arrangement," and the nomination of the state with which an arrangement is made, that it might be regarded as part of the same logical process to construe the Order *mutatis mutandis* to apply to Indonesia as to construe, *mutatis mutandis*, the expression "arrangement with any foreign State."

Article 2 of the United Kingdom-United States Extradition Treaty, 1931,⁵⁰ includes the following paragraph:

It is understood that in respect of all territory of His Britannic Majesty . . . other than Great Britain and Northern Ireland, the Channel Islands and the Isle of Man, the present Treaty shall be applied as far as the laws permit.

It follows that any alteration in the law of the territory to which the treaty was applied may negative the treaty's operation. Succession or otherwise to the treaty itself could not, therefore, become an issue of controversy.

THE EXPRESSION "TERRITORY" IN SPECIFIC CONTEXT

Ghana signed a devolution agreement with the United Kingdom, whereby it was stated to enjoy the rights of British treaties which had applied to the Gold Coast, and would undertake the obligations of such treaties insofar as they might be held to apply to Ghana.⁵¹ The United States Treaty List⁵² includes under the name Ghana several United Kingdom-United States treaties. Of these, certain ones might, upon construction, require substantial re-writing to fall within the formula in the devolution agreement. Three will be selected for analysis, the Bermuda Agreement on Air Services, 1946⁵³ the Mutual Defense Assistance Agreement, 1950,⁵⁴ and the Economic and Technical Co-operation Agreement, 1948.⁵⁵

By Article 12 (2) of the Bermuda Agreement on Air Services, references to the "territory" of each contracting party shall be construed according to the definition of "territory" contained in Article 2 of the Chicago Convention on Civil Aviation of 1944, which reads as follows:

⁵⁰ 163 L. N. Treaty Series 59; 135 Brit. and For. State Papers 323; Cmd. 4928; 47 Stat. 2122.

⁵¹ 287 U. N. Treaty Series 234; Cmd. 345. The analysis of the three treaties in this section was made by Mr. I. Shearer in the course of preparation of an article to be published in the *Revue générale de droit international public*, and is included here with his consent. Mr. Shearer is Lecturer in Law in the University of Adelaide.

⁵² Treaties in Force, 1962.

⁵³ 3 U. N. Treaty Series 253; 147 Brit. and For. State Papers 1111; Cmd. 6747; 60 Stat. 1499; T.I.A.S., No. 1507.

⁵⁴ 80 U. N. Treaty Series 261; 156 Brit. and For. State Papers 784; Cmd. 7894; U. S. Treaty Series 126; T.I.A.S., No. 2017.

⁵⁵ 22 U. N. Treaty Series 263; 151 Brit. and For. State Papers 149; Cmd. 7469; 62 Stat. 2596; T.I.A.S., No. 1795.

For the purposes of this Convention the territory of a State shall be decreed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

The Agreement provides for treatment of the designated airlines of the other party not less favorable than that accorded to national airlines in matters such as supplies of fuel and spare parts and recognition of certificates of airworthiness, et cetera. The annex to the Agreement provides for the fixing of rates in the event of the breakdown of the I.A.T.A. rate machinery and for the routes to be served by carriers of the two parties.

One of the routes approved for carriers designated by the United States is New York-Azores, Dakar or Monrovia-Accra (or Lagos)-Leopoldville-Johannesburg. When Ghana became independent, the United Kingdom could no longer be internationally responsible to the United States for carrying out its obligations at Accra airport. In actual fact, American landing rights there were unaffected by independence, so that Ghana's succession to the Agreement might be undisputed. But should Ghana designate its own carriers, it could not participate realistically in the Agreement unless new schedules of routes et cetera are drawn up, for it could not be pretended that, in succeeding to the Agreement, former British colonies would be bound by the designations of carriers and specifications of routes applicable under the Agreement before they became independent. This example illustrates that, in admitting succession to treaties, especially to those of a complex character, a substantial re-examination of such treaties may be called for to enable a realistic succession to take place. It may well be that, in a case like the present, it will be found more convenient, while admitting succession in principle, to negotiate a separate agreement embodying substantially the same terms as before, but with appropriate modifications to meet the individual case.

The United States list of *Treaties in Force* states that Article IV only of the Mutual Defense Assistance Agreement, 1950, is applicable to Ghana, and was made applicable to the Gold Coast on July 19, 1952. The Agreement as a whole consists mainly of reciprocal undertakings that the parties will provide materials and assistance to facilitate the defense plans of the North Atlantic Treaty Organization. Article IV provides that the provisions of Article V of the Economic Co-operation Agreement of July 6, 1948, shall be regarded as an integral part of this Agreement. Article V of this Agreement provides for the supply of materials to the United States for stockpiling or other purposes, upon such reasonable terms as may be agreed, and for the promotion of the increased production of such materials. The Mutual Defense Assistance Agreement as a whole was not extended to non-metropolitan "territories" of the parties, whereas the Economic Co-operation Agreement was specifically extended to a large number of colonies, including the Gold Coast. The American interpretation of Article IV of the Mutual Defense Assistance Agreement is apparently that, not only are the provisions of Article V of the Economic

Co-operation Agreement incorporated into the later agreement, but that their territorial application is imported as well. This interpretation might not be free from controversy, although the point would only arise in the event of the expiration of the Economic Co-operation Agreement itself and the consequent survival of Article V as Article IV of the Mutual Defense Assistance Agreement. The Economic Co-operation Agreement is terminable on 6 months' notice, the Mutual Defense Assistance Agreement on 12 months' notice.

The preamble to the Economic and Technical Co-operation Agreement, 1948, between the United States and the United Kingdom makes it clear that this Agreement is to be considered within the framework of the principles and objects of the European Economic Co-operation Convention. The two governments, "desiring to set forth the understandings which govern the furnishing of assistance by the Government of the United States of America under the Economic Co-operation Act of 1948, the receipt of such assistance by the United Kingdom, and the measures which the two Governments will take individually and together in furthering the recovery of the United Kingdom as an integral part of the joint programme for European recovery," agreed to a number of provisions relating to the granting and use of various kinds of assistance to be furnished by the United States.

By Article V, the United Kingdom agreed to facilitate the transfer to the United States, on such terms of sale, barter or exchange as may be agreed, of materials originating in the United Kingdom required by the United States for stock piling or other purposes, and to promote the increased production of such materials. To this end the two governments agreed to negotiate, on request, a schedule of minimum availabilities of such materials, to the protection of rights of access by United States nationals in the development of such materials on terms of treatment equivalent to those afforded to nationals of the United Kingdom, and to negotiate a schedule of increased production of such materials, an agreed percentage of which was to be transferred to the United States.

By Article XI the term "United Kingdom," as used in the agreement, means the United Kingdom and any territory to which the Agreement shall have been extended. The Gold Coast is included in the schedule, attached to Article XII, of colonies to which the Agreement is applicable. In each of two amendments to this Agreement, made necessary by amendments to the Economic Co-operation Act and for broadening the scope under Article IV (6), the United Kingdom undertook to consult the governments to which the head Agreement had been extended with a view to securing their consent to the extension to them of the provisions of the amendment.

The provisions of this Agreement are so intimately connected with the economy of the United Kingdom that it could be argued that the territorial application was contingent upon the territories concerned remaining part of the United Kingdom. The inclusion of this treaty in the *Treaties in Force* suggests that the compiler of the list has worked mechanically

rather than systematically, and that the appearance of any treaty in the list is not conclusive of anything more than the attitude of the United States to the question.

THE PROBLEM OF "BRITISH SUBJECT" SPECIFICATION IN COUNTRIES
FORMED OUT OF BOTH CROWN COLONIES AND PROTECTORATES

Several of the newly independent countries of the Commonwealth are formed by amalgamating, either in federal form as in the case of India, Malaya and Nigeria, or in unitary form as in the case of Ghana, territories which were both Crown colonies and protectorates. For example, India consisted of British India and the Indian States which were under suzerainty. Malaya was formed by separating Singapore from Penang and Malacca in 1946 and federating the latter two Crown colonies in 1948 with the protected states, and the Malaysia proposal involves the further incorporation in the Federation of two Crown colonies, Sarawak and North Borneo, and another protectorate, Brunei. Nigeria was formed out of Lagos Colony, the Northern and Southern Protectorates, and the northern section of the British Trust Territory of Cameroons. Ghana was formed out of the Gold Coast Colony, Ashanti, which was annexed by the Crown in 1901, the Northern Territories Protectorates and the Trust Territory of Togoland. In all these countries, the inhabitants of the former Crown territories constitute only a minority of the total population.

Since British treaties do not apply to protectorates unless specifically extended, but do, in general, extend to Crown colonies (ceded or conquered) in the absence of territorial application provisions, and since only inhabitants of Crown colonies are British subjects,⁵⁶ a problem arises with respect to continuity of treaties which gain advantages for "Her Majesty's dominions" or "Her Majesty's subjects." If the whole country, or the inhabitants of the whole country, are to become beneficiaries of this formula, it follows that the treaties concerned are not merely maintained but greatly extended in scope and operation. Not only additional millions of persons, but whole new categories of industrial and primary production, are affected, with not inconsiderable ramifications in the field of trade and commerce.

To date the problem has been avoided in practice. Thailand takes the extreme of regarding the relevant treaties as having lapsed, while India takes the equally extreme position of contending that they now extend to the whole of India. It is obviously impracticable to continue to restrict the beneficiaries of the treaties to those categories of persons who were, or would have been, Her Majesty's subjects, when they are now the possessors

⁵⁶ *Sobhuza II v. Millar*, [1926] A.C. 518, held that inhabitants of protectorates are not British subjects. The British Protected Persons Order-in-Council, 1934 S.R. & O. No. 499, provided that the residents of the scheduled territories have the status of "British protected" persons. The protectorates mentioned above are scheduled territories. Inhabitants of Trust Territories likewise are not British subjects, but have status equivalent to that of British protected persons: *B. v. Ketter*, [1940] 1 K.B. 787; *Wong Man On v. The Commonwealth*, (1952) 86 C.L.R. 125.

of a new citizenship which embraces additional categories of inhabitants. Whether, in the case of those countries which remain monarchies in the Commonwealth, and in virtue of the "common clause" achieving a uniform Commonwealth nationality, it is legitimate to construe the expression "Her Majesty's subjects" to include all citizens of the countries in question, is obviously a moot point. The expression, such treaties "as may be held to have application to" the new countries by their unitary names, which appears in the various agreements by which rights and obligations of treaties are transferred to them by the United Kingdom, and which has been taken to be an escape clause enabling the assignee to pick and choose the treaties it wants, was probably designed to deal with this problem of extension of the benefits of treaties from a small territory and a restricted number of persons to a large country and a greater number of persons.

In the *United States Treaties in Force* nine United Kingdom treaties are listed against Ghana. Of these, only five territorially applied to all four regions which compose Ghana, three applied to Gold Coast Colony alone, and one applied to Gold Coast Colony and Ashanti.

CONCLUSION

The presumption underlying the various Acts of the United Kingdom granting independence has been that no greater change would be effected in the legal situation of the new countries, provided they remained connected with the Crown, than had already been effected in the cases of Australia, New Zealand, and Canada, and this is clear from the draftsman-ship which, apart from adding the expression "independence," and making some consequential interpretative changes to certain statutes, merely extends to the new countries the relevant sections of the Statute of Westminster. In the cases of those territories, such as Uganda⁵⁷ and Tanganyika,⁵⁸ which were not Crown colonies, the Act transformed them into "Her Majesty's dominions,"⁵⁹ on the assumption that all legislation applying to these dominions would automatically extend to the new countries. The question arises whether the same presumption also operates in the case of treaties, so that it could be concluded that independence has wrought no effect in the advantages achieved for Her Majesty's dominions by British treaties.

The background to the "nevertheless" clause offers material for analysis of this question. On January 23, 1899, the Law Officers were consulted upon the Commercial Treaty with Japan of 1894,⁶⁰ which contained provisions relating to travel and residence, as well as commercial liberty. Pursuant to the policy which had then crystallized of not extending commercial treaties to self-governing colonies without separate accession, the treaty had not been extended to the Australian colonies. Queensland, however, had become a party by accession,⁶¹ and the question arose whether

⁵⁷ 10 & 11 Eliz. 2, c. 57.

⁵⁸ 10 Eliz. 2, c. 1.

⁵⁹ Sec. 1.

⁶⁰ C. 7588; 19 Hertslet 691.

⁶¹ 24 Hertslet 694.

residents of Queensland were really in any different position from residents of the other colonies. The Law Officers favored the view that "natives of any Colony" not adhering to such treaties could still, as British subjects, claim all the benefits flowing from the treaties except such as related to purely fiscal or commercial matters.

At the Imperial Conference in 1907 the self-governing colonies sought to be released from the older commercial treaties by which they had been automatically bound, and negotiations were opened with several governments with a view to the signature of protocols providing for separate withdrawal. The Colombian Government objected that, since the residents of the colonies would be entitled to the advantages of British subjects, whereas Colombian advantages depended upon the territorial application of the treaties, British colonials would have favored treatment in Colombia, but Colombians none in the colonies which might withdraw. This would create a one-sided situation. Upon receipt of this objection, an Inter-Departmental Committee from the Foreign Office, the Colonial Office, the India Office and the Board of Trade was set up on May 21, 1909, to report upon the question. The Board of Trade proposed that a solution might be found by providing for the withdrawal of colonies from all the articles "except those of non-adhering Colonies on general grounds of international law." It was decided, however, that the question of differentiation was too complicated for decision. The India Office proposed that withdrawal should be restricted to the "non-personal" parts of the treaty, but the Colonial Office objected that the colonies held different views as to the points on which they would be prepared to grant most-favored-nation treatment.

After discussion, the India Office proposed that "where a Colony refuses to adhere to a Commercial Treaty the natives thereof can only claim under that Treaty such rights as would, in the absence of such Treaty, be assured to them on grounds of international law and comity," and it was concluded by the Committee that Colombia would remain "convinced that we should hold that British subjects, natives of a Colony, not adhering to a Commercial Treaty, cannot be divested of their character of British subjects by the non-adherence of their Colony, and thereby be deprived of the general and personal benefits flowing from the Treaty." Furthermore, there were serious objections to the maintenance of the view adopted by the Law Officers in 1899, especially as the British Government was acquiescing in the exclusion of British subjects, natives of India, from personal rights of citizenship in certain colonies whose natives claimed these personal rights in India itself as well as in other parts of the Empire. It would be difficult in future to induce other contracting parties to accept the view taken by the Law Officers, as

it would seem clearly inequitable that, in the case of this country and another, natives of one portion of the British Empire (e.g., Australia) should be entitled to claim all the rights flowing from a Treaty, while nationals of the other country should enjoy in Australia none of these rights at all. If a dispute were to arise under any

existing Treaty, no Court of Arbitration would, in the opinion of the Committee, be likely to enforce the view of the Law Officers.

Upon receipt of this Report, the Foreign Office dropped the negotiations with Colombia for three years. However, in 1912, Colombia signed a protocol permitting separate withdrawal. The subsequent history is important in considering the cogency of the point, fully adverted to by the Committee, that the evolution of separate systems of citizenship in the form of discriminatory rights within the Empire was drastically qualifying the unitary conceptions underlying the notion of British subject, an evolution completed in the formal severance of citizenship and British nationality in 1948.⁶² Australia and New Zealand took the view, and continue to take it, that their citizens gain the benefit of the "nevertheless" clause in its various forms, though they are silent on the question whether they can claim benefits accruing to "British subjects." Australia withdrew from the Colombian treaty in 1914,⁶³ but New Zealand has not withdrawn. The Australian *Treaty List* does not mention the continuance of favors after withdrawal, and mentions only commercial advantages under the "nevertheless" clause in respect to the Treaty of Bangkok, 1937. What view international law takes towards the question which the Committee discussed, must, in the absence of a more coherent practice, be regarded as controversial.

⁶² British Nationality Act, 1948. See R. R. Wilson and R. E. Clute, "Commonwealth Citizenship and Common Status," 57 A.J.I.L. 566 (1963).

⁶³ 105 Brit. and For. State Papers 266; Cd. 6523.

THE PROPOSAL FOR INVESTMENT GUARANTEES BY AN INTERNATIONAL AGENCY

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One of the more heartening developments in the field of development economics has been the modest success of the United States investment guarantee program. It did not therefore come entirely as a surprise when Mr. Eugene R. Black, then President of the World Bank, told his Board of Governors at their Vienna meeting in September, 1961, that, following a suggestion by the Development Assistance Committee of the O.E.C.D., the Bank was "studying the possibility of devising a multi-lateral scheme for the insurance of private foreign investments against various non-commercial risks."¹

Acting promptly on this initiative, the staff of the Bank had, by March, 1962, completed a report on the advantages and disadvantages of an international guarantee plan without making specific recommendations.² This report was discussed by the Development Assistance Committee in May, 1962; and, under its sponsorship, the technical aspects were considered by a panel of advisers at an informal meeting in May, 1963. No further action has been taken to date, although the matter remains on the agenda of the Development Assistance Committee. Since the date of the Bank Report, generally favorable statements of views have been submitted by the International Chamber of Commerce³ and by the Legal and Economic Committees of the Consultative Assembly of the Council of Europe.⁴

It is apparent from the complications of the subject and the magnitude of the financial obligations involved that a working program of investment guarantees is still some distance in the future, if in fact it materializes at all. In the meantime, governments which may be requested to participate can reasonably question whether so grand and difficult an undertaking is really likely to increase investment in developing areas. The answer involves, in addition to an attitude toward the usefulness of private investment in general, an appraisal of the numerous intangible factors which motivate investment decisions, and an estimate as to whether the

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¹ New York Times, Sept. 19, 1961, p. 45, col. 2.

² International Bank for Reconstruction and Development, Multilateral Investment Insurance, March, 1962 (hereinafter cited as Bank Report).

³ International Chamber of Commerce, Preliminary Statement of Views on Multilateral Investment Insurance, Doc. No. 111/114, May 4, 1962.

⁴ Consultative Assembly Doc. No. 1419 (rev.) (1962); *ibid.* No. 1429 (1962).

national plans now in operation have actually influenced such decisions to any significant extent in the past.

In weighing the value of private investment, and hence of investment guarantees, it is well to keep in mind that private funds are insufficient in amount and largely unavailable for the fundamental development projects such as transportation, education, and electric power, on the existence of which business enterprise depends. Granting so much, private investment has a part to play in other areas of development. Its effects include the establishment of technical skills and personal incentives which cannot as a practical matter be transplanted by governmental interventions; the encouragement of private enterprise as a factor in the economic system of the country receiving the investment; and, perhaps of lesser importance, the provision of some additional funds which would otherwise have to come from public sources in the developed countries.

In the United States, Congress has placed a high priority on the encouragement of private investment abroad, and its members have complained from time to time that the Administration was not doing its part to encourage such investment. One important legislative manifestation of this Congressional attitude was the establishment of the current program of investment guarantees in 1948.⁵ No doubt the success of this program has been a principal factor in the discussion of a multilateral plan.

Official enthusiasm for private overseas investment has been tempered recently in the United States by the feeling that such investment aggravates the balance-of-payments difficulties in which the country now finds itself.⁶ While this view is not without dispute,⁷ it is reflected in the provision of the Mutual Security Act of 1959 which limited future investment guarantees to underdeveloped countries,⁸ and in certain provisions of the Internal Revenue Act of 1962, principally those taxing undistributed income of specified foreign subsidiaries in developed countries at United States rates.⁹ Private investment in the "less developed countries" is exempted, however, and, balance-of-payments difficulties aside, the Congress

⁵ Economic Co-operation Act of 1948, 62 Stat. 137; 43 A.J.I.L. Supp. 64 (1949).

⁶ The balance of payments should be distinguished from the balance of trade. During 1962 the United States had a favorable balance of trade of \$5,900,000,000 but expenditures for foreign aid, armed forces overseas, and the like, amounted to \$8,000,000,000, causing a deficit of \$2,100,000,000, and a consequent drain on United States gold reserves.

⁷ Many statements of the opposing view were made during the hearings on H.R. 10650, which contained the Administration's tax proposals for 1962. An analysis of 82 companies made by the National Association of Manufacturers, for example, seemed to confirm the view that investment in foreign subsidiaries tended to increase the exports of the U. S. parent. *Business International*, June 15, 1962. During 1962 the remittance of profits and dividends to the United States from foreign investments equaled 2.91 billion dollars, up 8.9% from 1961, while investments and other outflow of funds equaled 1.38 billion dollars, yielding a favorable balance of 1.53 billion dollars. *Ibid.*, March 29, 1963.

⁸ The Mutual Security Act of 1959, 73 Stat. 246, 251.

⁹ Internal Revenue Code of 1954, Secs. 951-964.

of the United States retains a decided preference for development by private means.

This preference would appear to be shared by other important mercantile nations. Both Germany and Japan, as will be seen below, have undertaken investment guarantee programs. In Japan's case, it is part of an extensive effort to encourage direct private investment by its nationals in overseas markets, an effort in which development is secondary to the desire to provide outlets for semi-finished materials from Japanese plants and to increase remittances of profits from foreign operations.¹⁰ The most impressive testimonial to the effectiveness of private capital is, of course, the proliferation of economic incentives offered by the developing countries themselves.

One can agree more easily about the desirability of private investment than about the proper way to nurture it. It is fashionable to speak of improving the "climate for investments," an elusive concept perhaps best defined as the consensus of individuals with funds to invest concerning the desirability of disposing them in a particular country in the light of the current legal, economic, and social situation. In this situation no single factor can be regarded as the proximate cause of an investment decision, nor can any such factor be considered to be responsible for an increase of investment activity. But experience tells us that the reduction of factors inimical to investment must in the long run increase the flow of funds. It is upon this generalization that the case for guarantees must rest.

The *modus operandi* of investment guarantees is the contractual assumption by the insurer of certain risks, generally political in nature, which are believed to adversely affect such investment decisions. Increased risk is, of course, an expected concomitant of foreign investment. A rough distinction can be made, however, between the normal commercial hazards, such as the loss of usual markets or fluctuations in commodity prices, and hazards such as expropriation, currency regulation, and war. By and large it can be said that the returns available from an investment will adjust themselves to the first type of hazard in the normal operation of the market, but that any serious political risk is beyond market compensation and operates simply to discourage or prevent private investment.

It is the basic assumption of a guarantee program that the lessening of such risks will increase investment, an assumption which, as has been noted, must be taken on faith. But any appraisal of the effectiveness of guarantees must be made in the light of the inadequate protection available to investors from other sources. Remedies under traditional international law for confiscation or expropriation with inadequate compensation are presently in a most unsatisfactory state, with widespread disagreement in principle as to their correct application, especially in the case of non-discriminatory expropriations carried out in the name of public reform.¹¹

¹⁰ See, generally, *Business International*, Aug. 31, 1962; Sept. 14, 1962; and Oct. 5, 1962.

¹¹ See Rubin, *Private Foreign Investment: Legal and Economic Realities* 5-19 (1956). For a statement of the traditional doctrine, see 1 Hyde, *International Law*, Chiefly as

Any restriction on the ability of states to effect such reforms with or without compensation is deemed by some to be a determination that the social evolution of the country must take place along moderate and evolutionary lines, in the context of a free economy. This is a determination which impatient populations are ill prepared to accept.¹²

Efforts to correct this situation by multilateral agreement on the rights of investors have been unsuccessful and give little hope for the immediate future.¹³ At least two important efforts are being made to restate the law with respect to the responsibility of states for injuries to persons and property,¹⁴ but in view of the paucity of authority in many areas,

Interpreted and Applied by the United States 710-717 (2d rev. ed., 1947). The two positions on non-discriminatory expropriations are set out in Compensation for American-Owned Lands Expropriated in Mexico, Dept. of State Pub. 1288, Inter-American Ser. 16 (full text of official notes July 21, 1938, to November 12, 1938, with respect to compensation of United States nationals for expropriation of agrarian properties by Mexico).

¹²For a discussion of this dilemma in the context of a specific Asian country, see Montoya, "Problems of Foreign Investment," 8 Far Eastern Law Rev. (Phi.) 93 (1960).

¹³For a summary of recent investment code proposals, see Fatouros, "An International Code to Protect Private Investment—Proposals and Perspectives," 14 U. Toronto Law Rev. 77 (1961); Brandon, Survey of Current Approaches to the Problem, Report of Conference on the Encouragement and Protection of Investment in Developing Countries, Sept. 29-30, 1961, Int. and Comp. Law Q. Supp., Publication No. 3 (1962). Various compromise suggestions have also been put forward, such as the proposal that the IFC draft an investment code "to which governments would subscribe but which would not be a negotiated instrument," Beale, "Government Efforts to Increase Private Investments Abroad," 39 Dept. of State Bulletin 967, 970 (1958) (Speech before 2nd International Investment Law Conference, Nov. 21, 1958, Washington, D. C.); see also Gardner, "A Critique of U. S. Foreign Investment Policy," Spring, 1959, U. Illinois Law F. 121. Perhaps the most promising effort at the present time is the study by the O.E.C.D. of the Abs-Shawcross Draft Convention of 1959, which is itself a joint effort of a group of European lawyers led by Lord Shawcross, and the German Society to Advance the Protection of Foreign Investments. Brandon, above; "The Proposed Convention to Protect Private Foreign Investments—A Round Table," 9 Journal of Public Law 115 (1960). The objections to a multilateral investment code are stated in Rubin, *op. cit.* note 11 above; Miller, "Protection of Private Foreign Investment by Multilateral Convention," 53 A.J.I.L. 371 (1959); Walker, "Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice," 5 A. J. Comp. Law 229 (1956). See, generally, Fatouros, Government Guarantees to Foreign Investors (1962); Schachter, "Private Foreign Investment and International Organization," 45 Cornell Law Q. 415 (1960).

¹⁴Dr. F. V. García-Amador has prepared for the International Law Commission of the United Nations several drafts and comments with respect to a Convention on the International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens. García-Amador, Fourth Report on International Responsibility to the International Law Commission, *seriatim* in U.N. Docs. A/CN. 4/96, 106, 111, 119, 125 and 134 (1956-1961). The most important private work has been the revision of the 1929 Harvard Research Draft Convention on a similar subject by Profs. Sohn and Baxter, the revision itself now being in the 12th draft. Sohn and Baxter, "Responsibility of States for Injuries to the Economic Interests of Aliens," 55 A.J.I.L. 645 (1961). This work is currently being revised and expanded by the authors.

these efforts must be regarded as well-documented proposals rather than statements of existing law. Aggravating the problem have been the changes in the concept of private property which make it more difficult to define the bounds of legitimate regulation and to distinguish it from "creeping expropriation."¹⁵ Another recurring difficulty has been that of finding a forum for the settlement of disputes between investors and governments; the efforts of the latter to place such disputes beyond the reach of international arbitration or diplomatic intervention can be expected to become more sophisticated and consequently more successful.¹⁶

Against this background, investment guarantees become, *faute de mieux*, a more important instrument for the protection and, hopefully, the encouragement of foreign investment than might otherwise be the case. And perhaps it is not too optimistic to think that a program of international investment guarantees will itself lead to a greater agreement on fundamental rights.

To date, two responsible international organizations have advanced the idea of international guarantees. The more significant of these proposals, which will be discussed below, is contained in a recommendation first made in 1958 by the Consultative Assembly of the Council of Europe to its executive body, the Committee of Ministers.¹⁷ It contemplated a multilateral investment statute and guarantee program between the European investing countries and the capital-importing nations of Africa.

The whole question of investment in the developing countries also appeared on the agenda of the meeting of the Interparliamentary Union which took place in Rio de Janeiro in 1958. Following a suggestion that endorsement be given to a proposal for a guarantee fund and investment code, with a new international body to enforce it, it was voted

that respect of the provisions of this [investment] Code be assured by recourse of private investment, in case of dispute, to an international court of justice and guaranteed by the creation of an International Fund set up under the auspices of the United Nations.¹⁸

¹⁵ Rubin, *op. cit.* note 11 above, at 29.

¹⁶ A discussion, with examples, is found in the commentary by Dr. García-Amador on Ch. 3 (Contractual Rights) of the Draft Code. García-Amador, note 14 above, at 119. On the Calvo clause, see generally 2 Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 994-998 (2d rev. ed., 1947); Lipstein, "The Place of the Calvo Clause in International Law," 1945 *Brit. Yr. Bk. of Int. Law* 180. Some proposals have been made for the direct referral of investment disputes to an international body. See, e.g., Lee, "Proposal for the Alleviation of the Effects of Foreign Expropriatory Decrees upon International Investments," 36 *Canadian Bar Rev.* 351, 357 (1958).

¹⁷ Consultative Assembly Recommendation 159 on the Development of Africa, in Council of Europe, *Texts Adopted by the Assembly, 10th Ordinary Session, 1st Part* (1958). The recommendation was further elaborated in a report of the Assembly's Economic Committee in 1959. Council of Europe, *Report on Investment Statute and a Guarantee Fund Against Political Risks*, Consultative Assembly Doc. No. 1027 (1959). See also Consultative Assembly Recommendations 211 (1959) and 223 (1960) on the same subject.

¹⁸ Proceedings of 47th Conference of the Interparliamentary Union, p. 1070 (1958).

- A number of private suggestions have also been made for a multilateral investment guarantee system, some in considerable detail. That of E. H. Van Eeghen¹⁹ is typical and will be examined in greater detail below.

In 1956, presumably upon the inspiration of the United States program, the Japanese statute authorizing export credit guarantees was amended to permit insurance of direct overseas investment as well.²⁰ The program is generally similar to, but more limited than, its American model. Guarantees may be extended only to equity investments, with the insurable value declining over the policy term on a formula basis, and the investor being required to bear 25% of the loss. There is no requirement that the recipient country enter into an agreement with Japan. The program has received relatively little support: through 1961, policies having a face value of only \$12,000,000 had been written.

Germany followed suit with a program of investment guarantees in 1959.²¹ Again, the structure of the program is similar to the United States model, the most striking difference being the requirement that recipient countries enter into a bilateral agreement with Germany containing many of the provisions of an investment code, or provide other equivalent assurances. By the end of 1961 only seven such agreements had been negotiated. As in the case of Japan, the insured values must be reduced on a formula basis over the policy term, with the investor bearing 20% of each loss. Approximately \$50,000,000 of guarantees had been approved by the end of 1961.

UNITED STATES INVESTMENT GUARANTY PROGRAM

The United States, through its Agency for International Development, is now the operator of a flourishing investment guarantee program. Much has been written about the United States program, in particular an excellent monograph by Mrs. Maria von Neumann Whitman,²² so that no more than a sketch will be attempted here.

At present the United States program is sixteen years old. Constituted at first to provide guarantees for investments in postwar Europe, it is now limited by statute to underdeveloped countries. The program made

¹⁹ Van Eeghen, "Multilateral Investment Guarantees," 5 A.B.A. Section of International and Comparative Law Bulletin 36 (July, 1961).

²⁰ Export Insurance Law (Law No. 67 of March 31, 1950), extended to the insurance of foreign investment capital as of April, 1956, and that of foreign investment profits as of May, 1957. A summary of the Japanese plan is contained in Annex A-2 of the Bank Report.

²¹ Budget Law of 1959, Art. 18, par. 1, (1959) Bundesgesetzblatt, Part II, p. 793. A summary of the German plan is contained in Annex A-3 of the Bank Report.

²² Whitman, *The United States Investment Guaranty Program and Private Foreign Investment*, Princeton Studies in International Finance, No. 9 (1959). See also Rivkin, "Investment Guaranties and Private Investment," 19 Fed. Bar Journal 357 (1959); Tidd, "The Investment Guaranty Program and the Problem of Expropriation," 26 George Washington Law Rev. 710 (1958); *International Cooperation Administration, Investment Guaranty Handbook* (1960 ed.); and "New Developments in Investment Guarantees," 1962 Proceedings, American Society of Int. Law 77-89.

slow progress at first. In recent years it has become a modest success, although still small by traditional governmental standards. By June 30, 1963, the face value of guarantees outstanding had reached \$884,000,000,²³ the total premium income of the agency since inception was \$12,000,000, and net claims paid were \$651,000.²⁴ Its staff, buffeted from one agency to another during the past decade, is still small in size.

The risks insured, to which Congress has added from time to time, include restrictions on the convertibility of capital and earnings, expropriation, and war. While the insurance of these named risks is still the backbone of the program, an entirely new departure was taken by Congress in the Foreign Assistance Act of 1961²⁵ which empowered the Agency for International Development to write an all-risk contract,²⁶ including the commercial hazards, on a pilot basis.

A.I.D. policies may be issued only on investments in countries "with the government of which the President has agreed to institute the guaranty program."²⁷ These agreements may include provision for insurance of one, two, or all three of the above political hazards; on August 30, 1963, for example, existing agreements permitted coverage of convertibility hazards in 54 countries; of expropriation in 52; and of war risk in 32. There are, in addition, fairly standard provisions which require the consent of the host country before an investment is made, and which permit subrogation by the United States to any rights which may remain to the investor following the payment of a claim. An effort is made to include provision that claims of the United States from this source will be subject to direct negotiations between the countries, with arbitration if negotiations are unsuccessful, but this is not always secured.

It would appear that the United States has now pretty well exhausted the list of countries to which such formal agreements are acceptable. However, progress is apparently being made toward the development of other arrangements with the host country of a more informal and flexible nature,

²³ The cumulative total for all guarantees issued through June 30, 1963, is \$1,194,000,000. The figure given in the text is described as the "maximum outstanding liability," and would appear to be more significant, since cancellations of coverage have taken place as political conditions improved. Both figures are somewhat misleading, since the insured value of a particular risk is included two or three times, if two or all three hazards are covered. The cumulative total for convertibility alone, for example, is \$647,000,000.

²⁴ A payment of \$650,000 was made in 1961 under a Development Loan Fund repayment guarantee. Two payments were made in 1962 under the investment guarantee program involving a total net cost after salvage of approximately \$1,400.

²⁵ 75 Stat. 424.

²⁶ This is the designation commonly used. In point of fact, the coverage may be determined by the Administrator; the law merely authorized guarantees "assuring against loss . . . due to such risks as the President may determine, upon such terms and conditions as the President may determine. . . ." Foreign Assistance Act of 1961, par. 221 (b) (2), 75 Stat. 429, 22 U.S.C.A. par. 2181 (b) (2). No all-risk guarantees had been written by September, 1963, although negotiations for several were reported in progress.

²⁷ Foreign Assistance Act of 1961 §221 (a), 75 Stat. 429, 22 U.S.C.A. §2181 (a).

which, it is hoped, will satisfy the objections of some countries where guarantees are not presently available.²⁸ Those who express doubts about the need for agreements at all point out that no other form of United States economic aid carries such a requirement.

In considering the A.I.D. program, a careful distinction should be made between the long-term investment guarantees provided by A.I.D. and the short and medium-term export credit insurance currently provided by the United States Export-Import Bank and a private group of insurance companies known as the Foreign Credit Insurance Association.²⁹ The A.I.D. guarantee is designed to cover a commitment of capital funds by the investor in the project country, together with the remittance of profits thereon, for a period of up to twenty years. The Eximbank—FCIA policies, on the other hand, provide full commercial and political coverage on foreign balances owing to American exporters for periods up to five years.

On the record it is clear that the United States program has received fair support from the investment community, at least since 1958. A few successful overseas investors, like Cabot Corporation, of Boston, have used the guarantees since the outset. It is, of course, difficult to judge whether this demonstrates some success in inducing investment, or whether it is simply a sign of the greatly increased activity by United States businessmen overseas, which has shown up in all segments of the economy since 1958.

Like everything else in the foreign field, the program has its critics, and their comments may have some relevance to an international guarantee system. There is a belief that recent Administrations, despite clear evidence of Congressional intent, have given only lip service to the idea of promoting the investment of private capital overseas.³⁰ A practicing lawyer, speaking at a recent conference on the problems of international financing, voiced the objections that the difficulty of the definition of insured hazards in the contract made it impossible to advise his clients with any certainty of what they were getting, that the procedures used by the staff in negotiating contracts were unduly time-consuming and inflexible, and that the bilateral treaty program unreasonably restricted the areas where coverage was available.³¹ But another lawyer, experi-

²⁸ Thus, it is reported that guarantees will be written on investments in Colombia in the absence of formal agreement, but upon specific approval of the investment by that country. *Business International*, Oct. 26, 1962.

²⁹ See note 47 below.

³⁰ Address by Robert L. Garner, Conference on Legal Problems of International Financing, Yale Law School, March 2, 1962. In its report on the Foreign Assistance Act of 1961, the Senate Committee on Foreign Relations stated with respect to the guarantee program: "The purpose . . . is to expand the role of private enterprise in furthering the economic growth of less-developed countries and areas." 1961 U. S. Code Cong. & Admin. News 2486.

³¹ Address by Samuel V. Goekjian, Esq., Conference on Legal Problems of International Financing, Yale Law School, March 3, 1962.

enced in international matters, states that the program is "clearly the most effective investment incentive device in the field."³²

To what extent this represents merely the inevitable aura of controversy around a novel undertaking is difficult to say. The broader coverage permitted by the 1961 Act may eventually ease the problems of definition but will certainly introduce new difficulties in turn. Small budgets, limited personnel, and frequent organizational changes have handicapped the administration of the agency. It is probably in this area that the greatest improvement can be expected from the increased size and better acceptance of the guarantee program.

THE COUNCIL OF EUROPE PROPOSAL

Because of its thoughtful presentation and distinguished sponsorship, the proposal³³ made by the Council of Europe for an international guarantee fund to be created by joint action of the European and African countries deserves closer examination.

One can trace the ancestry of the present Guarantee Fund proposal to the so-called Strasbourg Plan of 1951, which envisaged an economic union of Europe and its colonial territories.³⁴ It was a far-sighted concept, but the forces of African and Asian nationalism were already making obsolete the premise on which it was based. In 1957, a study group was commissioned by the Economic Committee of the Consultative Assembly to review the possibilities of economic co-operation between European and the emerging African nations. The suggestions made by this group and eventually adopted by the Assembly comprised a four-pronged attack on the problem of the economic development of Africa: an Investment Fund, to make grants for the "infrastructure"; an Investment Bank, to make World Bank-type loans; a Guarantee Fund; and an Investment Statute; being listed more or less in order of time and priority.³⁵

In its final form, the report is an evolution of ideas, flowing from the numerous public and private efforts to draft a multilateral investment code on the one hand, and from the United States guarantee program on the other. The guarantee plan must be international, it must be founded on a basis of equality between participating nations, and it "takes for granted that, generally speaking, the participating countries are agreed upon the rights and duties of investors and borrowers."³⁶ While such basic agreement on rights and duties is a condition of a successful guarantee plan, in the view of the Assembly, it need not at once be incorporated

³² Address by Charles M. Spofford, Esq., 1963 Proceedings, American Society of Int. Law 184 at 187.

³³ Council of Europe, note 17 above.

³⁴ New York Times, Sept. 26, 1952, p. 1, col. 1.

³⁵ Council of Europe, Report of the Study Group for the Development of Africa, Consultative Assembly Doc. No. 701 (1957). See generally Gaitskell, "Europe and the Economic Development of Africa," 6 European Yearbook 29 (1958).

³⁶ Council of Europe, Report on Investment Statute and a Guarantee Fund Against Political Risks, Consultative Assembly Doc. No. 1027 (1959) at 22.

in an Investment Statute. The memory of previous failures to secure international acceptance of a worthwhile investment code is still fresh; the plan contemplated that the guarantees might well precede and smooth the way for a statute. Nonetheless, it is clear that there is more emphasis placed on an understanding between nations with respect to fundamental treatment of investments than in any of the national plans.

The political nature and purpose of guarantees is frankly expressed in the report. There are, it is pointed out, three possible ways of viewing the matter: as a simple insurance device, as an instrument of national policy designed to encourage private foreign investment, or as an instrument of international co-operation based on agreement between a group of countries. It is the last concept on which the proposal is based. This view of the goal will naturally affect the way in which detailed arrangements are worked out, since it removes the system both from national pressures as well as from the financial requirements of commercial insurance.

The hazards suggested for coverage under the Council of Europe proposal are similar to those under the United States plan, namely, convertibility, expropriation, and armed conflict.

Some original thinking has clearly been applied to the problem of creating and maintaining the guarantee fund. An initial endowment is proposed, of which, following the practice of the World Bank, only a part need be paid in at the outset. Premiums received would be accumulated, to the extent remaining after expenses. Two additional sources of funds are then proposed, in the alternative. A share in the premium might be assumed by the host country; or a contribution might be made by the host country to a reserve account in proportion to the amount of investments effected in its territory and guaranteed by the fund. Claims would be paid out of this account before other sources were drawn upon. It is doubtless contemplated that this contribution would create an additional incentive to avoid actions which would constitute the basis of a claim.

In view of Mr. Black's remarks,³⁷ the comments with respect to the relationship between the fund and existing national plans are of special interest. No conflict is foreseen between national plans serving a national purpose and the international plan, since it is supposed that they would operate on a different level and in response to different needs. As far as national plans created by nations within Europe are concerned, it is even anticipated that reinsurance or other ties between the national and international systems might be worked out.³⁸ This is quite in contrast with Mr. Black's statement that an international guarantee could be expected to supersede national programs.

To date no action has been taken by the Committee of Ministers on this proposal for a guarantee plan. It may well be that those interested will watch the evolution of the World Bank study before renewing attempts to secure action by the European nations alone.

³⁷ New York Times, note 1 above.

³⁸ Council of Europe, note 36 above, note at 23.

THE VAN EEGHEN PROPOSAL

While the Council of Europe plan would confine itself to European and African countries, others have suggested a world-wide system of investment guarantees. Of these proposals, one of the most detailed is that put forward by Mr. E. H. Van Eeghen, a Dutch banker, at meetings of the International Chamber of Commerce in 1960 and 1961.³⁹ It contains several interesting departures which are worth discussing.

Van Eeghen contemplates an organization of nations, including those which export and import capital, along the lines of the World Bank, which would have as its purpose the assumption of those "political, transfer, and calamity" risks for which private insurance could not be secured. In its suggestions for coverage, the Van Eeghen plan resembles both the United States program and the Council of Europe proposal. In addition to convertibility, expropriation, and armed conflict, he would insure the "risks of calamities and 'acts of God' . . . as far as this is not possible at reasonable premiums via existing facilities."⁴⁰ Just what "calamities" might be included is not entirely clear, though perhaps the phrase means hazards for which commercial insurance would be available in more highly developed countries.

Again following the practice of the United States, consents are required by both the capital-exporting and capital-importing countries before a guarantee may issue. This is consistent with his general view that responsibility for the soundness or desirability of the project should remain with the individual investor and the countries involved, not with the guarantee institution.

Van Eeghen's suggestions for the financial structure of the international organization are of some importance and originality. It is proposed that the capital structure of the organization reflect the benefits conferred by the outstanding guarantees. Each country is to be responsible for a portion of the capitalization which is equal to one-half of the guaranteed investments which it has either imported or exported.

In the event that claims exceed accumulated premiums, the sums required are to be a charge against capital without reference to the identity of the country in which the claim was incurred. The effect is to place a larger burden upon those countries, capital-exporting and capital-importing equally, in which there has been the most investment activity. Certainly this does accomplish the result of placing this burden on those who have benefited, at least if the concept of benefit is taken rather narrowly. It would not seem to provide any significant deterrent effect against arbitrary action by a member country whose share of capital was not proportionately large. It may also raise questions about the wisdom of placing a heavier burden on a country which is successful in attracting a greater volume of investments, and which presumably has the greater need for such investments.

Van Eeghen, like the authors of the Council of Europe report, has

³⁹ Van Eeghen, note 19 above.

⁴⁰ *Ibid.* at 37.

- difficulty with the question of whether agreement on a code of fair treatment for investors must accompany agreement on the investment guarantee organization. His conclusion appears to be that it need not, though such a code should be elaborated at a later date, perhaps through the gradual accretion of precedent in the settlement of specific disputes.

THE BANK REPORT

While it makes no concrete proposals, the staff report submitted to the World Bank in March, 1962,⁴¹ is the most comprehensive discussion of international investment guarantees yet available, and displays considerable research and reflection. It is founded on a study of certain private proposals and existing plans, and on the results of a questionnaire sent to businessmen in various capital-exporting countries by the International Chamber of Commerce at the request of the Bank. The proposals, plans, and answers to the questionnaire are summarized in appendices to the Report.

The heart of the Report is a section of 23 pages devoted, first, to an appraisal of the incentive value of investment guarantees, followed by an examination of certain substantive issues such as the scope of protection to be offered, and finally by a discussion of the advantages and disadvantages of a multilateral program vis-à-vis the national programs. Most of the arguments on both sides of these issues are set forth, although space limitations prevent any extended discussion. By and large, the Report tends to emphasize the difficulties of the project, which is perhaps just as well at the outset, as long as one keeps in mind that many of the obstacles foreseen, such as the impossibility of predicting a beneficial result by factual demonstration, have applied to most international undertakings. Some of these difficulties are examined in the balance of this paper.

There is no discussion of the allocation of responsibility for administration of a multilateral program. Mr. Black states in his preface that "examination of this question may more appropriately await the outcome of consideration by governments of the issues dealt with in this report." No doubt the action taken by the Development Assistance Committee will be influential in this respect.

In a sense the most interesting feature is the detailed analysis of answers to the questionnaire which is found in Annex C. Because of the vagaries of testing on the part of the national Chambers, it is not a true statistical sample of business opinion, but it is a fertile source of ideas and suggestions. Many of the comments in the body of the Report are clearly thoughtful elaborations of points raised in these answers.

By and large, there has been a surfeit of specific proposals for multilateral guarantee schemes, and a paucity of the kind of analysis found in the Bank Report. It is clear that the practical experience of the Bank has lead the authors to underscore the handicaps under which an international

⁴¹ International Bank for Reconstruction and Development, note 2 above.

organization works and to minimize its advantages. Thus, examining the possibility of recoupment against host governments following payment of a claim, the Report points out that, while capital-exporting countries have "a great variety of means" at their disposal for inducing a satisfactory settlement of claims, an international agency has only the sanction of publicity and a refusal to do business with the offender in the future.⁴² This is a refreshing change from the naïve faith in international action which is more commonly found, but, on the other hand, it would be regrettable if some of the objections which are properly raised in the context of a staff report did not eventually receive a more balanced, and perhaps more optimistic, appraisal.

THE INTERNATIONAL SOLUTION

In the most general sense, the purpose of an international guarantee program is the encouragement of productive capital investment in areas where such investment might otherwise be unlikely to go. Interest in such a program by the World Bank and others is apparently based on the hope that it could overcome certain hazards which are most acute in areas in an early stage of economic development. Thus, exchange controls are likely in a society which must import most of its manufactured goods; expropriation or confiscation is not uncommon in a country reaching desperately for economic growth; and civil disturbances will occasionally occur in an atmosphere of political turbulence. While recognizing that these are not the only deterrents to investment, it is thought that guarantees can at least mitigate the resulting hardship to investors, and perhaps keep open a path to future investments which might otherwise be closed.

One might ask whether even this limited objective could be a subject of agreement among the 74 nations constituting the membership of the World Bank. Perhaps the best answer is the existence of the two international bodies which are associated with the Bank: the International Finance Association, which since 1956 has made loans to private enterprise in many underdeveloped countries; and the International Development Association, which since 1960 has made soft loans to governments. Underlying these organizations are certain assumptions about the value of private investment (in the case of I. F. A.) and about the need for supporting the economy of the developing countries (in the case of I. D. A.) which might equally support the adoption of a guarantee plan.

Granting the need and the possibility that the World Bank might assume responsibility, there is a question as to whether the international plan would add enough to what is already available from the existing plans in the United States, Japan, and Germany to justify a further effort. In fact, there are a number of gaps in the national programs which could be filled by an international agency. The greatest and most obvious is the limitation of each national program to investments made directly or indirectly by its own citizens. There are sources of private

⁴² *Ibid.* at 22.

capital outside of the above three countries to whom investment guarantees should, arguably, be available, and for whom the international agency might be the only source.

Investment guarantees available from individual countries are inevitably limited by considerations of national policy. In addition to the obvious situation of a quarrel between the two countries involved in a prospective guarantee, there are more subtle limitations based on a reluctance by one government to involve itself too deeply in the affairs of another and smaller country, due to possible charges of interference or domination. A much greater degree of participation by an international body is possible without charges of interference, as the World Bank has shown.

One can also hope for a volume and a consequent degree of financial stability on the part of a world guarantee fund which it would be difficult for the program of any single country to achieve. Although a major economic upheaval will affect all countries, the minor tides of prosperity and depression, of stability and chaos, ebb and flow in the countries of the world in their own independent times and ways. While it is arguable whether additional premium and spread of risk would make a guarantee plan self-supporting in difficult times, it would at least level off the peaks and valleys, and make the financial prospects more attractive to those members whose resources are strained by even a small share in the burdens of the plan.

It is hardly surprising that the task of assessing an international guarantee program, and presumptively of carrying it forward if the assessment is favorable, has fallen upon the World Bank. The Bank is the logical choice for the work. Since its founding at Bretton Woods in 1944, it has disbursed some \$5,000,000,000 in loans, and presently is lending at the approximate rate of \$900,000,000 per year. The idea of an association between countries having funds for investment and countries needing those funds has been copied regionally by the European Investment Bank, the Inter-American Development Bank, and the Arab Investment Bank. There are some signs today that the market for the type of bankable loan which has been the Bank's stock in trade may be stabilized at or near its present size, with a consequent need for more soft loans and other devices not requiring hard credit. The Bank has been able to meet these changing needs through the medium of the International Finance Corporation and the International Development Corporation. An affiliated corporation formed for the purpose of making investment guarantees would have the advantage of following an established pattern of organization.

The unique element in the field of development economics is the subtle combination of charity and business. It is recognized that countries in dire straits must be helped, that certain urgent projects must be carried out regardless of whether they will return a profit in the conventional sense; but on the other hand, where the possibility of a return exists, the development agency is expected to take advantage of it. Investment guarantees, though in the clothing of private insurance, are no exception

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to this rule. The skills involved in maintaining the nice balance between benevolence and business are in short supply today, with the Bank the outstanding international practitioner of the art.

As a practical matter the chance of the Bank actually sponsoring an investment guarantee affiliate will depend upon the reaction accorded to the idea by its capital-importing members. However attractive the proposition may appear in industrial countries, the past failures to agree on an investment code are sufficient evidence of the difficulties involved in securing agreement among the less developed members, and even the prestige of the Bank may be insufficient to induce these countries to participate. So far the Bank has always insisted upon broad participation before undertaking a new venture; if informal contacts suggest that a guarantee plan would be appealing only to the United States and Europe, for example, it is likely that the Bank would suggest that some other organization undertake it.

At the outset a guarantee agency does not need much money, and "with a little bit of luck" it may never need much. On the other hand, the possibilities of catastrophe losses are evident. There is, to start with, an adverse selection of risks, since investors do not generally insure commitments in countries where the political risk is deemed to be slight. In addition, a premium which is sufficiently low to be attractive to investors appears to be inadequate to provide reserves for any major disaster. A world-wide depression could set off a wave of expropriations and currency restrictions leading to a heavy drain on the resources of the agency. To meet this possibility, a guarantee agency must have either extensive reserves in being or firm commitments which can be called on if needed.

The whole problem of reserves is less difficult in the case of a national program, where the credit of a government is directly engaged, and where, in the unlikely event that claims coming from a world-wide catastrophe exceeded reserves in hand, action by a single government would provide the additional funds. Investor confidence in the United States program, for example, is not appreciably affected by the fact that funds in excess of current reserves would have to be sought from the Congress;⁴³ but it is doubtful whether the same could be said of a multilateral program, if such funds must be sought *de novo* from numerous member governments.

Fortunately, the methods used in the original financing of the World Bank provide a precedent which would be useful. The Bank has financed its loans to a large extent by its own borrowing on the world capital market, a process which required only "seed" capital and guarantees from its sponsor governments. Payment for the capital stock of the Bank was in three forms, 2% being paid in gold or dollars, 18% in currency of the subscribing country, and 80% in the form of capital callable on demand

⁴³ As of June 30, 1963, maximum outstanding liabilities under the United States program were \$884,000,000. The Reserve Fund at the same date was \$269,000,000, of which sum \$199,000,000 consisted of authority to borrow from the Treasury which has not so far been exercised, and \$70,000,000 consisted of direct appropriations and fee income.

to meet the Bank's obligations. Something of the kind could be utilized for the capitalization of a guarantee affiliate.

Since one important and distinctive element of an international guarantee is the possibility of wide participation, the financing methods used must not discourage nations who can make but a small financial contribution. Various suggestions have been made to link the capital structure, or at least the responsibility of states for liability under outstanding contracts, to the benefits conferred.

But there may prove to be serious disadvantages to a formula system. In time of crisis, the heaviest burden may be on the least stable members. A formula which penalizes users might well tip the balance against participation by a capital-importing nation. It would seem more important to encourage broad participation, with its accompanying possibilities of ultimate progress toward agreement on fair treatment of investments, than to risk such participation by a formula of doubtful incentive value.

A number of proposed formulas are described in the Bank Report. But on balance the Report seems to favor the assignment to each member country of a subscription "reflecting its economic strength," with no relation to insurance written for its nationals or on property within its borders. In the event that some link was desired which would reflect the benefits of the program, the subscription could be adjusted to one of the standard economic indicators, such as industrial production or gross national product.

The scope of operations of an international agency depends in part on whether a feasible relationship could or should be worked out with the existing national systems. It has, of course, been suggested by Mr. Black,⁴⁴ and earlier by Frank M. Coffin,⁴⁵ then Managing Director of the

⁴⁴ New York Times, note 1 above.

⁴⁵ Hearings Before the House Committee on Foreign Affairs, 87th Cong., 1st Sess., p. 910 (1961). As a statement of the United States position on an international program, Mr. Coffin's statement is of considerable interest:

"Proposals have recently been made in several quarters for the establishment of an international guarantee institution. Such an organization, perhaps associated in some manner with the International Bank, would to a large degree be aimed at superseding existing unilateral or bilateral guarantee systems under which individual capital exporting countries provide specific guarantees to their own citizens who invest abroad, often under agreements with the receiving countries.

"An international guarantee organization would provide equal protection to investors from all the independent countries which became members—and would thus exercise a powerful pull on all these countries to join. In this way it would create the same protection for all private investment in less-developed countries, thus encouraging greater investment from countries which do not yet have a guarantee program and eliminating differences and 'competition' between guarantee systems.

"More importantly, such a guarantee institution would directly associate the less-developed countries that desire private investment in the substance and obligations of the guarantee program. Such full membership would provide for the views of the investment-exporting countries. It would provide not only a uniform and widely applicable guarantee system, but also a working forum in which views and approaches on private foreign investment could be exchanged and co-ordinated on the basis of equality. It is to be hoped that such a forum would be of assistance in coping with

United States Development Loan Fund, that the international program might supersede the national programs, which would presumably wither away. A more likely alternative is that the national facilities will continue to exist on more or less their present scale. At the very least, it will be necessary to service the contracts now outstanding for periods up to twenty years. National interests, in addition, may not always be co-extensive with the interests of a world organization, and the national plans may be deliberately saved to serve purely national purposes.

A principal argument for an international plan is the avoidance of administrative duplication involved in a proliferation of national plans. It is unlikely, of course, that new national plans will be created if an international one comes into existence. If the writer is correct in believing that the three existing national plans will survive, a certain duplication will doubtless exist, but there are advantages which can be realized as well. Co-operation, based on the weaknesses and strengths of each, can be mutually beneficial. It is suggested that such co-operation might be based on four general principles:

1. *Avoid Overlapping Coverage with Existing National Plans*

An international agency can best accomplish this by concentrating on providing coverage in those capital-exporting centers where it is not now available. This should be done administratively rather than by rule, since the agency should be in a position to accommodate itself quickly to changes in national policy. When staff and resources permit, insurance could be made available to, for example, United States investors. But since it is unlikely that significant differences in coverage will exist, there would appear to be little to be gained from the point of view of the investor in having both plans available.

2. *Concentrate on Coverages and Techniques Which Encourage Participation by the Capital-Importing Nations*

One important asset of an international agency in the development field is its ability to engage developing countries in straight talk about the requirements for private investment and a sound economy. Private investment can benefit, as illustrated by the complicated arrangements between private companies, national governments, the World Bank, and the Republic of Ghana for the construction of the Volta Dam and aluminum smelter, in which it appears that the good offices of the Bank played

emerging problems or differences over private investment at an early stage, before such difficulties reach the point of extremity.

"No funding or legislative authority is now being requested for United States membership in such an international guarantee institution. The idea is as yet in the proposal and study stage. But if the idea proves attractive and feasible—and particularly if it has attraction to a significant number of less-developed countries themselves—the United States should be prepared to respond promptly and affirmatively.

"The executive branch will, therefore, be interested in exploring the merits of these proposals with other interested governments during the coming months."

an essential part in securing concessions by Ghana with respect to the protection of the investment.⁴⁶

With developing nations often willing to make rather extraordinary efforts to attract capital investment, among them being certain guarantees with respect to conversion of currency and expropriation, it is reasonable to think that a joint undertaking to supplement and guarantee these individual efforts would be quite welcome. Special guarantee contracts designed to complement specific statutory provisions can well be imagined. Under these circumstances, would the local government be encouraged in a hard chance to confiscate foreign property, knowing that loss would be covered by guarantees? While the possibility cannot be discounted entirely, there is nothing in the virtually claim-free experience of the United States to support such fears. It is unlikely that conduct of this sort is restrained by fears of subrogation. What is more likely is that decisions of this sort are far too serious and too deeply rooted in political and social changes to be affected at all by the existence of guarantees.

One contribution by developing countries whose value cannot be precisely estimated is a sharpened awareness that changes in the field of property rights are inevitable. Not all of such changes are in the direction of government ownership, although that is the current trend. One important function of a guarantee plan which is difficult to carry out on a national basis is to smooth the transition of property rights from one phase to the next, without unnecessary injury to the owners, and without impediment to reasonable social changes.

3. Explore with National Plans the Possibility of Reinsurance Cessions and Acceptances, and Other Mutually Beneficial Arrangements

A national guarantee agency might find it advantageous to reinsure some or all of its risks with the international body. This could be done on a treaty basis, with the international system taking an excess of loss or quota share, or in the alternative, accepting a share on a facultative basis with respect to the larger or more unusual risks. It is possible, but less likely, that an international agency might find it advantageous to lay off some of the larger risks with the national plans as a way of spreading the potential catastrophe hazard.

National plans might act as the insurer of smaller risks, or as intermediaries between the international agency and the local business community. Even the United States program has had difficulties in persuading the business community of its value, or, indeed, of its existence. It is probably fair to say that an international agency will have more difficulties in this respect. It is the multiplicity of capital-exporting countries with whom the international agency must deal that makes the marketing task difficult. Each capital-exporting country has its own pat-

⁴⁶ The best concise description of the complicated financial and governmental undertakings with respect to this project is contained in a booklet published by the Government of Ghana: *The Volta River Project: Statement by the Government of Ghana* (1962).

terns and institutions of investment to which a guarantee plan must accommodate itself. No doubt the largest investors everywhere will be quickly apprised of any international plan, as they are of the national plans, but special efforts will have to be made to reach the medium and small investor.

4. Seek to Broaden the Market for Guarantees by Arrangements with National Plans or Private Industry

This point is an obvious reference to the joint program which has been recently started by the United States Export-Import Bank and a group of private insurers known as the Foreign Credit Insurance Association, under which the private group has made available to American exporters a single policy covering the credit extended by such exporters to foreign buyers against a wide variety of commercial and political risks for a term up to five years.⁴⁷ It is too early to judge how attractive this new Eximbank venture will prove to be. Nonetheless, it appears to be based on two sound principles. It combines in one policy as many of the hazards of the transaction as can be insured, thus conforming itself to the type of package all-risk or multiple-hazard policy to which insurance buyers are accustomed today. In the second place, it harnesses the extensive merchandising organization of the stock and mutual insurance companies.

Something similar might be done by an international agency with respect to investment guarantees. Reinsurance of political risks could be made available to property insurers in various countries, enabling them to incorporate this coverage in a broad policy form to be marketed through traditional insurance outlets.

There are certain areas in which the international character of a guarantee plan will present problems which will be difficult of solution even with the help of the existing national programs. An obvious example of this type of problem is the matter of currency. One can expect to find guarantees extended to citizens of country A with respect to investments in country B, payable in gold or the currency of country C. May premiums be paid in the currency of country A, if that should be a non-convertible or "soft" currency? What will be the effect of devaluation of one of the currencies involved? Must an insured elect in advance the currency in which losses are to be payable, or may this be changed during the policy term?

Another problem which may prove vexing is the development of a standard guarantee contract. It is one thing to work out documents of agreement between a lending agency in one country and a single large enterprise in another. It is a somewhat more difficult thing to make avail-

⁴⁷ This program has been in the process of rapid development since its inception in 1961 by the Foreign Credit Insurance Association, 60 John St., New York, N. Y. For background see Oppenheimer, "Credit Insurance and Foreign Trade," *Bests Ins. News* (F. & C. Ed.), Feb., 1962, p. 81. Coverage of hazards deemed uninsurable has also been made available by U. S. Government reinsurance of private companies in the case of flood and nuclear incidents.

able a standard form of contract which will be understandable to investors generally. An insurance contract depends for its effect on a common understanding of the meaning of key words used to delineate the risk. It is doubtful if a complex document such as a guarantee contract would have precisely the same meaning in different languages and under different legal systems. This problem is usually solved by selecting a single-language version as determinative. For various political and legal reasons, this solution may not be available.

The best approach to a solution of this particular problem may lie in the similarity of investment guarantees to commercial insurance. Insurance contracts are in use throughout the world, and, because of the international character of the business, have much in common with each other. While perhaps not the ideal vehicle for a guarantee contract, the shortcomings might be overlooked to secure the benefits of a familiar form.

This similarity to commercial insurance has undoubtedly helped the managers of the national plans win public and legislative acceptance. In the United States, the family resemblance to insurance, with the suggestion that the program might be self-sustaining, has strengthened the program in its annual appearance before the Congress.

Further in keeping with their character as insurance, the national guarantees have always been available only to those who came and purchased them; the door of the shop has always been open, so to speak, but the purchaser must first walk in. This has its advantages, but it is not the only way of handling the matter. An international guarantee agency might well evaluate projects on an *ad hoc* basis, and when satisfied of their worth, make the guarantee available. One can imagine the agency taking the initiative in seeking out capital for projects it has "in inventory," with ensuing negotiations as to the scope of the guarantee necessary to attract the investment. Faced as it is with the problem of making its services known in many capital markets, it may be that some greater degree of initiative like this will be required.

A guarantee is almost certain to be characterized by any local statutory definition as insurance. Almost every country regulates the writing of insurance on risks within its borders, usually in a manner which favors locally incorporated companies. Although these laws are directed to commercial insurance, they may, taken literally, apply to an international guarantee.

Regulation of this type is customarily brought to bear upon an insurer at two points: The place where the insurance is written, which in the case of a commercial insurer is generally the home office and place of incorporation; and at the location of the insured property or locus of the risk.⁴⁸ In the former case, the connection of the regulatory jurisdiction is an obvious and traditional one; in the latter, it is based on the concern of a government for the fair treatment of its citizens, and, at least among the States of the United States, is now established in law even where the

⁴⁸ See, generally, 2 Couch, Insurance (2d) 434-598.

insurer has no office or personnel within the jurisdiction.⁴⁹ Insurance regulation does not limit itself to the solvency of the insurer, which would be of less concern in the case of an international agency, but deals with a multitude of requirements for the protection of the insured, such as the method of serving legal process, the time for bringing suit, the status of representations and warranties, and the types of insurance which may be effected.

With the host country having presumptive regulatory jurisdiction, exemption from statutory requirements must be found in the articles of membership of an international body, in a multilateral instrument governing the conditions on which guarantees would be written, or in a bilateral treaty. In some cases, legislative action might be required; there is a precedent in United States Federal legislation exempting World Bank bonds from Securities Act requirements,⁵⁰ and State legislation permitting financial institutions to buy them.⁵¹

In the United States guarantee program, this issue has apparently been resolved by agreement with the host country. These agreements make reference to the enabling statute of the United States, and thus incorporate it by reference in a document which may, in the absence of superseding legislation, be regarded as the supreme law of the project country.⁵² At least when coupled with the requirement of specific consent for each new investment, this has worked well enough, though some further steps may have to be taken by an international body, especially if guarantees are to be written in conjunction with private insurance.

Much thinking remains to be done about the question of which hazards are to be insured, and how this might be affected by the specifically international character of the plan. It is interesting to note that the existing national plans and most of the proposals stick pretty closely to the three named hazards of convertibility, expropriation, and war. Of these three, convertibility, which is to say the risk that the local government will prohibit the remittance of profits or capital to the home country in order to conserve foreign exchange,⁵³ has been the most popular form of

⁴⁹ *Travelers Health Assoc. v. Virginia*, 339 U. S. 643, 94 L. Ed. 1154, 70 S. Ct. 927 (1949).

⁵⁰ 63 Stat. 298.

⁵¹ See, e.g., Mass. G. L. (Ter. Ed.), Ch. 175 §63 (3A).

⁵² There may be some problem in this connection arising from the new insuring authority given to A.I.D. under the Foreign Assistance Act of 1961. Using these new powers, for example, a foreign subsidiary of a U. S. investor may now be insured against fire and casualty risks as well as against the traditional political hazards. A situation is thus presented where the United States is insuring a company of country X against a loss by fire occurring in X and damaging property in X. Whether the references to prior U. S. statutes in the bilateral treaties can be construed as including exemption from the local requirements for this type of insurance is a matter for thought.

⁵³ Convertibility must be clearly distinguished from devaluation, which is quite another thing, and against which investors now and again request protection. In theory, at least, devaluation merely confers formal status upon an existing situation. Values of physical property and such intangibles as good will can be expected to reflect the change in due course.

guarantee under the United States plan. Insurance against this exchange risk is, like liability insurance, essentially insurance against a burdensome legal obligation, while insurance against the expropriation and war hazards concerns loss to the physical property itself.

All of these hazards are fundamentally concerned with political action, whether in its sophisticated form of regulation or in the more sinister manifestation of war. The statement is frequently made that such risks are uninsurable and that, if protection is to be afforded, it must be done by government. This is putting it too strongly. There is nothing about a political risk *per se* which is uninsurable. In this case, however, there is a catastrophe potential which makes it difficult to value the hazard and to set a premium. All of the events insured are associated with economic and political upheavals, and history demonstrates that these may, in fact are likely to, occur on a world-wide basis.

One of the most difficult problems in any guarantee program is the drafting of an adequate definition of expropriation. Straightforward nationalization of the physical plant of the investor can be coped with; it is the statutory or administrative harassment of the enterprise, sometimes called "creeping" expropriation, which is difficult to define, to prevent, and to insure. The cultural loss suffered when the late Mayor La Guardia drove burlesque from New York by invoking the fire regulations merely brought to the attention of many a technique used by strong governments everywhere. Investors indicate that they would like to be protected against these tactics. Perhaps something can be done, especially if the action is discriminatory, but it is doubtful if a fully satisfactory definition of the hazard can ever be developed.

In the national plans and in most proposals the war risk includes revolution and civil disorders of various kinds. The evidence indicates that investors are not particularly concerned with the risk of international war alone. No doubt revolution and associated civil disorders are more of a hazard, but it should be noted that riot and vandalism coverages are already available under many commercial policies, with the dividing line rather obscure. There is something to be said for eliminating coverage of international war in any international guarantee. Aside from the catastrophe possibilities on a world-wide scale, and the known lack of demand, one can question whether the investor is exposed to any greater risk on this score in a developing country than at home.

An international guarantee organization must be created, and it must establish relations with countries in which investments are to be made. Shall one separate these two tasks, having in mind that some developing countries are not members of the World Bank or its affiliates? Or shall one combine them, as Van Bieghen and the Council of Europe suggest, to achieve such virtues as may arise from participation and responsibility?

A separate approach has much to recommend it. Unless one adopts some linkage between capital and benefits, there is a recognizable difference between the charter of an organization, incorporating such matters as capital, voting rights and internal organization, and its working relationships

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with the rest of the world. One needs to be fundamental and formal; the other flexible and discreet. The United States has found it wise to negotiate a bilateral agreement with each country in which investments are to be guaranteed; there is a range of content quite obviously dictated by the requirements of each situation. Difficulty might be encountered, if the possibility of individual treatment was lacking.

On the other hand, there are strong arguments for the use of a multilateral instrument which encompasses organizational provisions as well as the ground rules for insurance so that all who are to benefit must subscribe. Such an approach would of necessity bring the developing nations into managerial councils where they could supply a point of view often lacking to international projects associated with foreign investment, a point of view which might be turned toward moderation by the effects of participation in the common enterprise. On balance, the possibilities of this approach are sufficiently attractive to justify thorough exploration before falling back on a bilateral system or on separate multilateral treaties with respect to organization and guarantee procedures.

Whatever the form of agreement, there will in all likelihood be provisions concerning the subrogation of the insuring agency, and a requirement that the consent of the project country be given to each investment. It seems to be generally agreed that the guarantor of an investment should be subrogated to the rights of the insured in the event of loss. It is at this point that the hypothetical adverse interest of the insurer becomes real and immediate, and delicate situations are to be expected. In providing for treaty rights in this area, the general question is whether the subrogated insurer is to be left to his remedies in the local courts, or whether an international framework for the settlement of such claims is to be created. United States practice requires an undertaking by the project country that it will permit transfers to the United States of local currency arising from payment of a loss, that it will recognize the subrogation to the United States of "any right, title, claim or cause of action existing in connection therewith," and that such rights shall be treated no less favorably than those of nationals of the United States engaged in like transactions. This position would seem to be the minimum acceptable to an international agency.

In the case of the United States, an effort is also made to secure agreement that differences will be settled by negotiations on the diplomatic level, with international arbitration if no understanding is reached. The United States does not always achieve this; it is possible that it would be easier for an international organization to do so. A smaller country might well feel that diplomatic negotiation with one of the large Powers was a one-sided affair, but that an international agency could be expected to conduct its affairs without placing national policy or prestige at stake in the proceedings. Whether the reality would actually favor small defaulting nations is debatable.

There would appear to be advantages on both sides to removing subrogation claims from the local to the international level. Strictly speak-

ing, the subrogated insurer stands in the same shoes as the insured investor, whether the remedy be municipal or international, but it would hardly be realistic to say that an international organization such as the World Bank is in the same position as an individual claimant; it is at once in a much stronger position to press its claims, and at the same time in a more vulnerable position if it presses too hard and too far in an atmosphere of nationalism or social reform. Furthermore, claims are apt to come in blocks as the result of economic catastrophe, social reform, or some more primitive revolutionary adventure, and diplomatic channels then provide a means for handling them in the mass.

The paucity of claims under the national programs makes it easy to forget that each risk insured represents a possible conflict of interest between the insurer and the project country, which in the event of distressed economic conditions could assume substantial importance. There is a safety valve in the national program: A claim which would embarrass a friendly country might not be pressed. Where shall this discretion lie in an international program? What shall be the standards for its exercise? It would be wise to answer these questions at the outset.

Subrogation is also likely to raise problems in the event that the definition of expropriation is broad enough to include regulations which deny to the owners the fruits of the enterprise. Assume, for example, that the local government adopts a rate schedule for utilities which is calculated to force private utilities out of business. At what point shall the guarantee agency claim indemnification?

Both the United States and Germany (but not Japan) require the consent of the recipient country to a proposed investment before a guarantee will be issued. The Council of Europe and Van Eeghen proposals take the same position. From the point of view of a national program, prior consent offers the advantages of a safeguard against charges of economic imperialism, a deterrent to later expropriation, and, hopefully, an assurance that the project will fit into the local plan of development. It has the disadvantage of adding a time-consuming step to the already cumbersome process of securing a guarantee. An international agency may find some middle ground. A general consent to investments of a particular type might be negotiated. If a multilateral treaty is used, much of the sense of participation and responsibility which appears to be an objective of the consent requirement would be already created. In those circumstances, it might be well left to each individual country to indicate to the administering authority whether and on what basis it desired to be consulted before guarantees were issued.

While guarantee programs to date have been oriented toward private enterprise, there is no reason to foreclose the possibility of guaranteeing certain types of government obligations, and a bare framework for this might be created in the enabling treaty. There are, no doubt, different criteria for a portfolio investment guarantee of this sort, and hard cases might present themselves if the local government appeared to be assuming the functions of private capital. The United States Export-Import Bank,

which has power to lend to both governments and private enterprises, on many occasions has been forced to judge whether a project for which financing was sought belonged properly in the public or private sector, so that it might be guided in its consideration of a loan application.⁵⁴ This is a question of economic philosophy on which the members of an international organization might, and in fact would be likely to, disagree.

One of the intriguing possibilities of an international guarantee plan is the chance of progress toward a multilateral investment code. There is no doubt about the difficulties under which any one of the affluent nations labors in dealing with a poorer country on the subject of the treatment to be accorded private investment by its nationals. Experience suggests that a good deal more progress in this direction could be made by an international agency. This concept of the guarantee plan as the thin end of a wedge was held by the Consultative Assembly of the Council of Europe in connection with its plan for the development of Africa, the report stating that "even if it should appear that an Investment Statute cannot be adopted within a short time, a Guarantee Fund would help to establish cooperation between Africa and European States on a sound basis. . . ." ⁵⁵

Some minimum of agreement about private investment is of course necessary even to the most rudimentary guarantee plan. In this connection the Consultative Assembly report goes on to say:

[The] international guaranty fund takes for granted that, generally speaking, the participating countries are agreed upon the rights and duties of investors and borrowers. Such agreement may be expressed either formally by virtue of the participating countries acceding to a statute on foreign private investments, or it may exist *de facto*.

This may be putting the matter too strongly. While admittedly there is no basis for guarantees in a purely socialist economy, there are differences in attitude toward economic rights and duties which can be accommodated in a guarantee plan. Drawing too strict a line at the start would seriously reduce chances of future progress.

As noted above, direct attempts to secure multilateral agreement on expropriation of investments have failed because of the reluctance of developing nations to make broad commitments which might limit their freedom of action in the future, while, on the other hand, quite extensive undertakings have been made in individual cases. Excessive pressure to reach agreement in principle tends to result in a hardening of positions which makes later dealings with respect to individual cases more difficult. At the outset, therefore, the question is quite simply how far the wedge can be pushed without shattering the log asunder.

Participation in an international guarantee plan could carry with it a substantial inducement for undertakings of this kind. A participating

⁵⁴ Sauer, "The Export-Import Bank and Private Foreign Investment," 19 Fed. Bar Journal 327 (1959).

⁵⁵ Council of Europe, note 36 above, at 2.

country has the chance of receiving guarantees upon investments flowing from any country in the world, rather than just from those countries now operating national programs, and to that extent enjoys an advantage in the competition for investment capital. Experience with other types of development programs also indicates that most countries prefer to receive benefits from an international agency, doubtless because of the feeling that they will be given without attempts to influence other national policies. Even if undertakings concerning protection of investments were not an absolute condition of participation, there might still be rewards for such undertakings in the form of a lower premium or more liberal benefits. A voice in the management of the agency may also prove attractive to a developing country.

If agreement on treatment of investments is to be secured, not only must participation be made attractive, but the undertakings requested must be kept down to a reasonable level. Such undertakings might, for example, be confined to new investments. In this area many countries are already giving preferential treatment through a variety of tax and other concessions designed to attract new industry, and there is generally a chance for the government to exercise some discretion as to whether the investment shall be permitted at all. If a more limited undertaking were desired, it could be confined to insured investments or to discriminatory actions falling outside the area of general social reform.

Taken as a whole, the treaty program of an international guarantee agency could make an important contribution to international good behavior toward investment property. It will require delicate guidance by its sponsors so that everything is not lost by too much being sought.

CONCLUSIONS

With all its complexities and difficulties, the idea of an international investment guarantee agency deserves further development by the World Bank and other interested organizations. At the present stage, guarantees can only be termed one useful tool among many for improving the investment climate in the developing nations.

An important accomplishment of such a program would be the creation of a framework within which both capital-exporting and capital-importing nations could work toward a reconciliation of their views on expropriation. Too much should not be asked at first in the way of commitments on this subject; it is clear that it will not be given. But within the framework of a joint effort to secure private investment against political risks, one can hope that the incidence of these risks will itself be diminished.

There is a temptation to be dazzled by the idea of a single, world-wide system of guarantees, catering to all investors and replacing all other guarantee programs. But experience suggests a more modest approach. For the present, it would be more desirable to work with, and supplement, national programs rather than to replace them. A firm step rather than a great leap forward seems called for at this time.

THE NETHERLANDS CONSTITUTION AND INTERNATIONAL LAW

A DECADE OF EXPERIENCE

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INTRODUCTION

On June 22, 1953, important amendments to the Netherlands Constitution concerning the administration of foreign affairs came into force. Among the most radical probably was the recognition by our Constitution of the primacy of international agreements and of decisions of international organizations over rules of municipal law. This spectacular innovation inspired the editors of the *Chicago Daily Tribune*, when announcing this event in their issue of December 12, 1952, to choose as a headline: "Less than a Nation."

The present author enjoyed the privilege of setting forth the essential features of the 1953 Revision.¹ Ten years have elapsed since then, ten years of experience and habituation. There seems to be every reason now to investigate whether The Netherlands is still a nation and, if not, what has become of it. A new stock-taking is all the more called for, since in 1956, though at that time the teething troubles were hardly past, the said articles were submitted to a technical revision necessitated by experience gained in the first years.

The essence of the 1953 Amendments may be summarized as follows:

1. They adapt the constitutional provisions on the declaration of war to modern international law (Articles 58 and 59).
2. They put the treaty-making power of the Crown more strictly under the control of the *Staten-Generaal* (Articles 60, 62).
3. They provide a more flexible procedure of parliamentary approval of international agreements (Article 61).
4. They render it possible to deviate from the Constitution if the development of the international legal order so requires (Article 63), and they accept the possibility of yielding authority to international organizations (Article 67).
5. They ensure the binding force of international law as prevailing over municipal law, and authorize the courts to test national statutes as regards their conformity with international agreements and decisions of international organizations (Articles 60 (third paragraph), 65, 66 and 67 (second paragraph)).

¹ "The Netherlands Constitution and International Law," 47 A.J.I.L. 537 (1953).

. In the present article there will be examined as to each of these items (a) the amendments adopted in 1956, and (b) the way in which the relevant articles have been applied in the course of legislative, administrative and judicial practice. A general appraisal will be given in a concluding section.

During the second reading of the 1953 Amendments, the suggestion was made by members of Parliament and by the Government that a technical readjustment of some of the amended articles might be desirable. Consequently, an advisory commission was set up in September, 1954, consisting of experts in the field of public law and international law, presided over by the late Professor Kranenburg, member of the Council of State. Most of the amendments suggested by the Commission (hereafter referred to as "the Commission") were endorsed by the Government.² From the outset it had been emphasized by the latter that only technical amendments would be taken into consideration.³ Having regard to the fact that the provisions adopted in 1953 had been in force for only a couple of years, both the Government and the Commission were of the opinion that substantial modifications were not advisable. After having passed the Chambers of Parliament in two readings, the said amendments entered into force by virtue of their solemn proclamation on September 10, 1956.⁴

Another event, of no less importance, was the entry into force of the Charter of the Kingdom of The Netherlands on December 29, 1954, laying the foundations of a new legal order accepted by the three component parts of the Kingdom: The Netherlands, the Netherlands Antilles and Surinam.⁵ The Charter, which ranks above the Netherlands Constitution, delegates the regulation of some matters, such as the conduct of foreign affairs, to that Constitution, although it itself also contains a few provisions on these matters.⁶

² See Explanatory Memorandum, Annexes to the Proceedings of the States-General (Bijlagen bij de Handelingen der Staten-Generaal; hereafter to be abbreviated as Bijlagen), Second Chamber (II), 1955-1956, 4133 (R 19), No. 3, with the Commission's Report appended. References to the pages of the Commission's Report are to the pages of this appendix. For a critical appraisal of that Report, see Van Eysinga in *Nederlands Juristenblad*, 1955, p. 615.

³ It should be noted in passing that a more general and systematic revision of the Netherlands Constitution, not restricted to specific topics such as the present subject matter, has been deemed desirable in various quarters. Although proposals to that effect were made by a commission appointed for that purpose by the Government, the so-called Van Schaik Commission, this general revision came to nothing. So the general trend in The Netherlands seems to be that advantage is being taken of the regular elections of Parliament for introducing amendments of a fragmentary character only, as was also the case in 1956. Cf. 47 A.J.I.L. 537, 538 (1953).

⁴ *Staatsblad* (Bulletin of Acts and Decrees) 1956, Nos. 437 and 446. The complete text of the Constitution as amended in 1956 is to be found *ibid.*, No. 472.

The English version of the relevant parts of the Constitution, Arts. 58-67, as they stand after amendment in 1956, is appended to the present article on page 107. For comparison with the text as it was before, see 47 A.J.I.L. 538 *et seq.* (1953).

⁵ See Van Panhuys, "The International Aspects of the Reconstruction of the Kingdom of the Netherlands in 1954," in 5 *Netherlands Int. Law Rev.* 1 *et seq.* (1958); an English translation of the Charter is reproduced *ibid.* at 107.

⁶ Arts. 3 (1 b), 5, 24-29.

I. PROVISIONS ON THE DECLARATION OF WAR

Notwithstanding the fact that suggestions for their completion had been made in various quarters, Articles 58 and 59 relating to the settling of international disputes and to the question of war and peace were not altered in 1956. These suggestions were occasioned by the fact that Article 59 (dealing with the state of war and its termination) was considered to be insufficiently attuned to modern requirements. Though that article has rightly done away with traditional conceptions about aggressive war, it was held that, in addition, something positive had to be provided corresponding to the modern concept of lending military support to collective security actions. Therefore the Van Eysinga Committee had proposed to provide that military forces would not be made available for such actions except after previous consultation with the *Staten-Generaal*.⁷ Though favorable to this suggestion in principle, the Government took the view that this question fell rather within the framework of the constitutional provisions on military matters contained in the tenth chapter of the Constitution.

The Van Schaik Commission had also made a proposal on this matter, though its wording was slightly different from the Van Eysinga formula, namely:

The King can make no military forces available for the collective maintenance of the law (*collectieve rechtshandhaving*) except with the previous consent of the United Assembly of the *Staten-Generaal*, unless the Kingdom is bound thereto in pursuance of its international obligations.⁸

Remarkably enough, the Government did not adopt any of the suggestions made by the two Commissions, although, on the occasion of the 1956 revision, a few amendments were introduced into the tenth chapter. In accordance with the views expressed on this point by the Kranenburg Commission, the Government argued that it would be too difficult to find an adequate formula covering all conceivable situations.⁹

It should be noted in passing that the said amendments—abrogating certain restrictions placed upon sending members of Netherlands military forces to places outside Europe (*i.e.*, the former Articles 198 and 199)—may have a bearing on the participation by The Netherlands in international collective actions. It is true that these articles did not preclude the Netherlands' sending a contingent to participate in the United Nations

⁷ 47 A.J.I.L. 542 (1953); see, on this and other proposals, Van Panhuys, "De regeling der buitenlandse betrekkingen in de Nederlandse Grondwet" (The Regulation of International Relations in the Netherlands Constitution), Report to the Netherlands Branch of the International Law Association, Mededelingen van de Nederlandse Vereniging van Internationaal Recht, No. 34 (1955), p. 29 *et seq.*

⁸ Cf. Report referred to in previous note, p. 33. These proposals are of a similar tenor to the provision inserted in the Danish Constitution in 1953. Cf. *Revue du droit public et de la science politique*, 1954, No. 1, p. 78.

⁹ Expl. Memo. (4133 (B 19)), p. 1, in conjunction with the Report of the Commission, p. 9; see also Memo of Reply, First Chamber, p. 5.

action in Korea, but this contingent consisted of volunteers only. Since the 1956 amendment, a limitation to volunteers would no longer be necessary from a constitutional point of view.¹⁰ In any event, expectations, possibly raised by the Government's promise that the problem of parliamentary control of Netherlands participation in collective action would be favorably considered on the occasion of a more general revision,¹¹ have not as yet been realized.

Fortunately, the provisions concerning war have found no application in the period described here. It is true that in 1960 diplomatic relations between The Netherlands and Indonesia were broken off by the latter in connection with the dispute over Western New Guinea. Later on, this was followed by military skirmishes, but this latter situation, brought to an end by the Netherlands-Indonesian Agreement of August 15, 1962,¹² never necessitated any statement by the Government declaring that the Kingdom was at war with Indonesia. This phenomenon of performing hostile acts without admitting a formal state of war—sometimes called a *status mixtus*—is not uncommon in our days.¹³

II. PARLIAMENTARY CONTROL OF THE TREATY-MAKING POWER¹⁴

A. Revision

This matter is dealt with both in Article 60 (1) and (2), laying down as the principal rule that all international agreements require parliamentary approval for their entry in force, and in Article 62 listing a few exceptions to that rule.

Article 60(1) has remained unchanged. A suggestion that a special provision should be inserted covering cases where treaties are ratified without any preceding signature, such as the conventions drawn up under the I.L.O. Constitution, was not accepted.¹⁵ In accordance with the Commission's recommendations, the Government adhered to the view that in these cases Article 60 can be applied *per analogiam*. In a similar vein they also maintained that agreements purporting to enter into force upon signature could, if necessary, be submitted to Parliament even prior to their signature; up to now no such instances have occurred.

¹⁰ See *ad* 4023 (R 10), first Bill, Bijlagen I, 1955-1956, No. 151, p. 4. The Government's reply was a little hesitant, see *ibid.* No. 151a, p. 4.

¹¹ *Cf.* 47 A.J.I.L. 543 (1953).

¹² Tractatenblad (hereafter cited as Trbl.) (Netherlands Treaty Series), 1962, p. 77; 57 A.J.I.L. 493 (1963).

¹³ *Cf.* Green, "Armed Conflict, War, and Self-Defence," in 6 *Archiv des Völkerrechts* 388 (1956-1957).

¹⁴ The system adopted in the following sections of this paper implies that Art. 64, relating to accession to and denunciation of agreements, will receive no attention. This is no deadly sin, as its revision in 1956 was of a purely drafting nature, while in regard to its application nothing happened worth reporting here. See Report of the Commission and Explanatory Memorandum, cited note 2 above, *ad* Art. 64.

¹⁵ Proceedings First Chamber, 1955-1956, pp. 378 and 401; Expl. Memo, p. 3; Report of the Commission *ad* Art. 60.

In Article 60(2) the term *communicated* (*medegedeeld*) was substituted for *submitted* (*overgelegd*). This was done in order to contrast the communication *ad informandum*, which is required for all agreements, regardless of whether they are subject to parliamentary approval or not, with submission for approval as provided in Article 61.¹⁶

Article 62, enumerating the exceptions to the requirement of parliamentary approval, underwent various modifications. In the first paragraph under *b*, the words, "in so far as the Act of Approval did not otherwise stipulate," were substituted for "provided that the States-General, when they gave their approval to the agreement, did not make a reservation in this respect." The reason for this amendment was to make it clear, in conformity with practice, that such a reservation cannot be made in cases of a *tacit* approval. Under the new text, the reservation can only be made by an amendment to the bill of approval, this being a right of Parliament solely to be exercised by its Second Chamber.¹⁷

The revision of Article 62(d) concerns the question whether it is legitimate for the Government to enter into secret agreements. In conformity with views already expressed by the Government during the debate in Parliament preceding the 1953 revision,¹⁸ the Commission held that under the 1953 text the conclusion of such agreements is allowable. However, in order to eliminate any doubts, it proposed to substitute "cogent" for "urgent" and to delete from the original text the words "without delay." Although initially the Government wanted also to delete the word "definitely" in order to obtain more elbow-room, the text as finally adopted is identical to that proposed by the Commission.¹⁹

The amendments to the second and third paragraphs are of a technical nature, partly necessitated by the re-wording of Article 61. It may be of some interest to note that the term "legally possible," used in the second paragraph, refers not only to the provisions of the agreement but also to rules of unwritten international law concerning the lawful means of abrogating a treaty.²⁰

Finally, it should be observed that the Government, concurring with the views expressed by the minority of the Commission, did not subscribe to the latter's proposal to specify that agreements concluded under Article 62(d) can only be submitted to *express* approval, as distinct from the *tacit* procedure.²¹

B. Application

From the outset it has been realized that the rigid rule of parliamentary control enacted in 1953 might give rise to difficulties with other govern-

¹⁶ Report of the Commission *ad* Art. 60; their suggestion was accepted by the Government on a proposal moved by the 2d Chamber, see Bijlagen 4183 (R 19) No. 9, and Proceedings 2d Ch. 1955-1956, p. 800.

¹⁷ Report of the Commission, *ad* Art. 62; Memo of Reply I, p. 5.

¹⁸ Cf. 47 A.J.I.L. 549 (1953).

¹⁹ Bijlagen II, 1955-1956, 4133 (R 19), No. 10; Proceedings I, p. 810.

²⁰ Memo of Reply II, p. 4.

²¹ Expl. Memo, p. 4.

ments having wider powers. This fact has given birth to two practices: (1) the provisional application of agreements pending their approval by Parliament; (2) the conclusion of agreements for one year with a proviso for their tacit renewal after that period.

Ad (1). Although this practice was already known under the Constitution as it was prior to 1953, it came to full prosperity under the new regime. Article 11 of a bilateral Air Navigation Agreement with Liberia of November 28, 1958, may be quoted as a sample:

The present agreement shall be provisionally applicable from the date of its signature and shall come into force on a date to be laid down in an exchange of notes stating that the formalities required by the National Legislation [*sic*] of each Contracting Party have been accomplished.²²

The question may well be asked whether this arrangement for "provisional application" constitutes in itself a *binding*, albeit provisional, agreement. If so, the Government would have no power to accept such undertakings. From a constitutional point of view, subject of course to their political responsibility vis-à-vis Parliament, the Netherlands Government is authorized to make non-binding arrangements with other states. Whether an arrangement has binding force or not must be ascertained from the intention of the parties. Cases may well be conceived in which opinions differ as to what was in fact intended.²³

In the present instance it must, in any case, be presumed that the Netherlands Government does not regard stipulations of the type quoted above as binding under international law. This is borne out by the fact that agreements of this type are listed in the Index of the *Tractatenblad* under the heading "Agreements not yet entered into force." This practice is equally followed in cases where the agreement to apply a treaty

²² Trbl. 1959, No. 4. Provisions on the provisional application of multilateral treaties also occur; see, e.g., Art. 16(b) of an agreement, Sept. 7, 1956, on the European factory for isotopic separation of uranium, Trbl. 1957, No. 26; and the International Coffee Agreement, 1962.

²³ A complete confusion existed, not only between members of Parliament and the Government, but also among the members of the Cabinet themselves as to the legal character of the decision to accelerate the realization of the Common Market adopted at Brussels on May 12, 1960, by "the representatives of the States members of the EEC assembled within the framework of the EEC Council of Ministers" (*cf.* Official Gazette of the European Communities, Sept. 12, 1960, p. 1217): Was this a decision taken under Art. 14(7) of the E.E.C. Treaty, was it a binding agreement implementing Art. 15(2) of that Treaty, or, thirdly, was it rather a non-binding-agreement in the nature of a gentlemen's agreement? Finally the Netherlands Minister of Foreign Affairs cut this Gordian knot by describing the decision as one which, not being a formal decision of the Council, should be regarded as a decision *sui generis*. Though stressing, on the one hand, that the decision had certain legal effects, he doubted, on the other hand, whether it was of such a nature that it could be enforced by the Court of the European Communities. *Cf.* Proceedings 2d Chamber, 1959-1960, pp. 1164, 1197, 1212-1213, 1227 and 1235. See also on this decision Catalano, *Manuel de Droit des Communautés Européennes* 31, note 1(1962).

provisionally, that is, pending its entry into force, has been laid down in a separate protocol or exchange of notes.²⁴

In final analysis the question whether "understandings" of this kind have a binding character or, in other words, whether they are agreements in the technical sense, is a question of international law. Article 24 of the Draft Articles on the Law of Treaties drawn up by the International Law Commission in 1962 deals with a "provisional entry into force" which is perceived as being binding upon the contracting states until either the treaty has entered into force definitely or those states have agreed to terminate its "provisional application."²⁵ Without any doubt, stipulations to that effect would come within the purview of Article 60(2) of the Netherlands Constitution, unless, of course, one of the exceptions of Article 62 would obtain. In a similar vein the Netherlands Supreme Court decided that exchanges of notes agreeing to apply a treaty on a provisional basis pending its ratification should be equated to agreements proper, at least as regards their internal force of law.²⁶

An interesting example of provisional operation of treaties with binding effect is to be found in an Agreement between The Netherlands and the Organization for Economic Co-operation and Development of September 30, 1961.²⁷ Since the Convention of December 14, 1960, establishing that Organization had come into force before the procedure of ratification in The Netherlands was completed, it was agreed in the former Agreement that, from the date of the entry into force of the Convention of 1960, The Netherlands would assume all the obligations and enjoy all the rights flowing therefrom "as though it had ratified it." As the 1961 Agreement was concluded for the term of one year, parliamentary approval could be dispensed with by virtue of Article 62(1c) of the Constitution. However, there is nothing to prevent states, if they wish to do so, from making understandings for the provisional application of treaties not having any binding effect, provided that such application is possible under the municipal law of the contracting states.

Ad (2). The practice has developed to conclude agreements, particularly bilateral trade agreements, for the duration of one year, but subject to tacit renewal for another period of one year, and so on, unless notice is given within a certain time limit before the expiration of the said period.²⁸ Although the conclusion of agreements for one year, provided they do not involve considerable pecuniary obligations, is allowed under Article 62(sub c), opinions might be divided on the question whether agreements providing for their tacit renewal can still be regarded as falling under that heading. They come pretty near to agreements con-

²⁴ *Cf.*, e.g., the Protocol on the Provisional Application of the Statutes of the European School, Trbl. 1957, No. 246.

²⁵ 57 A.J.I.L. 244 (1963).

²⁶ Decision of Dec. 10, 1954, referred to below in Part V, *sub* A; see also note 56.

²⁷ Trbl. 1961, No. 126.

²⁸ See, e.g. Trbl. 1953, No. 108; 1954, No. 78; 1955, No. 76; 1956, No. 20; 1957, No. 135; 1958, No. 126; 1959, No. 69; 1960, No. 96; 1961, No. 78.

cluded for an indefinite period but providing for their denunciation under certain conditions. However this may be, at present a "convention" (usage) sanctioning this practice has come into existence. A recent variant of this practice is that the agreement is entered into for one year and will be renewed for an indefinite period thereafter unless denounced.²⁹ Such agreements are submitted to the States-General after their entry into force and must be denounced if approval is not obtained.

To make more complete the picture of the functioning of parliamentary control, a more detailed discussion of Article 62 seems desirable:

Article 62(a). Under the new Constitution no empowering laws as envisaged in this provision were enacted. A bill designed to authorize the Government to enter into civil aviation agreements was subsequently withdrawn.³⁰ The States-General were of the opinion, and the Government agreed, that the *ad hoc* procedure provided in Article 62(1)(d) should be preferred to an authorization in blank under Article 62(1)(a).

Article 62(b). Stipulations reserving parliamentary control as made possible in this provision were inserted in various bills, *e.g.*, those concerning the approval of some of the treaties establishing European Communities.³¹ Difficulties arose in regard to treaties made in pursuance of treaties entered into under the pre-1953 Constitution. The Government took the view that the exception laid down in Article 62(1)(b) equally applies to agreements implementing treaties entered into before 1953, provided that the latter had been approved by the States-General.³²

Article 62(d). Agreements concluded under this provision are of rare occurrence (one or two per annum).³³ If not of secret character, these agreements were, as far as could be ascertained, submitted to the States-General for approval in accordance with Article 62(2). It is not always apparent, however, whether a reservation to terminate the agreement in case of non-approval, as contemplated in the third paragraph of Article 62, was made in their regard. That paragraph allows the omission of such a reservation whenever this would manifestly conflict with the interests of the country. Presumably, no such reservations have been made in regard to secret agreements. This procedure was followed by the Dutch Government in a somewhat clumsy though well-intentioned manner in respect to an agreement on financial matters concluded with Indonesia on

²⁹ See, *e.g.*, Trbl. 1958, No. 110; 1960, No. 116; 1961, No. 86.

³⁰ Bijlagen, 2d Ch., 1954-1955, 3429, Doc. 4, and *ibid.*, 1958-1959, 4401, No. 9.

³¹ Staatsblad 1954, No. 25, Art. 7 (European Defense Community); 1957, No. 498, Art. 6 (E.E.C.); 1957, No. 494, Art. 5 (Euratom). The E.O.S.C. Treaty was concluded and approved under the old constitution.

³² See, with regard to an agreement between The Netherlands and the United States of June 4, 1954, concerning the development of special weapons, allegedly tending to implement the Netherlands-U. S. Mutual Defense Assistance Agreement of Jan. 27, 1950, Bijlagen I, 1954-1955, 3700-III-115b-pp. 1 and 2. The Agreement of 1954 was confidentially communicated to the States-General.

³³ See, *e.g.*, Trbl. 1953, No. 133; 1954, No. 75; 1958, No. 101; 1959, No. 71.

January 13, 1954: some parts of it were submitted, or at least communicated, to the *Staten-Generaal*, while other parts were withheld on account of their allegedly secret character. This procedure gave rise to severe criticism on the part of the States-General.⁸⁴ For obvious reasons no statistics are available concerning the conclusion of secret agreements entered into under this heading. In some cases, however, members of Parliament having a fine nose may pick up the scent, as may be illustrated by Professor Gerretson's tackling the Government upon a highly classified agreement concluded under Article 15(3) of the European Defense Community Treaty.⁸⁵

III. PROCEDURE OF PARLIAMENTARY APPROVAL OF INTERNATIONAL AGREEMENTS

A. Revision

The innovation of Article 61, as amended in 1953, was that it introduced the procedure of tacit approval as an alternative to approval by an Act. Although its text was completely re-worded in 1956, the essence remained untouched. The intention of the framers of the new text was to express more clearly that the two procedures are of equal rank, whereas the 1953 text might have created the impression that tacit approval was the normal procedure.

The only amendment of a substantial character was the deletion of the provision that, prior to the termination of the time limit of 30 days referred to in Article 61, both Chambers of the States-General could declare that express approval was not necessary.⁸⁶ The purpose of this amendment was to avoid discussions on the question whether the Chambers by making this declaration could overrule a wish expressed by the qualified minority.

Proposals tending to enlarge parliamentary control by excluding the procedure of tacit approval with regard to (a) agreements entered into under Article 62(1) under *d*, and (b) self-executing agreements, were not adopted in the text as finally enacted.⁸⁷

A related question was whether the Government, before submitting an agreement to Parliament, was under an obligation to consult the Council of State (*Raad van State*). Although the Government adhered to the view that from a legal point of view they were not obliged to do so under the 1953 regime, they were willing to insert a provision to that effect in Article 84 of the Constitution dealing with the *Raad van State*. This amendment was adopted.⁸⁸

⁸⁴ Bijlagen I, 1954-1955-3700-III-No. 115, p. 15.

⁸⁵ See note appended to Bijlagen I, 1953-1954-3200-III-117.

⁸⁶ See 47 A.J.I.L. 539 (1953).

⁸⁷ As to (a), see p. 92 above; as to (b), p. 100 below.

⁸⁸ Art. 84, third paragraph. Although the Commission was no less of the opinion that the Raad van State ought to be consulted, their proposals were technically different from the one made by the Government. See their Report, pp. 8 and 11.

. B. *Application*

	June 22, 1953- May 31, 1954	June 1, 1954- May 31, 1955	June 1, 1955- July 31, 1956	Aug. 1, 1956- Dec. 31, 1957	Jan. 1, 1958- Dec. 31, 1959	Jan. 1, 1960- Dec. 31, 1961
	Netherlands Kingdom Total	Netherlands Kingdom Total	Netherlands Kingdom Total	Netherlands Kingdom Total	Netherlands Kingdom Total	Netherlands Kingdom Total
1. Submitted for express approval (Art. 61(2))	8 — 8	8 3 11	7 7 14	5 1 6	20 8 28	12 12 24
2. (a). Submitted for tacit approval (Art. 61(3))	25 — 25	42 3 45	28 7 35	48 15 63	62 30 92	19 48 67
(b). Express approval asked under Art. 61(3)	(5) — (5)	(5) — (5)	(1) (1) (2)	(4) (2) (6)	(5) — (5)	— — —
3. Total of agreements submitted for approval	33 — 33	50 6 56	35 14 49	53 16 69	82 38 120	31 60 91
4. Agreements communicated, not subject to parliamentary approval by virtue of Art. 62(1)a, b, c	17 — 17	30 3 33	30 43 73	33 63 96	19 43 62	41 22 63
5. Total of agreements communicated*	50 — 50	80 9 89	65 57 122	86 79 165	101 81 182	72 82 154

* Not included are agreements communicated in one period and submitted for approval in a later period.

The diagram reproduced above³⁹ enables the reader to visualize the volume of international agreements concluded by The Netherlands after the enactment of the new Constitution (June 22, 1953), and the procedures applied.

One of the things to appear from it is that cases in which submission for express approval, as provided in Article 61(3), is asked by Parliament are becoming less frequent. Furthermore, it shows that the procedure of tacit approval is more frequently employed than that of express approval. If one remembers that the introduction of the tacit approval procedure in 1953 was intended to remove certain practical inconveniences attaching to the rigid rule of parliamentary approval,⁴⁰ it can be concluded that this procedure has served this purpose well. The diagram also shows the frequency of international agreements entered into on behalf of the Kingdom as a whole, as compared to those made on behalf of The Netherlands.⁴¹

³⁹ The present author is indebted to Mr. M. J. Van Emde Boas, assistant lecturer at the University of Leyden, for having composed this diagram on the basis of data published in the *Jaarboek van het Ministerie van Buitenlandse Zaken*, and for his valuable assistance also in other respects.

⁴⁰ *Of.* 47 A.J.L.L. 548 (1953).

⁴¹ *Of.*, on this matter, Van Panhuys, 5 *Netherlands Int. Law Rev.* 14-16 (1958).

IV. CERTAIN ASPECTS OF THE RELATIONSHIP BETWEEN THE CONSTITUTION.
AND INTERNATIONAL AGREEMENTS, PARTICULARLY WITH REGARD
TO SUPRA-NATIONAL ORGANIZATIONS

A. *Revision*

Article 63 was inserted in 1953 with a view to enabling the treaty-making power to conclude agreements containing provisions deviating from the Constitution, in particular those instituting international organizations. Apart from a technical modification of its second sentence necessitated by the redrafting of Article 61 (see above), this article remained unchanged in 1956. The Government did not join the majority of the Commission in their suggestion to transfer the third paragraph of Article 60—prohibiting the courts from enquiring into the constitutionality of agreements—to Article 63 and to re-word it in such a manner as to make it clear that this provision only precluded judicial review as to the alleged *intrinsic* unconstitutionality of agreements, thus leaving the courts at liberty not to apply agreements made in violation of the rules laid down in Article 60(2) in conjunction with Articles 61 and 62.⁴² Hesitating to give such a narrow meaning to Article 60(3), the Government declared that they considered this proposal to overstep the scope of a purely technical modification.

Article 63 should be seen in close connection with Article 67(1) providing for the conferring of legislative, administrative and judicial powers on international organizations, including those of a "supra-national" character. From its very conception, the precise relationship between the former article and Article 67(1) in regard to the various possible contingencies has never been entirely clear.⁴³ So it is understandable that in 1956 this question came up for discussion again. Both the Government and the Commission were of the opinion that it was not feasible to indicate in which cases the grant of powers contemplated in Article 67 would amount to a derogation from the Constitution. In order to clarify, however, that Article 67(1) did not rule out *de plano* the applicability of Article 63 to the making of agreements conferring powers on international organizations, a reference to Article 63 was inserted in Article 67.⁴⁴

B. *Application*

The procedure provided in Article 63 was only applied in a few cases, namely, in regard to the European Defense Community Treaty⁴⁵ and the above-mentioned Agreement between The Netherlands and Indonesia on

⁴² See, on this matter, the Report of the Commission, p. 13, and for the opinion of the dissenting minority, p. 21. Cf. also, Memo of Reply, p. 2, Proceedings I, 1955-1956, p. 401. On the distinction between intrinsic and extrinsic unconstitutionality in relation to Art. 63, see 47 A.J.I.L. 551 (1953). As to the *intrinsic* unconstitutionality of agreements, the reader should also consult Section V below.

⁴³ See also 47 A.J.I.L. 552 (1953).

⁴⁴ Report of the Commission, p. 15, in conjunction with the Expl. Memo, p. 5.

⁴⁵ See Art. 6 of the Act of Jan. 22, 1954, Staatsblad 1954, No. 25.

New Guinea.⁴⁶ In both cases the procedure was applied not at the proposal of the Government but on the suggestion of Parliament.

A second common feature in both cases was that no consensus existed as to whether the treaty really derogated from the Constitution, though the Government was ready to admit that *doubts* concerning the constitutionality of the treaty were justified. The clauses inserted in the Acts of approval are accordingly couched: "The approval takes place, *insofar as necessary*, with due observance of Article 63."⁴⁷ In the case of the E.D.C. Treaty, doubts existed as to the admissibility of compulsory military service to be performed in other than strictly national armies. As to the New Guinea Agreement, the doubts stemmed from Article 1 of the Constitution laying down that the territory of the Kingdom comprises The Netherlands, Surinam, the Netherlands Antilles and Netherlands New Guinea. According to some, this provision only contains a geographical description, while others regard it as of juridical relevance. Even if the latter view should be accepted as correct, Article 1 must be read in conjunction with Article 3(2), stipulating, *inter alia*, that the frontiers of the Kingdom may be modified by law. It has been argued that this provision allows the legislature to approve treaties providing for the cession of territories.⁴⁸

It is interesting to note that the procedure of Article 63 was not applied in respect of the European Common Market and Euratom treaties. Apparently, both the Crown and the States-General were of the opinion that the intrinsic constitutionality of these treaties, although they conferred large powers upon the organs to be established under them, was beyond a shadow of a doubt.

Application of Article 63 logically implies that the Government and the States-General are of the opinion that the agreement so approved is required by "the development of the international legal order." While this is easily understood as far as the E.D.C. was concerned, it is more difficult perhaps in regard to the New Guinea Agreement, that is to say, if one takes into account the attitude adopted by the Cabinet during the preceding negotiations. It is true that the Government denied the existence of any derogation from the Constitution in the latter Agreement, but the fact that the Government did not oppose the proposed reference to Article 63 implied that they considered that the Agreement was required by the development of the international legal order *insofar as any doubt was justified*.⁴⁹ This implication, however, the Government refused to admit.

⁴⁶ Art. 2 of the Act of Sept. 14, 1962, Staatsblad 1962, No. 363; see also note 12 above.

⁴⁷ Italics added.

⁴⁸ Art. 63 was not applied when, on Feb. 21, 1963, the Second Chamber approved the general Netherlands-German treaty of April 8, 1960, concerning the regulation of various matters, although this treaty provides for the retrocession to Germany of small portions of German territory assigned to The Netherlands in accordance with inter-Allied arrangements of 1949. The status of these areas was a provisional one, however. *Cf.* Trbl. 1960, No. 68.

⁴⁹ In this sense Professor Samkalden in his capacity as member of the First Chamber, Proceedings 1961-1962, pp. 605-609.

V. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL LAW

A. *Revision*

Articles 65 and 66 are concerned with the internal applicability of international agreements and their supremacy over municipal legislation. As laid down in Article 67(2), these rules also obtain with regard to decisions emanating from international organizations.⁵⁰ Articles 65 and 66 were rather drastically redrafted in 1956; the essence of this version can be summarized in three points:⁵¹

1. Their sequence was reversed; it was deemed more logical that the provisions on the internal force of agreements should precede that declaring their supremacy.

2. In order to avoid the inference that agreements entered into and duly published prior to the enactment of a statute on the publication of agreements, as prescribed in Article 66 (old version),⁵² would have no force of law if not published in accordance with that statute, the provisions on the publication of agreements and on the internal application of agreements were separated.

3. Acting on the assumption that the provisions concerning the internal force of agreements and their supremacy over municipal law as enacted in 1953 were restricted to self-executing agreements,⁵³ the drafters of the 1956 version expressed this more explicitly. Thus Article 65 now stipulates that provisions of agreements which, "according to their terms, can be binding upon anyone," shall have such binding force after being published. Article 66 has been similarly re-worded.

The Government did not accept the interesting proposal by the Commission that agreements containing self-executing provisions and not falling under one of the exceptions listed in Article 62 should always be subjected to *express* approval.⁵⁴ Nor could they, *a fortiori*, agree to a suggestion made by the minority of the Commission to the effect that no agreement—including those enumerated in Article 62(1)(b)-(d)—could become binding upon private persons unless approved by an Act. The minority asserted that the possibility of the executive making rules binding upon citizens without prior consent of the legislature, as implied in the system adopted in 1953, was in fact a retrogression to a situation which in the history of our legislation existed only before 1848.⁵⁵ The Govern-

⁵⁰ Art. 67 (2) was not altered in 1956.

⁵¹ See Report of the Commission and Expl. Memo on Arts. 65 and 66.

⁵² This is the law enacted on June 22, 1961, Staatsblad, No. 207; so far it has not entered into force. During the parliamentary debate on the 1956 Revision, opinions appeared to be divided on the question as to how the situation was under the 1953 text, see Proceedings II, pp. 804 and 807 (1955-1956).

⁵³ Cf. 47 A.J.I.L. 553 (1953).

⁵⁴ Cf. the Commission's Report, p. 14; a different opinion was voiced by a minority, *ibid.*, p. 21.

⁵⁵ *Ibid.*, p. 23. The proposal suggested by the said minority, consisting of authorities in the field of public law, might well be compared to some parts of the Bricker Amendment in the United States. A provision of similar tenor is contained in Art. 29 (6) of the Irish Constitution.

ment tried to rebut that argument, *inter alia*, by pointing to a Supreme Court judgment of December 10, 1954, in which it was ruled that, even prior to 1953, agreements not approved by Parliament could contain rules directly binding upon private individuals.⁵⁶

B. Application

As prior to the enactment of the Constitution of 1953, Dutch courts continued to apply international agreements of a self-executing character after that date.⁵⁷ In a broad sense it can be said that this application of treaties implies the acceptance of their capacity to modify or derogate from existing rules of municipal law, including acts of Parliament.⁵⁸ So the judicial application of the Hague Convention on Civil Procedure of July 17, 1905, in fact amounts to a derogation from legislative rules, such as those exacting security for costs from foreigners and similar provisions.⁵⁹ But, as was said above, this is no novelty as compared with earlier case law.⁶⁰

In view of the restriction of the "supremacy clause" laid down in Article 66 (new version) to treaties "which according to their terms can be binding on anyone," great significance must be attached to a Supreme Court decision of June 1, 1956, in *Institut national des appellations d'origine des vins et eaux de vie v. J. Mettes*,⁶¹ in which a rather limited meaning was given to this term. This was an action for damages brought by a French association of vinegrowers against a Netherlands subject,

⁵⁶ Proceedings II, 1955-1956, pp. 801 and 803; the judgment has been reported in 4 *Nederlands Tijdschrift voor Internationaal Recht* (Netherlands Int. Law Rev.) 85 (1957).

⁵⁷ Cf., *inter alia*, cases reported in 5 *Netherlands Int. Law Rev.* 210 (1958) (Warsaw Convention on Air Transport); *ibid.* 394 (Treaty on Social Insurance); 4 *ibid.* 211 (1957) (Revised Convention of Mannheim concerning Navigation on the Rhine); 8 *ibid.* 289 (1961) (conflict between Hague Convention with regard to Divorce and Judicial Separation and Geneva Convention concerning the Status of Refugees); *ibid.* 190 (Bretton Woods Agreement).

⁵⁸ Special attention should be drawn to divergent judicial decisions concerned with the relation of the Geneva Convention on Road Traffic of Sept. 19, 1949, which became effective for The Netherlands on Oct. 19, 1952, to prior traffic legislation, including the Road Traffic Act. The true purport of this Convention gave rise to controversies. Some courts deemed that certain provisions of penal law were abrogated by the Convention in respect of persons entitled to its benefits. Others held that the Convention did not contain provisions of a self-executing nature and could not, therefore, be applied as a law. Some courts simply denied the existence of a conflict between the Convention and the said legal provisions. See 1 *Netherlands Int. Law Rev.* 328, 329 (1953-1954); 2 *ibid.* 208, 209 (1955); 4 *ibid.* 87 (1957); 8 *ibid.* 383 (1961).

⁵⁹ See cases reported in 2 *ibid.* 296 (1955); 3 *ibid.* 187 (1956); 5 *ibid.* 392 (1958); 6 *ibid.* 194 (1959); 8 *ibid.* 194 (1961) (this case also related to the Netherlands-American Treaty of Friendship of 1956).

⁶⁰ See, on this earlier case law, Erades and Gould, *The Relation between International Law and Municipal Law in the Netherlands and in the United States* 307-326 (1961).

⁶¹ 6 *Netherlands Int. Law Rev.* 399 (1959). A different view was adhered to by Advocate General Langemeyer (as he then was), who gave a brilliant description of the concept of a self-executing agreement provision. *Ibid.* 402 *et seq.*

Mettes, who has sold bottles labeled "Cognac Vieux," the content of which was not French cognac. The action was mainly based on Article 11 of the French-Netherlands Commercial Treaty of May 28, 1935, agreed to be provisionally operative between the two contracting states. In this article each of the high contracting states undertook to protect products from the territory of the other party against unfair competition, especially by "maintaining or taking" prohibitive measures against the use of wrong indications as to the geographical origin of such products. This article was so worded that it could easily be applied by the courts in conjunction with legal provisions already in force. Contrary to the course followed by the Supreme Court in decisions prior to the 1953 revision in regard to comparable treaty provisions, it refused to recognize the self-executing nature of the relevant provisions of the above-mentioned treaty.

The Court held that these provisions, besides imposing the obligation upon the contracting states to prohibit and to prevent certain acts, did not state at the same time that an obligation for everyone to abstain from such acts would exist after Article 11 entered into force. This judgment has rightly been criticized by authoritative writers for unnecessarily restricting the direct application of treaties and thus impliedly limiting the courts' constitutional capacity and duty to review statutes.⁶²

Interesting case law concerning the direct applicability of agreements was occasioned by the E.E.C. Treaty, specifically its Articles 85 and 86 prohibiting certain restrictive trading agreements and concerted practices.⁶³ The general trend of the judgments so far delivered in The Netherlands was that, in the absence of implementation rules to be issued by the organs of the Community under Article 87 of the Treaty,⁶⁴ these articles could not be regarded as self-executing.⁶⁵

On the other hand, recognition of the self-executing character of Article 177 of the said Treaty is implied in the decisions of Netherlands courts which have suspended their proceedings with a view to obtaining a prejudicial ruling by the Court of the European Communities on the interpretation of the Treaty in accordance with that article.⁶⁶ For there does

⁶² See Erades, *Netherlands Int. Law Rev.*, *loc. cit.* 404, and Veegens in his note appended to the judgment in *Nederlandse Jurisprudentie* 1958, No. 424.

⁶³ For an English translation of the Treaty, see Campbell and Thompson, *Common Market Law, Text and Commentaries* 206 (1962).

⁶⁴ Meanwhile, a first set of implementation rules was issued, namely Regulation No. 17, Feb. 6, 1962 (5 *Official Gazette of the European Communities* 204 (1962)), as amended (see *ibid.* 1655, 2751, 2918); *cf.* also Campbell and Thompson, *op. cit.* 447.

⁶⁵ See cases reported in 6 *Netherlands Int. Law Rev.* 405 (1959); 9 *ibid.* 196 (1962). See also, President of the Hague District Court, Nov. 24, 1961, *Nederlandse Jurisprudentie* 1962, No. 57; Court of Appeal, Arnhem, *ibid.* 117; Court of Appeal, Amsterdam, as quashed by the Supreme Court Jan. 13, 1961, *Nederlandse Jurisprudentie* 1962, No. 245.

⁶⁶ See decisions reported in 9 *Netherlands Int. Law Rev.* 198 (1962) (Robert Bosch GmbH et al. v. De Geus and Uitdenbogerd; see in the same case the judgment of the European Court of April 6, 1962, 57 *A.J.I.L.* 129 (1963)). The Court of Appeal at Amsterdam, in its decision, referred to in the preceding note, denied that Art. 177 should be construed as covering *summary* proceedings as well.

not exist any Netherlands Act enjoining the courts to do so. It may be remarked in passing that the judgments to be rendered by the latter court under Article 177 are most likely to affect the rulings of the Netherlands courts on the direct applicability of international agreements, at least of those comparable to the E.E.C. Treaty. A case in point is the judgment of February 5, 1963, in *N. V. van Gend & Loos v. Netherlands Tax Administration*.⁶⁷ Here the European Court decided that Article 12 of the E.E.C. Treaty, prohibiting the introduction of new, or the increase of existing, customs duties, may be invoked by private individuals in the courts of the member states without any implementing legislation being necessary.

Decisions by which courts have refused to apply statutes because of their being in conflict with *earlier* treaties are rare. An example is provided by a decision of the Rotterdam Court of First Instance, of June 24, 1955, in *N.V. tot voortzetting van de Koninklijke Hollandsche Lloyd v. Dampskibsselskabet Torm A.S.* Here Article 742 of the Commercial Code (enacted in 1927) concerning the suspension of prescription of actions for damages arising from a collision at sea was held inapplicable because of its incompatibility with the Brussels Convention of 1910 for the Unification of Certain Rules of Law with respect to Collisions at Sea. This decision was quashed by the Court of Appeal at The Hague, as confirmed by the Supreme Court in its judgment of April 11, 1958. The former held that the relevant provision of the Convention, in which the states had reserved a certain latitude of action, was not self-executing so that it could not be applied by the courts, whereas the Supreme Court construed the Convention in such a manner that it was not in conflict with Article 742.⁶⁸

Many interesting questions have come up for decision under the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 (entered into force for The Netherlands on August 31, 1954).⁶⁹ Although the rights defined in the Convention are, in principle, also enunciated in the Netherlands Constitution, its practical value, as far as The Netherlands is concerned, lies precisely in the fact that statutes (as distinct from lower legislation) cannot be reviewed as to their conformity with the Constitution, whereas such review was made possible in 1953 in respect to their conformity with treaties.⁷⁰ Fundamental questions can now be raised in the courts, for which the latter had no competence before 1953. Recent case law has

⁶⁷ Case 26/62; digested below, p. 194. See also note on this case by Biesenfeld and Buxbaum, below, p. 152.

⁶⁸ For the various decisions, see 2 *Netherlands Int. Law Rev.* 425 (1955); 6 *ibid.* 87 (1959); 7 *ibid.* 167 (1960).

⁶⁹ For the text of the Convention and its additional Protocol, see 1 *Yearbook of the European Convention on Human Rights* 4 (1955-1956-1957); the Convention is also reprinted in 45 *A.J.I.L. Supp.* 24 (1951); for 1963 Protocols, see below, p. 331. For a critical analysis of the Dutch case law, see Van Emde Boas in 1962 *European Yearbook* (to be published).

⁷⁰ Cf. also Röling, under Supreme Court, April 18, 1961, *Nederlandse Jurisprudentie* 1961, No. 273.

corroborated the view that the provisions of the said Convention defining various human rights and the restrictions which may be lawfully placed upon their exercise are self-executing. This is impliedly recognized in those decisions where Netherlands legislation was reviewed even where no conflict was deemed to exist.⁷¹ In its decision of February 24, 1960, in *X v. Inspector of Taxes*, the Supreme Court denied self-executory force to Article 13 of the Convention, laying down that everyone whose rights set forth therein are violated shall have an effective remedy before a national authority.⁷² The Court rightly pointed out that the courts could not derive from this provision more powers than assigned to them under existing legislation.⁷³ Article 13, being of a different nature than the articles defining human rights proper (Arts. 2-12), this verdict cannot be said to be in contradiction with the general trend referred to in the preceding paragraph.

An important question came up for decision before the Court of Appeal of Arnhem. Article 184 of the Netherlands Constitution contains a provision the essence of which is that public manifestations of religion outside buildings and enclosed places (which in fact means Roman Catholic processions) are not allowed except where this was permitted prior to the enactment of the 1848 Constitution. This provision was implemented by an Act of 1853. In a case against a Roman Catholic priest prosecuted for having conducted a procession outside the confines laid down by the Constitution, the said court held that Article 184 was not compatible with Article 9 of the Convention containing rules regarding freedom of thought, conscience and religion.⁷⁴ The judgment turned on the question whether Article 184, maintaining a situation which might have been legitimate in 1848, could still be regarded as a limitation "necessary in a democratic society for the protection of public order" as declared permissible in the second paragraph of Article 9 of the Convention. This question—the impact of which might well be compared to the issues at stake in *Oyama v. State of California* and *Fujii v. State of California*⁷⁵—was negatively answered by the Court of Appeal. Its decision was quashed by the Supreme Court.⁷⁶ Although the latter's reasoning is far from

⁷¹ Cf. decisions of the Supreme Court of April 18, 1960, 8 Netherlands Int. Law Rev. 286 (1961) (General Old Age Pensions Act, entered into force on Jan. 1, 1957); April 18, 1961, 9 *ibid.* 315 (1962) (Shop Hours Act, 1951); May 5, 1959, 8 *ibid.* 73 (1961) (Act on the sale of Alcoholic Beverages of 1931); in none of these cases was a conflict between the Convention and the relevant legislation deemed to be present. In his decision of June 15, 1961, 9 *ibid.* 321 (1962), the President of the Court of Rotterdam, though expressly leaving open the question whether Art. 4 of the Convention was self-executing, held that there was no conflict between that provision and a Decree on Labor Relations. ⁷² 8 *ibid.* 285 (1961).

⁷³ See, however, Böling's remark in his note to the judgment, *Nederlandse Jurisprudentie* 1960, No. 483.

⁷⁴ March 8, 1961, 9 Netherlands Int. Law Rev. 317 (1962).

⁷⁵ Cf. U. S. Supreme Court, 332 U. S. 623; and 44 A.J.I.L. 590 (1950); 46 *ibid.* 559 (1952).

⁷⁶ Jan. 19, 1962, 9 Netherlands Int. Law Rev. 317 (1962); the judgment is diversely appraised, see Erades, *ibid.* 322.

crystal clear, it appears that this court in fact subjected the constitutional provision to a review, but construed the second paragraph of Article 9 of the Convention as leaving a broad latitude to states in enacting measures deemed necessary for the protection of public order.

In this writer's previous article the remark was made that practice must show whether the courts will extend the new rule contained in the present Article 66 of the Constitution to unwritten international law *per analogiam*.⁷⁷ Decisions on this question did occur. So the Supreme Court had to express itself incidentally on the question whether it had authority to pass judgment on the conformity of Netherlands prize legislation enacted in 1940-1942 with generally accepted notions of the law of nations concerning prize law. This was *The Nyugat* case.⁷⁸ The Court held that it had no competence to review the relevant legislation. From the fact that in 1956 the supremacy of international law was only recognized with respect to international agreements of a self-executing nature, the Court argued *a contrario* that this was not the case as regards unwritten international law. It should be observed, however, that this *a contrario* argument is not a strong one if one takes into account that, as far as the present author is aware, during the parliamentary debates on the 1953 and 1956 revisions, no statements were made which might be construed as ruling out the priority of rules of customary international law, if susceptible of being applied by the courts, over municipal law. This decision may have been influenced by the fact that the plaintiff corporation had pleaded the argument that Article 66 (new) embodied a broad principle which could be applied to rules of customary international law *as well as to agreements of a non-self-executing nature*. In this broad sense the argument seems to be unfounded.

So far the Netherlands courts have not often been confronted with decisions of international organizations and the internal binding force of such decisions as regulated by Article 67(2) of the Constitution. One judgment has been reported in which one of the parties relied on the self-executing character of the "Code de Libéralisation," a regulation unanimously adopted by the O.E.E.C.⁷⁹ The case law on Articles 85 and 86 of the E.E.C. Treaty, commented upon above, implies that regulations issued

⁷⁷ 47 A.J.I.L. 557 (1958).

⁷⁸ *Swiss Corporation S.A. Maritime et Commerciale v. The Netherlands*, March 6, 1959, 10 *Netherlands Int. Law Rev.* 82 (1963) (an appeal for "revision" from the decision of the Supreme Court of Jan. 13, 1956, 3 *ibid.* 397 (1956)); cf. also, as being of a similar tenor as the 1959 decision, the Court of Appeal of The Hague, June 24, 1959, 8 *ibid.* 294 (1961), dealing with a possible conflict between legislation on alien enemy property and customary international law.

⁷⁹ *President of the Hague District Court*, June 12, 1958, 6 *ibid.* 195 (1959) (*Hurwits v. State of the Netherlands*). Though admitting its self-executing character, the President construed the "Code" as being of no avail to Hurwits. In his decision the President referred to Art. 66 instead of Art. 67(2) of the Constitution. The Code of Liberalization was adopted under Art. 13a of the O.E.E.C. Treaty. Decisions made thereunder are often assimilated to international agreements; see Freymond in 11 *Schweizerisches Jahrbuch für internationales Recht* 70 (1954), and Elkin, 4 *European Yearbook* 125 (1958).

by the organs of E.E.C. under Article 87 of the Treaty are likely to be considered self-executing by the Netherlands courts.

VI. CONCLUSIONS

The survey of the period 1953-1963 shows no extension of constitutional parliamentary control over the use of military force insofar as it is allowed within the framework of modern international law.

As to the treaty-making power, more constitutional leeway was given to the Executive in the matter of secret agreements. In practice its power was also broadened by the sanctioning of two procedures: (1) the provisional application of agreements; (2) the conclusion of agreements for a term of one year (Article 62(1)(c)), with a proviso for their tacit renewal. On the other hand, no use was made of Article 62(1)(a) to widen the powers of the Executive by statute. Neither were the exceptional powers granted under Article 62(2) and (3) often invoked.

The extensive use of the tacit approval procedure as envisaged in Article 61(3) bears evidence to a growing confidence on the part of Parliament. Proposals tending to enlarge parliamentary control by excluding the possibility of tacit approval in certain events and to prevent agreements having internal force of law except after parliamentary approval were defeated. The same holds true for the efforts to put the correct application of Article 62 under judicial review.

Although the procedure provided by Article 63 for treaties derogating from the Constitution was not often applied, not even in regard to the E.E.C. and Euratom treaties, constitutional provisions were sometimes submitted to judicial review, specifically as far as concerned their conformity with the European Convention on Human Rights. In this respect the Supreme Court proved itself more protective of the Constitution than the Court of Appeal at Arnhem. Nor are there any decisions in which a conflict between that Convention and regulations of a lower statute was deemed to exist.

Great importance must be attached to the Supreme Court's decision in *Institut national des appellations d'origine v. J. Mettes*, in which a narrow construction was given to the concept of a self-executing agreement. By this ruling the power given to the courts to deny validity to laws not in conformity with previous or subsequent treaties was impliedly limited. Albeit unintentionally, this tendency might have been facilitated by the explicit restriction of the scope of Articles 65 and 66 of the Constitution to self-executing agreements as formulated in the 1956 Constitution. This general inclination to protect municipal law against "erosion" from outside also underlies the Supreme Court's ruling in the *Nyugat* case where it refused to review domestic legislation on its conformity with unwritten international law.

So far, judicial decisions refusing to apply statutes by virtue of their incompatibility with earlier treaties have been rare and, insofar as the Supreme Court is concerned, non-existent.

• Especially when viewed in the light of these restrictive tendencies, it must be concluded that The Netherlands is still a "nation," although the present author firmly believes that his country would not have lost that character had the provisions of Articles 65 and 66 been more liberally applied. These tendencies are, for that matter, counteracted by the attitude of the Court of the European Communities in that specific field. This attitude may have a great impact on the further development of case law and jurisprudence in The Netherlands. As far as the development of international law within the sphere of municipal law is concerned, these Communities may prove to be pace-makers as much as (Western) politicians believe them to be peace-makers.

ANNEX

Article 58. The King shall have the supreme direction of foreign relations.

He shall promote the development of the international legal order.

Article 59. The King shall not declare the Kingdom to be at war with another Power except with the previous consent of the States-General. This consent shall not be required when as a result of an actual state of war consultation with the States-General has appeared to be impossible.

The States-General shall discuss and decide on these matters in united assembly.

The King shall not declare a war between the Kingdom and another Power to be terminated except with the previous consent of the States-General.

Article 60. Agreements with other Powers and with organizations based on international law shall be concluded by or by authority of the King. If required by such agreements they shall be ratified by the King.

The agreements shall be communicated to the States-General as soon as possible; they shall not be ratified and they shall not enter into force until they have received the approval of the States-General.

The Courts shall not be competent to judge the constitutionality of agreements.

Article 61. Approval shall be given either expressly or tacitly.

Express approval shall be given by an act.

Tacit approval shall be regarded as having been given, unless, within thirty days after a submission pertaining thereto of an agreement to both Chambers of the States-General, the wish is expressed by or in the name of one of the Chambers or by at least one fifth of the constitutional membership of one of the Chambers that the agreement should be subjected to express approval.

The period referred to in the previous paragraph shall be suspended for the time of adjournment of the States-General.

Article 62. Except in the case referred to in Article 63, approval shall not be required:

a) if the agreement is one with respect to which this has been laid down by law;

b) if the agreement is exclusively concerned with the implementation of an approved agreement, in so far as the Act of Approval did not otherwise stipulate;

c) if the agreement does not impose any considerable pecuniary obligation on the Kingdom and if it has been concluded for a period not exceeding one year;

d) if in exceptional cases of a cogent nature it would definitely conflict with the interests of the Kingdom that the agreement shall not enter into force until approval has been given.

An agreement within the terms of (d) shall as yet be submitted as soon as possible to the States-General for approval. In this case Article 61 shall apply. If approval of the agreement is withheld, the agreement shall be terminated as quickly as legally possible.

Unless it would manifestly conflict with the interests of the Kingdom, the agreement shall not be entered into except subject to the reservation that it shall be terminated in case of approval being withheld.

Article 63. If the development of the international legal order requires this, the contents of an agreement may deviate from certain provisions of the Constitution. In any such case approval can only be given expressly. The Chambers of the States-General can adopt a Bill pertaining thereto only by a two-thirds majority of the votes cast.

Article 64. The provisions of the four preceding Articles shall apply, *mutatis mutandis*, to adherence to and denunciation of agreements.

Article 65. Provisions of agreements which, according to their terms, can be binding on anyone shall have such binding force after having been published.

Rules with regard to the publication of agreements shall be laid down in the law.

Article 66. Legislation in force within the Kingdom shall not apply if this application would be incompatible with provisions of agreements which are binding upon anyone and which have been entered into either before or after the enactment of such legislation.

Article 67. With due observance, if necessary, of Article 63, legislative, administrative, and judicial powers may be conferred on organizations based on international law by, or in virtue of, an agreement.

With regard to decisions made by organizations based on international law Articles 65 and 66 shall similarly apply.

EDITORIAL COMMENT

THE RECOGNITION OF *DE FACTO* GOVERNMENTS: IS THERE A BASIS FOR INTER-AMERICAN COLLECTIVE ACTION?

On October 3, 1963, the Delegations of Venezuela and of Costa Rica to the Council of the Organization of American States presented a draft resolution to the Council, reciting the article of the Charter establishing the effective exercise of representative democracy as one of the fundamental principles of the Organization,¹ and calling for a Meeting of Consultation under Article 39 of the Charter to consider what attitude the governments of the member states should take with respect to regimes arising from a *coup d'état* against a government duly elected in the actual exercise of representative democracy.

In addition to the provisions of the Charter, the draft resolution cited the Declaration of Santiago of 1959,² emphasizing that peace among the American republics was only possible insofar as human rights and representative democracy were respected, and the Declaration accompanying the Charter of Punta del Este pledging the parties to the Alliance for Progress to "democratic institutions through application of the principle of self-determination by the people."³

But what could be done about it? What legal basis was there for collective action? The Foreign Minister of Venezuela denounced the overthrow of constitutionally elected governments in the strongest terms as an attack upon the Organization itself, its principles and its objectives. But the case clearly did not come under the Rio Treaty of Reciprocal Assistance, and there were no sanctions available for violations of the principles of the Organization, however forcefully they were declared in the Charter. The old established rule was that each government decided for itself whether to recognize a new *de facto* government, and each followed its own policy without any obligation to consult with others. Only once had collective action been proposed, and that was in time of war, when the Emergency Advisory Committee of Montevideo, in the presence of subversive activities of the Axis Powers, recommended that before recognizing a new government established by force the American governments should consult together to determine whether it was complying with inter-American commitments for the defense of the Continent.

What could be the reaction of the United States in the matter? We had always pretended, somewhat naïvely, that we had been consistent in our

¹ Charter of the Organization of American States, Art. 5. 46 A.J.I.L. Supp. 43, 45 (1962).

² Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, Aug. 12-18, 1959. Final Act, p. 4; 56 A.J.I.L. 537 (1961).

³ Eighth Meeting of Consultation of Ministers of Foreign Affairs, Punta del Este, Uruguay, Jan. 22-31, 1962. Final Act; 56 A.J.I.L. 601 (1962).

attitude from the time when Jefferson, as Secretary of State, was confronted with the outstanding *coup d'état* in modern history: "It accords with our principles," said Jefferson, "to acknowledge any government to be rightful which is formed by the will of the nation, substantially declared."⁴ There were other statesmen at the time who did not see in the excesses of the leaders of the French Revolution "the will of the nation, substantially declared." But the policy proclaimed by Jefferson prevailed, and *de facto* governments were recognized as *de jure*, no matter how they came into power, when they appeared to be sufficiently established to stay in power, and the fact that they did stay in power was taken as evidence of the will of the people. After all, it was argued, could any one suggest a better way of determining the will of the people without obvious intervention in the domestic affairs of the state?

After a time a new condition was added to the so-called rule of stability. What if a change in government should come about because of opposition by the revolutionary forces to some misconduct on the part of the government in power, to some element of its foreign policy, to some treaty it had entered into, believed to be contrary to the best interests of the state? Maybe it might be wise for third states before recognizing the new *de facto* government to inquire if it was prepared to observe the treaties and other agreements entered into by the preceding government and in general to live up to the obligations of international law. This, of course, might be taken for granted, but there was no harm in getting a statement to that effect, especially where foreign policies played a part in the *coup d'état*.

At times the opportunity was almost too great to be resisted—"I will recognize you, if you will do this and that." But the condition was clearly wrong when the promise extracted from the *de facto* government went beyond the obligations of international law. The record contains quite a few such cases, although they were not part of established policy. When, therefore, Secretary Stimson declared in 1931 that the practice of the United States in the matter of recognition had been "substantially uniform" since the days of Secretary Jefferson in 1792, we must take his statement as reflecting the judgment, good or bad, of the persons taking the decision as to the "will of the people" in the hundreds of cases presented to them. In the case of the recognition of the Government of Cuba within six days of the assumption of power by the forces of Fidel Castro, the time was too short to determine stability and the circumstances too obscure to accept as valid his declared intention to observe the principles of international law. As for the "will of the people," the assumption could be no more than a guess at the future.

Of what importance is the problem that an attempt should be made to find a basis for collective action? The Charter proclaims that the solidarity of the American States requires that their political organization be on the basis of the effective exercise of representative democracy.

⁴1 Moore, *Digest of International Law* 120 (1906).

Why? Obviously because a succession of governments, resulting not from constitutional procedures but from resort to force, creates uncertainty in respect to the responsibility of the government for acts of state. According to traditional practice, a *de facto* government which satisfies the two conditions of stability and willingness to observe international obligations is thereupon recognized as *de jure*, and its acts, as representative of the state, bind succeeding governments. In the case of Fidel Castro in 1959 it was of course not the stability of the new government, but the hope that lay in his promises of political and social reform that led to his recognition by the United States in so short a time. But in the two recent cases of *coups d'état* in the Dominican Republic and in Honduras, would it be fair to the people of either state to sign a treaty with either government that would be binding upon succeeding governments? It might be that opposition from the adherents of the preceding *de jure* government is being silenced by the armed forces of the *coup d'état*; in any case, the mere fact that violence has been resorted to is of itself a restraint upon freedom of speech and of the press.

On this last point it should be noted that respect for, and the protection of, fundamental human rights has become a legal obligation in inter-American relations. Apart from the proclamation of the fundamental rights of the individual that figures among the principles of the Charter, the American Declaration of the Rights and Duties of Man, followed by the Resolution taken at Caracas in 1954, the draft convention of the Council of Jurists of 1959, the draft of a Court of Human Rights, and the creation of a separate Commission on Human Rights, all indicate that any suppression of freedom of speech, of the press, and of assembly would be a grave offense against inter-American law. In consequence, before recognizing a new *de facto* government, it should be of first importance to inquire into the extent that it respects fundamental human rights and plans to restore the law of the Constitution, which it alleges to have been so grossly violated as to justify the *coup d'état*.

Thus limited, the *coup d'état* of the armed forces might be serving as an alternative to parliamentary government, by which a majority can overthrow a government before the expiration of its term. But inasmuch as the armed forces would have to demonstrate that they were acting on behalf of the people whose rights were being violated by a government which they could not put out of office, it would be incumbent upon them to make provision for the restoration of constitutional government as soon as possible. All this suggests, of course, that the particular country may not be as ready for constitutional government as its constitution anticipates; but the argument on that point has been decided by the Charter.

What procedure, then, appears to be available as a basis for collective action? The opposition of the United States to a draft convention submitted to the Council of Jurists in 1950 was on the ground that the tests proposed, effective authority based on acquiescence of the people, and willingness to observe international obligations, were not juridical in nature, and the same position was taken when an attempt was made to

prescribe the observance of fundamental rights as a condition of recognition. But while recognizing the practical difficulty of securing an agreement to act collectively in the application of the traditional rules of recognition, a first step could well be taken on the basis of the established tradition distinguishing between *de facto* and *de jure* recognition. It was agreed at Bogotá in 1948 that continuity of diplomatic relations was desirable; but this was not understood to mean more than that relations should be maintained with whatever new government might come into power on the basis and to the extent of its actual control of the administrative services of the country. This form of qualified or provisional recognition, described as *de facto* recognition, makes it possible to continue normal business relations without going so far as to determine whether the new government is entitled to speak in the name of the state in its international relations.

On the basis of this distinction between *de facto* and *de jure* recognition, the Council of the Organization, upon receiving notice that a change in government has taken place in one of its member states, would call a special meeting to discuss the situation. The representative appointed by the new government would be admitted to membership on the Council with the usual protocolary procedure. But in receiving him the Chairman of the Council would be careful to call to his attention that, until *de jure* recognition is given by a two-thirds majority of the members, the vote of his country would not be counted in cases calling for a meeting of Ministers of Foreign Affairs, whether under the Rio Treaty of Reciprocal Assistance or under Article 39 of the Charter, nor would the signature or ratification of a pending treaty be accepted as valid.

At the same time the Council would appoint an *ad hoc* committee of its members to observe the situation and to report on it in respect to the apparent existence of the traditional conditions of recognition: control of the administrative machinery of the state, the general acquiescence of the people, and the ability and willingness of the new government to discharge the obligations of the state.

A futile gesture? No, more than that. The prestige of the Council is great, and the maintenance by it of principles that have now become woven into the fabric of inter-American law would operate as a restraint upon the resort to force by army commanders when there is no real call on the part of the people for the overthrow of governments that are alleged to be grossly unfaithful to constitutional obligations. Obviously a collective decision in respect to the conditions of recognition would be more effective. It would avoid the embarrassing situation of a government maintaining legal relations with some and not with others of the same regional group. But for the moment a collective decision appears to be an impractical proposal. If, however, Jefferson's policy, said to be the traditional policy, is to be followed, this second step remains to be taken.

Query, would it not be more consistent with the traditional policy alleged to have been followed since Jefferson's day, if there were a longer delay between *de facto* and *de jure* recognition? *De facto* recognition

must, of course, be given forthwith; the new government is in power, and that is that; we must deal with it in normal administrative matters or there can be no relations with the country. But *de jure* recognition might well be delayed until there is time to observe the situation and determine whether it is just to the people of the country that the new government should have the right to create obligations for which the state and succeeding governments will be responsible.⁵

C. G. FENWICK

⁵ On December 3, 1963, the representative of Venezuela, supported by the representative of Costa Rica, introduced a motion before the Council of the Organization requesting a Meeting of Consultation of Foreign Ministers under the Rio Treaty of Reciprocal Assistance, basing the request upon the discovery of Cuban arms hidden along the coast of Venezuela and other acts of aggression in connection with the elections held on December 1. The Council approved the resolution and, acting provisionally as Organ of Consultation, authorized the chairman to appoint the proposed Committee of Investigation. The resolution made no reference to the earlier resolution of October 3 calling for a Meeting of Consultation to determine what measures should be taken to meet the problem presented by the new *de facto* governments.

NOTES AND COMMENTS

INSTITUT DE DROIT INTERNATIONAL: THE BRUSSELS SESSION, 1963

The *Institut de Droit International*, founded in 1873, held its fifty-first session from September 3 to 12, 1963, in Brussels. Under the presidency of Senator Henri Rolin, a distinguished group of sixty-seven Members and Associates participated, including the Honorary President, Judge Charles De Visser, Honorary Members Professor Hans Kelsen and Lord McNair, seven judges of the International Court of Justice and seven members of the International Law Commission.¹

At the Brussels session, six Associates were elected titular Members: C. Wilfred Jenks (U.K.), Paul Ruegger (Switzerland), Herbert W. Briggs, (U. S.), Alf Ross (Denmark), Johannes Offerhaus (Netherlands), Louis Cavaré (France). Under the regulations revised at the previous session the statutory number of Associates was increased from sixty to seventy-two, with provision for the gradual addition of Associates from countries having no members in the *Institut*. There were ten regular vacancies, for which thirteen candidates were presented; and the Bureau named five candidates for an additional three places open only to persons from states not having members in the *Institut*. Of eighteen candidates, the following thirteen were elected Associates: Milan Bartoš (Yugoslavia), Elliot Evans Cheatham (U. S.), Nihat Erim (Turkey), Isaac Forster (Senegal), Otto Kahn-Freund (U.K.), Manfred Lachs (Poland), Adolfo Miaja de la Muela (Spain), Sir Louis Mbanefo (Nigeria), Fritz Münch (Germany), Paul Reuter (France), B. V. A. Röling (Netherlands), Shabtai Rosenne (Israel), Angelo Piero Sereni (Italy). As a result of the election, thirty-seven of over one hundred states of the world have nationals in the *Institut*. Since election to the *Institut* is based upon the individual qualifications of members as international lawyers rather than upon principles of political or geographical representation, a broader representation is likely to be relatively slow; and, in fact, the representative principle overlooks the availability of highly qualified international lawyers in states which are considered "over-represented" in the *Institut*.

In thirteen working sessions the *Institut* considered four substantive topics: *The Legal Regime of Outer Space* (2nd Commission, C. Wilfred Jenks, *Rapporteur*); *Conflicts of Laws in the Law of the Air* (27th Commission, Alexandre Makarov, *Rapporteur*); *Modification and Termination of Collective Treaties* (11th Commission, Emile Giraud, *Rapporteur*); and *The Equality of Application of the Rules of the Law of War to Parties to an Armed Conflict* (4th Commission, J. P. A. François *Rapporteur*). Perhaps the outstanding achievement of the Brussels session was the unanimous adoption of the *Resolution concerning the Legal Regime*

¹ Of the United States group, Professor Hans Kelsen, Judge Philip C. Jessup, Professor Quincy Wright, and the writer were present.

of *Outer Space*, an English translation of which is appended. The *Rapporteur*, C. Wilfred Jenks, Assistant Director General of the International Labor Organization, had prepared two noteworthy reports which summarized the factual and scientific data, a knowledge of which would permit an imaginative approach to a law of outer space, and focused attention on the essential problems.² The question which arose early in the debates and on which opinion was divided—whether a law of outer space had an incipient existence or whether the proposals under discussion were entirely *de lege ferenda*—was wisely brushed aside. Attention was concentrated on certain principles the inclusion of which “in a generally accepted treaty or declaration governing the legal regime of outer space” the *Institut* would welcome. Basing itself on resolutions on international co-operation in the peaceful uses of outer space adopted unanimously by the United Nations General Assembly on December 20, 1961, Resolution 1721 (XVI), and December 14, 1962, Resolution 1802 (XVII), the *Institut* resolution emphasizes the necessity for a legal regime governing the participation of states in activities in outer space. While no attempt will be made here to analyze the provisions adopted by the *Institut*, it should be noted that principles of international law are envisaged as governing the regulation of space activities by the states of the earth; outer space and celestial bodies are not subject to appropriation; they are open to exploration and use only for peaceful purposes; and the principle of absolute or objective liability for injuries, irrespective of fault, was unanimously endorsed with reference to the responsibility of the state under whose authority space objects are launched. Because of the constant evolution of space development and utilization, the *Institut* decided to reconstitute its 2nd Commission on a continuing basis.

By unanimously adopting another resolution on *Conflicts of Laws in the Law of the Air*, the *Institut* made a further stride forward. Starting from the principle “that general rules of conflicts of laws should be applied in this special field insofar as the nature of aviation itself and the nature of aerial transport do not require the creation of special rules of conflict,” the resolution states that, subject to the provisions which follow, “the national law of the aircraft shall be that of the State in whose registers the aircraft has been entered.” The governing law in relation to rights *in rem*, hiring, chartering, contracts of employment or transport, aerial collisions, salvage and legal liability is then set forth. An English translation of the resolution is appended.

On the two other topics before it, the *Institut* ran into difficulties which prevented the adoption of substantive resolutions. The draft resolutions presented by the *Rapporteur* of the 11th Commission on *Modification and Termination of Collective Treaties* were ill-adapted for action by the *Institut*, in part because the *Rapporteur* was strongly opposed to the view of the majority of his own Commission, according to which:

² C. Wilfred Jenks, *Le Droit International des Espaces Célestes*, Rapport préliminaire, 260 pp. (1963); Rapport définitif, 114 pp. (1963). Printed by the *Institut*, the reports will be published in the 1963 *Annuaire de l'Institut de Droit International*.

In the absence of a right of denunciation expressly or impliedly provided for by the convention, a State cannot release itself from the obligations of a collective convention except with the consent of the other Parties or as a result of grounds (*causes*) provided for by general international law.

The view favored by the *Rapporteur* and one other member of his Commission provided that, in "the absence of a clause of denunciation, a collective convention can be denounced unless a contrary will of the Parties is established," although the denunciation would take effect only after a reasonable delay.

At its Fifteenth Session in 1963, the International Law Commission had debated with great care the question of a unilateral right of termination of treaties and had provisionally adopted the following compromise on one aspect of the problem:

ARTICLE 39

Treaties containing no provisions regarding their termination

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal. In the latter case a party may denounce or withdraw from the treaty upon giving to the other parties or to the depositary not less than twelve months notice to that effect.³

Even this limited right of unilateral denunciation is qualified by other provisions of the International Law Commission's 1963 draft. In fact, Article 39 is only one provision in an intricate network of articles dealing with the termination of treaties. Since the proposals before the *Institut* reflected little knowledge of the International Law Commission's work, the *Institut* decided to adjourn its discussion of the topic pending study of the observations of governments on the provisional draft of the International Law Commission.

The reasons why no detailed substantive resolution was adopted by the *Institut* on the proposals of its 4th Commission on *The Equality of Application of the Rules of the Law of War to Parties to an Armed Conflict* were of a different order: there was no possibility of reconciling strongly opposed positions on the desirability of introducing the principle of discrimination between belligerents in the application of the laws of war to aggressors. There were even objections of a terminological nature: Was it appropriate to refer to the "laws of war" or belligerent "rights" in a United Nations action against an aggressor? Was not the word "aggressor" old-fashioned in view of the subtle nuances of United Nations actions in cases of the threat or use of force? The proposals of the 4th

³ U. N. Doc. A/CN.4/163, July 17, 1963. Report of the International Law Commission covering the Work of Its Fifteenth Session, May 6-July 12, 1963, U. N. General Assembly, 18th Sess., Official Records, Supp. No. 9 (A/5509); below, p. 241.

Commission, recognizing that inequality of treatment of the parties *durante bello* was justified where the U. N. Security Council had determined an aggressor, assimilated a recommendation of the General Assembly under the Uniting for Peace Resolution (Res. 377 (V), November 3, 1950) to such a decision. While stipulating that both parties must observe humanitarian rules of warfare, the proposal denied the aggressor so determined the use of nuclear arms, recourse to measures of economic warfare such as blockade, the "right" to "confiscate" merchant vessels at sea, to sow submarine mines, to intercept contraband or to engage in naval bombardment of towns and ports. Decisions of the aggressor's prize courts were to be null and void and the aggressor was to be subject to full financial reparation, even if he had observed international law in the conduct of hostilities.

It is perhaps not surprising that the *Institut* contented itself with the following resolution, adopted September 11, 1963:

The Institut de Droit International,

Considering, on the one hand, that obligations whose purpose is to restrain the horrors of war and which are imposed on belligerents for humanitarian reasons by Conventions in force, by the general principles of law and by the rules of customary law, are always in force for the parties in all categories of armed conflict and apply equally to actions undertaken by the United Nations;

Being of the opinion, on the other hand, subject to the above reservation, that there cannot be complete equality in the application of the rules of the law of war when the competent organ of the United Nations has determined that one of the belligerents has resorted to armed force in violation of the rules of the law of nations consecrated by the Charter of the United Nations;

Invites the 4th Commission to continue its study of the question to what extent and under what conditions this inequality must be accepted.⁴

The second paragraph of this resolution was regarded by some as a recognition of the principles, set forth in Article 2, paragraphs 4 and 5, of the United Nations Charter, that all Members shall refrain in their international relations from the threat of use of force and, while assisting the United Nations, "shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action." Other participants in the frequently heated debates in the *Institut* thought that the 4th Commission should limit itself to inequality of belligerents in the conduct of hostilities, without considering the rights and obligations of third parties in such United Nations actions. The recognition of any inequality between belligerents was opposed by a number of members.

Conscious of the responsibilities it has exercised over a period of ninety years in promoting codification and progressive development of international law, the *Institut* has not hesitated to undertake tasks the resolution of which is beset with difficulties. The Brussels session of the *Institut*

⁴ English translation by Herbert W. Briggs.

was confronted with several extremely complex current juridical problems. Under the urbane and masterful leadership of President Henri Rolin, it conducted its proceedings on the highest level of professional skill and with an invigorating appreciation that it was dealing with an international law which was evolving to meet present and future needs.

At the final meeting, Judge Bohdan Winiarski, President of the International Court of Justice, was elected President of the *Institut* and the next session will be held in Warsaw in 1965.

HERBERT W. BRIGGS

ANNEX

RESOLUTIONS ADOPTED BY THE INSTITUT DE DROIT INTERNATIONAL,
BRUSSELS, SEPTEMBER, 1963

I.—Resolution concerning the Legal Regime of Outer Space¹

Adopted unanimously on September 11, 1963

The Institute of International Law,

Considering that the legal regime of the exploration and utilisation of outer space and celestial bodies should be inspired by a spirit of universality;

Acknowledging the common interest of mankind in the exclusive dedication of outer space to peaceful purposes in accordance with the Charter of the United Nations;

Noting the resolutions on international cooperation in the peaceful uses of outer space adopted unanimously by the General Assembly of the United Nations on 20 December 1961 and 14 December 1962 and the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water signed at Moscow on 6 August 1963;

Having regard to the urgency of international regulation of the matter in view of the rapidity of scientific and technical progress;

Recognizes the validity (*valeur*) of the following principles and would welcome their inclusion in a generally accepted treaty or declaration governing the legal regime of outer space:

1. Outer space and the celestial bodies are not subject to any kind of appropriation, they are free for exploration and use by all States for exclusively peaceful purposes in conformity with the following provisions.

2. No space object shall be launched otherwise than under the authority of a State. Each State shall ensure that the utilisation of every space object launched under its authority complies with the applicable international rules.

3. Every launching of a space object shall be registered by the State under the authority of which the launching took place with the United Nations or a special body to be created; the registration shall be effected promptly and with particulars to be agreed.

4. Every space object shall bear marks of identification showing its

¹ English translation by G. Wilfred Jenks. The French text is authentic.

origin and use call signals making it possible to identify the State under the authority of which the launching took place.

5. Every space object launched in accordance with the foregoing provisions shall remain subject to the jurisdiction of the State under the authority of which it was launched.

6. The State establishing a space installation is required to ensure good order and safety at the installation. Subject to any subsequent international agreement, persons using, and occurrences at, any space installation are subject to the jurisdiction of the State having established the installation.

7. All States shall ensure that space telecommunications comply with the regulations of the International Telecommunication Union.

8. States shall take appropriate measures for:

- a) mutual assistance among astronauts;
- b) mutual assistance among States on behalf of astronauts in need of assistance;
- c) prompt repatriation of astronauts after any emergency landing or rescue.

9. Appropriate measures shall be agreed upon for the return to the State under the authority of which the launching took place of space objects the launching of which has been officially notified, which bear identification marks showing their origin, and which on return to earth have come into the possession of another State.

10. The State under the authority of which the launching of a space object takes place shall ensure that every such object is, so far as practicable, fitted with a suitable device permitting the launcher to recover it on the termination of its useful life or if recovery is not feasible as a minimum to silence radio transmission therefrom and eliminate its other effects.

11. The State under the authority of which the launching of a space object takes place shall ensure that appropriate precautions are taken against biological, radiological or chemical contamination of or from outer space or celestial bodies. International cooperation in respect of the matter should be arranged.

12. Scientific or technological experiments or tests in space which may involve a risk of modifying the natural environment of the earth, of any of the celestial bodies or in space in a manner liable to be prejudicial to the future of scientific investigation and experiment, the well-being of human life, or the interests of another State, necessarily affect directly the interests of the whole international community. The provisions of this resolution should be supplemented by appropriate international arrangements to forestall such risk.

13. The State under the authority of which the launching of a space object has taken place shall be liable, irrespective of fault, for any injury, including loss of life, or damage that may result. Modalities of application of this principle may be determined by special convention. Any

limitation of the amount of the reparation due shall be determined in the same manner.

14. In all matters not provided for in the preceding paragraphs, States are bound by general international law, including the principles of the Charter of the United Nations.

15. The principles set forth in this resolution apply to space activities undertaken by States acting individually or collectively or by international organizations.

References to States in the preceding paragraphs are to be construed as including a reference to international organizations, it being understood that the States members of an international organization remain responsible for the space activities of the organization.

II. Resolution concerning Conflicts of Laws in the Law of the Air¹

Adopted unanimously on September 11, 1963

The Institute of International Law

Recalling its earlier resolutions relating to the problems of the Law of the Air, in particular its resolution on the legal status of aircraft (Madrid, Session of 1911), the resolution on international aerial navigation (Lausanne, Session of 1927) and the Draft Convention governing criminal jurisdiction in case of crimes committed on board private aircraft (Luxembourg, Session of 1937);

Restricting the object of the present resolution to conflicts of laws in matters of private air law, without ignoring the importance of settling questions of jurisdiction;

Postponing consideration of any problems that may be raised by the case of aircraft that might have an international character;

Considering that, insofar as the ideal of adopting a uniform law of the air cannot be attained, it is opportune to adopt uniform laws of conflict in this matter;

Taking as a starting point the principle that general rules of conflicts of laws should be applied in this special field insofar as the nature of aviation itself and the nature of aerial transport do not require the creation of special rules of conflict;

Adopts the following resolution:

Article 1

For the purpose of the following sections, the national law of the aircraft shall be that of the State in whose registers the aircraft has been entered.

Save as regards the rights *in rem* covered by Article 2, the national law of an aircraft chartered without crew by a firm that is the subject of some other State than that of the State of registration of the aircraft, shall for

¹ English translation by B. A. Wortley. The French text is authentic.

the period of the charter be that of the State of which the charterer is a subject.

Article 2

Rights *in rem* and private law claims in respect of aircraft shall be governed by the law of its nationality.

Claimants entitled to sums due for salvage of the aircraft and to special expenses essential for maintaining the aircraft may claim preferences in the order given there by the law of the State where salvage or preservation operations have been concluded.

No change of nationality shall affect rights already acquired.

Article 3

The hiring and affreightment of aircraft shall be regulated by the law to which the parties have indicated it to be their intention to submit.

If parties have not indicated their intention in this matter, any chartering and affreightment shall be subject to the national law of the aircraft.

Article 4

The contract of employment of the crew of an aircraft shall be governed by the law to which the parties have indicated their intention to be bound.

If the parties have not indicated their intention in the matter, the contract shall be governed by the national law of the aircraft.

Article 5

The contract of transport relating to passengers and goods shall be governed by the law to which the parties have shown an intention to submit.

When the parties have not settled the law applicable, the contract of transport relating to passengers and goods shall be governed by the law of the principal place of business of the transporter.

Article 6

In case of an aerial collision which occurs in an area subject to State sovereignty, the law of the place where the collision has occurred shall be applied.

In the case of an aerial collision which has occurred in a place not subject to State sovereignty, any national law common to both aircraft shall be applicable. Failing any such law, common to both parties, the law of the court seized shall be applied.

Article 7

Obligations arising between aircraft from any assistance and salvage in areas subject to a single State sovereignty shall be governed by the law of the place where such salvage has been rendered.

When assistance or salvage has been effected in an area not subject to State sovereignty, the national law of the aircraft concerned shall be applied.

Article 8

Damage caused by aircraft to third parties on the ground shall be governed by the law of the place where it is caused.

If damage has been caused in an area not subject to State sovereignty, the law of the court seized shall be applied.

Article 9

If a legal act has taken place or a fact giving rise to legal liability has occurred on board an aircraft in flight or in some area not subject to State sovereignty or whenever it is not possible to determine the territory over which the flight has taken place at the time of the act or fact giving rise to legal liability, such act or fact shall be governed by the national law of the aircraft instead of by the law of the place where such act or fact has occurred.

If an act covered by the preceding paragraphs relates to goods situated on board an aircraft, it shall be governed by the national law of the aircraft instead of by the law of the situation of the goods.

THE INTER-AMERICAN INSTITUTE FOR INTERNATIONAL LEGAL STUDIES

A half-century has gone by since the American Institute of International Law was formally organized on October 12, 1912, with Dr. James Brown Scott, then Secretary of the Carnegie Endowment for International Peace, as President. What fundamental changes in the world of nations have taken place since then! Dr. Scott was an idealist. The great cause of international peace could best be served, he believed, by promoting the procedure of arbitration for the settlement of international disputes. But arbitration could only be effective if there were specific rules of international law to be applied when controversies arose. Hence efforts to promote arbitration must be accompanied by corresponding efforts to promote the codification of international law. This latter task was being carried out in Europe by the Institute of International Law. Why could not corresponding measures be taken to promote the codification of international law by an Institute organized in America in line with the resolutions of the International Conferences of American States?

In point of organization the Institute consisted of founding members, statesmen of high rank, one from each country, who had served or were serving in the Foreign Offices of their respective countries, and affiliated members consisting of the national societies of international law in the different American Republics. These societies were to propose, among their nationals, qualified persons, five in number, to be elected as titular members of the Institute. In addition, there were ex-officio members, the

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executive secretaries of the national societies, and corresponding members of non-American nationality.¹

The record of the Institute fully justified Dr. Scott's anticipations, although the outbreak of war in Europe delayed its activities. On January 6, 1916, the Institute adopted a Declaration of the Rights and Duties of Nations paralleling the fundamental rights and duties of citizens under municipal law. If the document seems today somewhat primitive in the light of the Covenant of the League of Nations, lacking any proposals for international organization and collective security, it set a standard that was followed in 1933 by the Conference at Montevideo in adopting the Convention on the Rights and Duties of States.

The most important contribution of the Institute, however, was the series of projects prepared in advance of the meeting of the International Commission of Jurists at Rio de Janeiro in 1927, which in 1928 took shape as the series of seven conventions adopted at the International Conference held at Havana in 1928.² Strangely enough, the establishment of new governmental agencies of codification had the effect of overlooking the scientific work of the Institute; and with the death of Dr. Scott the Institute remained no more than a nominal organization. As late as 1956 Professor Ulloa urged the revival of the Institute, and the subject came up for discussion at a meeting in Buenos Aires in 1960, at which a preparatory committee was appointed to submit possible plans for its reactivation.

Reviving its former interest in the development of international law in the Western Hemisphere, the Carnegie Endowment for International Peace, in co-operation with the Department of Legal Affairs of the Pan American Union, convoked a Round-table Meeting of scholars to meet at San José, Costa Rica, on March 31, 1963, to discuss the situation and make suggestions and recommendations. Clearly the conditions of 1963 called for a new and wider outlook. The possible revival of the old Institute of International Law proved to be only an incident in the agenda of the meeting, which listed the implications of the Alliance for Progress upon international law in the Western Hemisphere, the legal aspects of the inter-American collective security system, the availability of the sources of international law, the institutional framework best suited to promote co-operation among scholars for the study of current international law problems, and the status of teaching and research in international law in the Western Hemisphere—topics one and all outside the range of the Institute as it functioned a generation earlier.

Participants in the Round-table Meeting included Professors Vittone of the University of Salvador, Buenos Aires, Albuquerque Mello of the University of Brazil, Albónico Valenzuela of the University of Chile, Urrutia

¹ For background of the founding of the Institute, see *Institut Américain de Droit International, Historique—Notes—Opinions* (Washington, D. C.: American Institute of International Law, 1916); and editorials by J. B. Scott in 6 A.J.I.L. 949-957 (1912), 7 *ibid.* 163-167 (1913), 9 *ibid.* 923-924 (1915), 10 *ibid.* 121-126 (1916).

² For texts of codification projects prepared by the Institute, see special supplements to this JOURNAL, Vols. 20, 22, and 23 (1926, 1928 and 1929).

of the University of Bogotá, Sotela of the University of Costa Rica, García-Bauer of San Carlos University, Guatemala, Ferrero of the Catholic University of Lima, Jiménez de Aréchaga of the University of Montevideo, Mármol of Catholic University "Andrés Bello" of Caracas, Milton Katz of Harvard Law School, Covey T. Oliver of the University of Pennsylvania, and Morin of the University of Montreal. In addition, a number of observers were invited, including F. V. García-Amador and Charles G. Fenwick of the Department of Legal Affairs of the Pan American Union, Oscar Schachter of the Office of Legal Affairs of the Secretariat of the United Nations, John B. Howard of the Ford Foundation, and Francis Deak, Executive Associate of the Carnegie Endowment for International Peace, through whose initiative the Endowment had sponsored the Round-table Meeting.

A number of background or discussion papers were prepared in advance of the meeting, notably one by Professor Jiménez de Aréchaga on the advantages of reactivating the Institute, and another by Dr. Carlos García Bauer on the same item (4) of the agenda; and one by Professor Milton Katz on item 1 of the agenda dealing with the implications of the Alliance for Progress.

Clearly indicative of the new and wider outlook upon international law of the participants in the Round Table was the primary attention given to the status of the teaching of international law in the Western Hemisphere and the materials available for adequate scientific work in the field. It appeared to be taken for granted that the work of the codification of international law that had formed the chief objective of the Institute was now adequately provided for by agencies of the Organization of American States. Codification had hitherto been confined to the political relations of governments. That was still its field; but new interests had come forward, problems of economic relations, social and cultural co-operation, private international law, the interaction of regional arrangements; and these were not matters for codification by government agencies, but matters for study and research by scholars laying the ground for subsequent action by governments.

To this end teachers were needed, and it was the duty of the professors now in charge to train a new generation with an understanding of international law in these new and wider fields; and to this end materials must be made available, the primary sources of international law, treaties, decisions of the International Court of Justice and other international tribunals, the interpretation of international law by national courts and by Foreign Offices. This was an essential condition, if the problems of vital and dynamic international law were to be met.

The discussion next turned to the kind of "institutional framework" that would best promote the co-operation of Western Hemisphere scholars in the study of the problems presented by the new international law, its basic principles and procedures. Agreement was general that the dormant American Institute of International Law should not be revived, but that a new Institute, established on a broader basis, would be preferable, to be

named "The Inter-American Institute for International Legal Studies." Again and again emphasis was put upon the problem of teaching, upon the study and research of scholars free from government direction and influence, whose work would in time influence governments and make possible more effective work on the part of official codification agencies.

It is of interest to note that, although the members of the Round Table were all Western Hemisphere experts dealing with problems primarily regional, the meeting was repeatedly warned and fully aware of the danger of weakening universal international law by adopting a rigid conception of regional law. Professor Katz in particular emphasized the implications for one another of the regional arrangements within the Americas, in Europe and in the Atlantic Area; and he raised the question whether the codification of international law should not be pursued in a world-wide framework or at least a framework co-extensive with the free world. To the same effect were the considerations prepared by Professor Morin of Montreal, who called attention to the changing scope of international law as understood by the new states of Asia and of Africa, and the necessity of co-ordinating the economic developments within the various regional groups.

Coming to the problem of creating the institutional framework believed to be desirable to promote the objectives agreed upon, an Organizing Committee of seven members was appointed, chosen from among the participants in the meeting. The resolution creating the Committee called upon it to draft the Statutes of the Institute, determine its membership, and work out a practical program of activity, specifying research in international law, the training of teachers, and the distribution of the legal material essential for the improvement of teaching. To assist the Organizing Committee in the performance of its tasks, Dr. Francisco V. García-Amador, Director of the Department of Legal Affairs of the General Secretariat, Organization of American States, was appointed Executive Secretary of the Committee, and made responsible, in his individual capacity, for ensuring the co-ordination and maintaining of the correspondence required for the execution of the provisions of the resolution.

The Round Table closed with a resolution (I) which sums up accurately the points of view expressed by the members:

WHEREAS

- 1) The discussions have made clear that the scope and quality of courses and research in international law in the Western Hemisphere, as well as the materials used for study and the teaching methods, do not meet the needs of today's world;
- 2) Moreover, the lack of an adequate financial incentive for practicing the teaching profession and for specializing in international affairs creates a serious obstacle to the development of international law; and
- 3) There is not sufficient mutual understanding among international legal scholars and those who practice international law as to basic principles, methods, objectives, research, subjects, and the problems and solutions that this body of law presents,

for which reason it will be necessary to create an institution to fill this gap,

The Roundtable of Western Hemisphere International Law Scholars

AGREES UPON THE FOLLOWING DECLARATIONS AND RECOMMENDATIONS:

- I. That it is a fundamental and unavoidable duty of Western Hemisphere institutions and professors of international law to improve the quality of professional training in the fields of international public law, including the rules of law that govern international organizations, international private law, and related matters, fields in which the specialized lawyer finds himself under an obligation to act or to give a reasonable opinion with respect to the complex situations of the world of today.
- II. That the basic program of studies of international law should emphasize new factors and conditions such as:
 - 1) The evolution that is taking place in certain fundamental concepts, such as sovereignty, exclusive competence, self-determination, non-intervention, and self-defense;
 - 2) The fundamental importance in the study of international law of economic and social development and of the aspirations for giving the peoples higher standards of living, as well as the leadership that international law should exercise in the establishment of the bases and structures needed to achieve this goal;
 - 3) The problem created by new international conditions, particularly with respect to the means of warfare and the nuclear peril;
 - 4) The impact of scientific and technological advances on international life;
 - 5) The changes in the structure of international society, caused by the birth of a great number of sovereign states and mainly by the creation and development of a variety of international organizations and forms of cooperation;
 - 6) The development achieved in the international protection of human rights and the growing importance of the individual in international law;
 - 7) The recognized importance of economic and political integration movements;
 - 8) The development of international law and its codification as a principal result of the activity of the United Nations International Law Commission and the activities of international organizations in the shaping of this law;
- III. That international legal studies in the Western Hemisphere should be arranged and planned in accordance with a program revised and improved so that they will be enriched and invigorated by the work being done in other regional areas and in other disciplines, particularly as regards methodology and approaches to teaching and research;
- IV. That the opportunities for the enrichment of teaching and research made possible by the United Nations and the Organization of American States should be utilized to the maximum;

- V. That, in order to improve the quality of teaching and research, national associations or institutions of international law should be established and these organizations should be encouraged to cooperate with bar groups and study centers in other regions;
- VI. That postgraduate specialization in international legal studies is essential for training competent new teachers, professors, practicing lawyers, and officials who are urgently needed in ever-increasing numbers to ensure the effectiveness of the rule of law in the Western Hemisphere and throughout the world;
- VII. That in order to achieve an immediate and effective improvement of the teaching of international law, it is necessary to take the following measures:
 - 1) To review carefully the content of the courses that are offered at present, with a view to ensuring that they are adequate to the needs of today, for which purpose each professor should avail himself of consultation and discussion with his colleagues of other nationalities;
 - 2) The basic course in public international law should not be displaced or diverted from its true nature by subjects that, even though they may affect it, are part of other legal disciplines; and
 - 3) Since there is a serious lack of Spanish and Portuguese versions of essential documents in this branch of the law, special attention should be given to the preparation of an inexpensive compilation of such material for the use of the student in connection with his course or courses in the international field, subject to the teaching methods in use. The preparation of such material could be done through a joint effort of the institution mentioned in the third paragraph of the preamble of this document and of other organizations.
- VIII. That the governments and universities of the Americas unite in an effort to encourage the training of professors and specialists in international law by providing opportunities and adequate financial conditions.³

C. G. FENWICK

THE NEW CHARTER OF THE ORGANIZATION OF CENTRAL AMERICAN STATES

At the Sixth Extraordinary Meeting of Ministers of Foreign Affairs of Central America, held at the invitation of the Government of Panama in Panama City from December 10 to 12, 1962, a new Charter of the Organization of Central American States (ODECA)¹ was adopted. It is to replace, when in force, the Charter of October 14, 1951,² and differs

³ Final Report, Roundtable of Western Hemisphere Scholars, San José, Costa Rica (New York: Carnegie Endowment for International Peace, 1963).

Following the meeting at San José, the Institute was incorporated under the laws of the District of Columbia on Oct. 22, 1963. By-laws are under preparation.

¹ These are the initials of the name of the Organization in Spanish: Organización de Estados Centroamericanos. For a translation of the New Charter, see annex below.

² For the Spanish and English texts of the Charter of 1951, see *Inter-American Juridical Yearbook 1950-1951*, pp. 396-399, 400-403, and 122 U. N. Treaty Series 3

substantially from the latter. Within the confines of this note, these differences can only be pointed out briefly.

I. *Purposes.* The goals mentioned in the Preambles to both Charters are largely the same, but are more concisely defined in the new document. On the other hand, the main aim of the Organization is different now: the "integration of Central America." The five Central American States are said to be an "economic-political community which aspires" to such integration instead of merely being the separate parts of a former unit pursuing the various objectives outlined individually in Article 1 of the Charter of 1951. The achievements under the latter apparently were considered significant enough to warrant integration as an attainable goal.

II. *Organs.* The stated closer ties between the Central American States find their expression also in a more elaborate organization with a number of new organs.

(1) *The Meeting of Heads of State* is still the "supreme organ" of the Organization (Articles 3 (1) of 1962 and 5 of 1951). However, it is likely to have more regular sessions than the old "Occasional Meeting of Presidents" (Article 4 of 1951).

(2) *The Conference of Ministers of Foreign Affairs* (formerly the Meeting of Ministers of Foreign Affairs) similarly is still the "principal organ" of ODECA (Articles 3 (2) of 1962 and 6 of 1951). However, it is now to have regular annual sessions instead of biennial ones (Articles 4 of 1962 and 7 of 1951), which no longer rotate among member states (Article 8 of 1951). The Conference may still create such subsidiary organs as may be necessary (Articles 6 of 1962 and 15 of 1951), but the new Charter no longer specifies that these subsidiary organs report to the (Meeting of) Ministers of Foreign Affairs, as did Article 16 of 1951. The newly created Executive Council is now the means of communication between the organs and member states (Article 9 (3) of 1962), but not necessarily between subsidiary and main organs. Only the Economic, the Cultural and Educational, and the Defense Councils are expressly required to report to the Conference of Ministers of Foreign Affairs through the Executive Council (Articles 18, 20 and 22 of 1962).

(3) *The Executive Council* was not provided for by the Charter of 1951. It is the "permanent organ" of the Organization, has its seat in San Salvador (Article 3 (3) of 1962), and is to meet in regular session once a week (Article 8 of 1962). It consists of the Ministers of Foreign Affairs of the member states or their representatives (Article 7 of 1962), and is responsible for the direction and co-ordination of the policy of the Organization for the achievement of its goals (Article 9 (1) of 1962). As such,

ff. (1952). For the background and activities of ODECA see, *inter alia*, Fenwick, 46 A.J.I.L. 509 ff. (1952) and 49 *ibid.* 563 f. (1955); Hudson, *The Permanent Court of International Justice* 42 ff. (1943); Padelford, 11 *International Organization* 41 ff. (1957); Karnes, *The Failure of Union, Central America, 1824-1960* (1961); Herrarte, *La Unión de Centroamérica, Tragedia y Esperanza* (1955); Moses in Wilgus (ed.), *The Caribbean: The Central American Area* 243 ff. (1961); *Inter-American Juridical Yearbook 1952-1954*, pp. 84 ff.; *ibid.* 1955-1957, pp. 117 ff.

it is likely to equal, if not to exceed, in importance the Conference of Ministers of Foreign Affairs.

The new Charter does not state the voting conditions in the Council. It is therefore not clear whether its decisions on substantive questions, like those of the Conference of Ministers of Foreign Affairs, require a unanimous vote (Article 5 (2) of 1962).

In view of this new permanent organ, the new Charter no longer provides for the Special Council foreseen in Article 17 of 1951. The latter is composed of the diplomatic representatives of the member states at the place of meeting of the Ministers of Foreign Affairs and of a delegate of the host member, and it assists this member in the preparation of the meeting.

(4) The new Charter deals in one paragraph (Article 9 (2)) with the *Secretary* and his staff to be appointed by the Executive Council. The old text, on the contrary, contained elaborate provisions on the Central American Bureau and the Secretary General (Articles 11 and 12 of 1951). It is likely that both will continue under the new Charter, although they are not mentioned as such therein, except for a reference in Article 28 to the "Bureau of the Organization" as the depository of the Charter and of the instruments of ratification.

(5) *The Legislative Council*, like the Executive Council, is new. It could mark the beginning of a Central American Parliament. The Charter does not state who will select the three members of Parliament from each of the member states. While in the Conference of Ministers of Foreign Affairs a unanimous vote is required on substantive questions (Article 5 (2) of 1962), in the Legislative Council a majority is sufficient (Article 13 of 1962), as is usually true of legislative bodies.

(6) *The Central American Court of Justice*, too, is a new organ of ODECA. It differs very much from its famous predecessor, created by the Washington Convention of December 20, 1907.³ It is composed of the "Presidents of the Judicial Powers" of the member states (Article 14 of 1962), which probably means the presidents of the respective Supreme Courts. The Court of 1907 consisted of five justices, one being appointed by each republic and selected from among the jurists who possessed the qualifications which the laws of each country prescribed for the exercise of high judicial office, and who enjoyed the highest consideration, both because of their moral character and their professional ability (Article 6 (1) of 1907). Provision was also made for the filling of vacancies by substitutes named at the same time and in the same manner as the regular justices and meeting the same requirements (Article 6 (2) of 1907). Five was expressly stipulated as the quorum (Article 6 (3) of 1907), which, in the absence of a provision to the contrary, must also be assumed for the new Court.

More important is the difference in the jurisdiction of the two courts.

³ For the text of the Convention, see 2 A.J.I.L. Supp. 213 ff. (1908); Herrarte, *Documentos de la Unión Centroamericana* 191 ff. (1957); Papers relating to the Foreign Relations of the United States, 1907, II, 697 ff. (1910).

The new Court is to have two functions which are not related to each other: (a) to decide legal disputes which member states submit to it, and (b) to prepare and give opinions on projects for the unification of Central American legislation (Article 15 of 1962). While it is not unusual for a court to give advisory opinions, an expert in Central American law need not necessarily be qualified to decide legal disputes between states and vice versa.

As far as the settlement of such disputes is concerned, the jurisdiction of the Court depends upon the consent of the parties (*conocer de los conflictos de orden jurídico que surjan entre los Estados Miembros y que estos convencionalmente le sometan*). By contrast, the parties to the 1907 Convention bound themselves to submit to the Court all controversies or questions which might arise among them, of whatever nature and no matter what their origin might be, in case the respective Departments of Foreign Affairs should not have been able to reach an understanding (Article 1 of 1907). The Court was also to take cognizance of questions which individuals of one Central American country may have raised against any of the other contracting governments, because of the violation of treaties and other cases of an international character, after national remedies had been exhausted or in case of denial of justice (Article 2 of 1907). Moreover, the Court had jurisdiction over cases arising between any of the contracting governments and individuals and submitted to it by common agreement (Article 3 of 1907 in the version of the Additional Protocol signed together with the main Convention).⁵ And finally, the Court could decide international questions which, by special agreement, any of the Central American governments and a foreign government might have determined to submit to it (Article 4 of 1907).⁶

These provisions of the 1907 Convention inspired a proposal to reconstruct the Charter of ODECA in terms of a "Basic Charter for the Central American Community." According to Article 28 of this draft Charter, the Court was to be composed of five magistrates; each member was to appoint one magistrate and one substitute. The jurisdiction of the Court was to comprise (Article 32): (a) differences between member

⁵ The term "convencionalmente" is, however, ambiguous.

⁶ Herrarte, *op. cit.* note 3 above, 196; U. S. Foreign Relations, *op. cit.* 701.

⁷ An article annexed to the Convention contained an "amplification" of the jurisdiction of the Court to include "conflicts which may arise between the Legislative, Executive and Judicial Powers, and when as a matter of fact the judicial decisions and resolutions of the National Congress are not respected." With the exception of Costa Rica, all parties to the Convention ratified this amplification. Hudson, *op. cit.* 45.

It will be recalled that a Convention for the Establishment of an International Central American Tribunal was signed at Washington on Feb. 7, 1923; see 2 Hudson, *International Legislation* 908 ff.; Herrarte, *op. cit.* note 3 above, 303 ff.; 3 Mendoza, *Tratados y Conveniones Internacionales Vigentes para Guatemala: Pactos Multilaterales Centroamericanos y Regionales* 7 ff. (1960). However, no tribunal was organized under the Convention, although it was ratified by Costa Rica, Guatemala, Honduras (which denounced it in 1953) and Nicaragua, and came into force in 1925. Hudson, *The Permanent Court*, *op. cit.* 68; Mendoza, *op. cit.* 7.

states on the interpretation and application of the Charter and treaties between member states, after all means of negotiation provided by such treaties had been exhausted; (b) other controversies between member states, of whatever nature or origin, when the parties could not reach an agreement through diplomatic channels; (c) controversies between one or more member states and a third state when submitted by mutual accord of the parties; (d) complaints by individuals of one of the member states against one or more governments of other member states for violation of treaties between member states or of human rights, but only after exhaustion of all the remedies of the defendant state or in case of denial of justice; and (e) consultations proposed by member states or citizens thereof.

A draft prepared at a meeting of high officials of the Central American States, which was held at the Central American Bureau in San Salvador from December 12 to 16, 1961, did not go that far. According to Article 23 of the draft Charter submitted by this "Technical Council," the Central American Court was to be a permanent tribunal with obligatory jurisdiction over member states, charged with resolving questions and controversies submitted by any of the states, or which might arise as a result of the application of the Charter or any agreement in force between them. It was also to have jurisdiction in any other case of any kind arising between the states themselves or between the states and any Central American person or persons and submitted by mutual consent.

However, at an informal meeting of the Ministers of Foreign Affairs of Central America held in San Salvador from November 15 to 17, 1962, it was merely decided to create a court composed of the Presidents of the Judicial Power of each state, which was to function: (a) as an organ of consultation in judicial matters and (b) as the Court of Arbitration provided for by the Central American Treaty of Economic Integration.⁷ In the 1962 Charter these two functions became the two specified in Article 15 referred to above.

(7) *The Economic Council* is now to be composed of the Ministers of Economy of the member states, while the old Council consists of delegates appointed by the governments (Articles 17 (1) of 1962 and 14 (2) of 1951). Moreover, all the organs of Central American economic integration form part of the new Council (Article 17 (2) of 1962).⁸

The functions of the old Council were those assigned to it by the Meeting of Ministers of Foreign Affairs (Article 14 (1) of 1951); those of the new Council consist in planning, co-ordinating and carrying out Central American economic integration (Article 17 (1) of 1962). Both Councils report annually on their activities, the former directly to the Meeting of Ministers of Foreign Affairs, the latter to the new Executive Council for

⁷ The text of this draft has been supplied by Lic. Marco Tulio Zeledon, Secretary General of ODECA.

⁸ On Central American economic integration, see Urquidí, *Free Trade and Economic Integration in Latin America* 90 ff. (1962); Keller, 5 *Journal of Inter-American Studies* 267 ff.; Rivero, 15 *Americas* 3 ff. (1963); Staley, 29 *The Southern Economic Journal* 88 ff. (1962).

the information of the Conference of Ministers of Foreign Affairs and on the basis of the reports of the different organs of Central American economic integration (Articles 14 (1) of 1951 and 18 of 1962). The 1951 Charter (Article 14 (2)) provided for a meeting of the Council at least once a year, but the new text is silent on this point.

(8) The *Cultural and Educational Council* (Articles 19-20 of 1962) was not provided for by the 1951 Charter, nor was (9) the *Defense Council* (Articles 21-22 of 1962). However, a Cultural and Educational Council, composed of the Ministers of Education and Culture of the five governments, was set up in 1955 by the Meeting of Ministers of Foreign Affairs, and there have been meetings of Ministers of Defense.⁹ Both Councils will continue to perform the functions which their names imply, and both are to report to the Conference of Ministers of Foreign Affairs through the Executive Council (Articles 20 and 22 of 1962).

(10) *Other Organs*. Under the old Charter, meetings of Ministers of other departments can be called by any government whenever necessary (Article 10 of 1951). According to the new Charter, such meetings may be proposed through the Executive Council (Article 23 of 1962). As mentioned above under (3), the creation of the Executive Council made it possible to dispense with the old Special Council.¹⁰

III. *General Provisions*. Despite the closer ties between the Central American States and the goal of complete integration mentioned above under I, the new Charter contains the same reservations as the old one concerning respect for the constitutional provisions of each member state, for their treaties and conventions in force and for the principle of non-interference with their internal regimes (Article 24 of 1962 and Articles 3 and 18 of 1951).

Unlike the old Charter, the new treaty authorizes each organ to adopt its own rules (Article 26 of 1962). It also specifies that the organs meet at the seat of the Organization unless they decide otherwise (Article 27 of 1962), but it does not state expressly where that seat is. It only says that the permanent organ of ODECA, the Executive Council, shall have its seat at San Salvador (Article 3 (3) of 1962), where the seat of the Central American Bureau is (Article 11 (3) of 1951), and that the seat of the subsidiary organs shall be designated in accordance with an equitable geographic distribution and the needs which determined their creation (Article 6 (2) of 1962).

The original of the new Charter and the instruments of ratification shall be deposited in the Bureau of the Organization instead of the Ministry of Foreign Affairs of El Salvador (Articles 28 of 1962 and 20 of 1951).

As far as the finances of ODECA are concerned, the Economic Council is to make the necessary studies, and a special protocol on the subject is to be drawn up and approved by the member states (Transitional Article 3 (1) of 1962 against Article 13 of 1951). Pending the entry

⁹ Moses, *loc. cit.* 247; Inter-American Juridical Yearbook 1955-1957, p. 117.

¹⁰ See also III, below, on the *ad hoc* Committee of Ambassadors on the accounts and assets of ODECA.

into force of the new plan and the availability of sufficient funds, the assessment quotas used in the United Nations shall apply (Transitional Article 3 (2) of 1962). An *ad hoc* Committee, consisting of the Ambassadors of member states to ODECA, is to receive the accounts of the General Secretariat and the assets of the Organization (Transitional Article 4 of 1962).

IV. *Position of Panama.* Both Charters provide for the adhesion of Panama and for her membership in the Organization (Transitional Articles 1 of 1962 and 1951). Pending such adhesion and membership, the new Charter permits Panama to join any subsidiary organ which has already been or may be established in the future (Transitional Article 2 of 1962).

At the same Sixth Meeting of Foreign Ministers a "Declaration of Panama"¹¹ was adopted in which the member states support the "just aspirations of Panama in her claims concerning her sovereignty and territorial integrity." In the same Declaration they undertake to support each other in solidarity in any claim one of them may have against non-member states with regard to rights concerning its sovereignty or territorial integrity.

In opening the meeting of Foreign Ministers and in welcoming his colleagues from Central America, Panama's Minister of Foreign Affairs explained on December 10, 1962, why Panama could not yet join the Organization.¹² He referred to the

problems and political situation based on particular international relations which we cannot alter or upset overnight. We have an economic structure strongly conditioned by our position as a place of international transit which we must maintain and strengthen and which requires careful consideration of all factors likely to affect it unfavorably. We have a relatively high level of production costs which requires us to go slowly in the adoption of measures which could increase unemployment rates or decrease the supply of labor or just returns on invested capital.

He further stressed strongly the

fact that the Isthmus of Panama is the link which unites South America with the rest of the American Continent: For reasons of the necessary continental solidarity and of the imperatives of our geographic position which impose upon us a destiny of union, we must not cause this link to break or deteriorate; on the contrary, we have to make it into an ever stronger tie of identification, attraction and interchange between all the Americas.

Nevertheless, he pointed out, there is ample room for collaboration with the Central American sister republics in the fields of international relations, economics, transportation, communications, education and health. He mentioned the tripartite Treaty of Preferential Treatment of 1961 between

¹¹ Acta Final de la Sexta Reunión Extraordinaria de Ministros de Relaciones Exteriores de Centro America, p. 11; text supplied by Dr. Galileo Solís, Minister of Foreign Affairs of Panama.

¹² Discurso pronunciado por S.E. el Dr. Galileo Solís, Ministro de Relaciones Exteriores de Panamá el 10 de diciembre de 1962; text supplied by Dr. Solís.

Panama, Costa Rica and Nicaragua, and invited the governments of El Salvador, Guatemala and Honduras to conclude the same treaties with Panama. He finished by quoting a note, dated August 29, 1961, and addressed to the Secretary General of ODECA, which defined the "sincere, frank and cordial position of Panama with regard to the plans for the economic and political integration of Central America," and which emphasized the centuries-old ties between, and traditions of, the five republics, which do not apply to Panama.

Membership of Panama in ODECA thus does not seem to be imminent. Similarly, it remains to be seen whether the optimism which led to the adoption of the new Charter of the Organization was justified. Its ratification does not proceed as speedily as that of the 1951 document, which came into force within less than three months.¹⁵

SALO ENGEL

ANNEX

CHARTER OF THE ORGANIZATION OF CENTRAL AMERICAN STATES

[*Translation*]

The Governments of Costa Rica, Nicaragua, Honduras, El Salvador and Guatemala,

WHEREAS:

It is necessary to provide the five States with a more effective instrument by establishing organs which assure their economic and social progress, eliminate the barriers which divide them, improve constantly the living conditions of their peoples, guarantee the stability and expansion of industry, and strengthen Central American solidarity,

THEREFORE:

The above mentioned Governments decide to replace the Charter signed on October 14, 1951, in San Salvador, Republic of El Salvador, by the following CHARTER OF THE ORGANIZATION OF CENTRAL AMERICAN STATES:

PURPOSES:

Article 1. Costa Rica, Nicaragua, Honduras, El Salvador and Guatemala are an economic-political community which aspires to the integration of Central America. For this purpose the Organization of Central American States (ODECA) has been established.

ORGANS:

Article 2. To achieve the purposes of the Organization of Central American States, the following Organs are established:

- a) The Meeting of Heads of State;
- b) The Conference of Ministers of Foreign Affairs;

¹⁵ On Jan. 9, 1952, and not, as generally assumed, on Dec. 14, 1951; see 122 U. N. Treaty Series 10 (1952). For the entry into force of the new Charter, see Art. 29 of 1962.

- c) The Executive Council;
- d) The Legislative Council;
- e) The Central American Court of Justice;
- f) The Central American Economic Council;
- g) The Cultural and Educational Council; and
- h) The Council for Central American Defense.

Article 3. The Meeting of Heads of State is the Supreme Organ of the Organization.

The Conference of Ministers of Foreign Affairs is the Principal Organ.

The Executive Council is the Permanent Organ of the Organization. Its seat shall be in the city of San Salvador.

PRINCIPAL ORGAN:

Article 4. The Conference of Ministers of Foreign Affairs shall meet ordinarily once each year, and extraordinarily whenever at least three of them deem it necessary.

Article 5. At the Conference of Ministers of Foreign Affairs each Member State shall have only one vote.

Decisions on substantive questions must be adopted unanimously. If there is doubt as to whether a decision is substantive or procedural, it shall be resolved by unanimous vote.

Article 6. The Conference of Ministers of Foreign Affairs may create the subsidiary organs which it considers appropriate for the study of the different problems.

The seat of the different subsidiary organs shall be designated in accordance with an equitable geographic distribution and with the needs that determined their creation.

EXECUTIVE COUNCIL:

Article 7. The Executive Council shall be composed of the Ministers of Foreign Affairs or their specially accredited representatives. It shall be the legal representative of the Organization.

Article 8. The Executive Council shall be presided over by one of its members. The Presidency shall rotate annually among the States Members of the Organization. The Council shall meet ordinarily once a week and extraordinarily when convoked by its President.

Article 9. The function of the Executive Council is to direct and co-ordinate the policy of the Organization for the fulfillment of its objectives.

For the proper functioning of the offices charged with executing administrative tasks, the Council shall designate a Secretary and the necessary personnel. For this purpose it shall adopt the respective Rules to determine their obligations.

The Council shall be the means of communication between the Organs and the Member States.

LEGISLATIVE COUNCIL:

Article 10. The Legislative Council is composed of three representatives from each of the Legislative Powers of the Member States.

This Council shall act as advisor and organ of consultation in legislative matters. Likewise, it shall study the possibilities of unifying the legislation of the Central American States.

Article 11. The Council shall establish the working Committees which it deems convenient, in accordance with its own Rules.

Article 12. The Legislative Council shall meet ordinarily once each year starting September 15, and extraordinarily whenever the Executive Council convokes it at the request of at least two Governments of Member States.

Article 13. For the adoption of the resolutions and recommendations of the Council, a favorable vote of the majority of its members shall be required.

CENTRAL AMERICAN COURT OF JUSTICE:

Article 14. The Central American Court of Justice is composed of the Presidents of the Judicial Powers of each of the Member States.

Article 15. The functions of the Central American Court of Justice are:

- a) To decide the conflicts of a legal nature which arise among the Member States and which the latter agree to submit to it;
- b) To prepare and render opinions on projects for the unification of Central American legislation, when so requested by the Conference of Ministers of Foreign Affairs or the Executive Council.

Article 16. The Central American Court of Justice shall meet whenever it deems it necessary or it is convoked by the Executive Council.

CENTRAL AMERICAN ECONOMIC COUNCIL:

Article 17. The Central American Economic Council is composed of the Ministers of Economy of each of the Member States and shall be charged with the planning, co-ordination and execution of the Central American economic integration.

All the organs of Central American economic integration shall form part of the Council.

Article 18. The Economic Council shall make annually a full report of its activities to the Executive Council, for the information of the Conference of Ministers of Foreign Affairs, based on the reports of the diverse organs connected with the Program of Central American Economic Integration.

CULTURAL AND EDUCATIONAL COUNCIL:

Article 19. The Cultural and Educational Council shall be composed of the Ministers of Education of the Member States or their representatives.

Article 20. The functions of the Cultural and Educational Council are:

- a) To promote educational, scientific and cultural interchange between the Member States;
- b) To undertake studies concerning the status of education, science and culture in the region;
- c) To co-ordinate the efforts to achieve the uniformity of the educational systems in Central America;

- d) To render a report of its activities to the Conference of Ministers of Foreign Affairs through the Executive Council of the Organization.

DEFENSE COUNCIL:

Article 21. The Defense Council is composed of the Ministers of Defense or of the heads of equivalent departments, corresponding to them in rank or functions in the respective Member States.

Article 22. The Defense Council shall act as Organ of Consultation in matters of regional defense and shall watch over the collective security of the Member States. It shall report on its activities to the Conference of Ministers of Foreign Affairs through the Executive Council.

GENERAL PROVISIONS:

Article 23. Any Member State may propose, through the Executive Council, a meeting of the Organs or of Ministers of other departments to deal with matters of Central American interest.

Article 24. The operation of the Organization shall not interfere with the internal regime of the States, and none of the provisions of the present Charter shall affect the respect for and fulfillment of the constitutional norms of each of them, nor may it be interpreted in such a way as to impair the rights and obligations of the Central American States as members of the United Nations and of the Organization of American States, nor the particular positions which any of them may have assumed through specific reservations in treaties or conventions in force.

Article 25. The present Charter shall be ratified by the Central American States in the shortest possible time in accordance with their respective constitutional procedures.

It shall be registered with the (General) Secretariat of the United Nations in compliance with Article 102 of its Charter.

Article 26. Each of the Organs originating in the present Charter shall prepare its own Rules.

Article 27. The Organs shall meet at the seat of the Organization unless they decide otherwise.

Article 28. The original of the present Charter shall be deposited in the Bureau of the Organization, which shall forward a true certified copy to the Ministers of Foreign Affairs of the Member States.

The instruments of ratification shall be deposited in the Bureau of the Organization, which shall notify the Chancelleries of the Member States of the deposit of each of said instruments.

Article 29. The present Charter shall enter into force the day on which the instruments of ratification of the five Member States are deposited.

Article 30. This Convention on the Organization of Central American States shall maintain the name of "Charter of San Salvador."

TRANSITIONAL PROVISIONS:

Article 1. The present Convention remains open to the Republic of Panama so that it may adhere at any time to this Charter and form part of the Organization of Central American States.

•

Article 2. Until the Republic of Panama adheres to this Charter and forms part of the Organization of Central American States, it may join any of the subsidiary organs already established or which may be established in the future, signing for this purpose the Protocol or Protocols which may be necessary.

Article 3. The financial resources for the functioning of the Organization shall be the object of a special protocol between the Member States, and for this purpose the Central American Economic Council is entrusted with carrying out the corresponding studies.

Until the plan for financing ODECA goes into effect in definitive form and the necessary funds for this purpose can be counted upon, the Member States shall continue to contribute to the budget of the Organization with quotas proportional to the coefficients established in the distribution of quotas of the United Nations.

In case said coefficients should be modified, the Executive Council shall adjust the quotas of the Member States in accordance with these modifications.

Article 4. Within thirty days after the date of the deposit of the last instrument of ratification of the present Charter, the Ambassadors of the Member States accredited to ODECA shall form an *ad hoc* Committee to receive by inventory the assets of the Organization, as well as the rendering of accounts by the General Secretariat.

Article 5. When the present Charter enters into force and the Executive Council is constituted, the latter shall elect its first President by drawing lots.

IN WITNESS WHEREOF:

The Ministers of Foreign Affairs of the Central American Republics sign this document in the city of Panama, Republic of Panama, on the twelfth day of December, Nineteen Hundred and Sixty-two,

For Costa Rica: DANIEL ODUBER QUIROS

For Nicaragua: ALFONSO ORTEGA URBINA

For Honduras: ROBERTO PERDOMO PAREDES

For El Salvador: HECTOR ESCOBAR SERRANO

For Guatemala: JESUS UNDA MURILLO

THE ATHENS CONFERENCE ON WORLD PEACE THROUGH LAW

For years experts have been keenly aware of the inadequacy of international law and international institutions to prevent the development of serious disputes and assure peaceful settlement of disputes which arise. However, lawyers in general are not trained in international law and therefore have not been fully aware of this inadequacy and its terrifying implications. In 1958, a few leaders in the American Bar Association, deeply impressed with the horrifying alternative to a world governed by the rule of law, and unhappy about lack of general lawyer participation in advancing the rule of law, took a series of steps which led to the First

World Conference on World Peace through Law held in Athens, June 30 to July 6, 1963. A distinguished committee chaired by Thomas E. Dewey examined the question of greater lawyer participation in the maintenance of the world rule of law. This led to the creation of a Special Committee of the American Bar Association on World Peace through Law, which for five years laid the foundations of the Athens Conference. It held regional United States conferences and followed these with four continental conferences held in Costa Rica, in Nigeria, in Japan, and in Italy. These conferences recommended a world conference and laid a rich foundation for it. The Special Committee also produced a Working Paper of over 200 pages in English, French, and Spanish, which presented a broad factual and analytical background for many of the subjects discussed at the First World Conference.

The broad purpose of the Athens Conference was to determine what lawyers the world over could do to substitute the rule of law for the rule of force in international relations. Leaders of the legal profession from 115 nations were invited as delegates and there were also many observers and special participants. This outstanding group included prime ministers, ambassadors, ministers of justice, chief justices and justices, law school deans and law professors, as well as practitioners. They represented extremely varied cultural, religious and geographic backgrounds, and many different legal systems. All attended in a personal capacity and not as government officials, and no inhibitions were put upon the free expression of what was considered the best way for lawyers to carry out Conference purposes. Although representatives from the Communist countries were invited and many of them accepted, at the last moment they failed to attend the Conference, with the exception of Yugoslavia. However, delegates from over 100 countries actually participated, and attachés from Communist embassies and legations in Greece attended some Conference sessions.

The Athens Conference opened with an impressive inaugural session attended by an estimated 1,800 persons. King Paul and Queen Frederika of Greece led a procession to the platform, followed by the Prince and Princess and the speakers at the meeting. After an invocation by the Archbishop of Athens, the Co-Chairman of the Conference, Mr. Dimitrios Zepos, introduced the following speakers: the undersigned; Mr. Spyros Pallis, Conference Co-Chairman and President of the Athens Bar Association; the Honorable Earl Warren, Chief Justice of the United States; His Majesty King Paul of Greece; His Excellency the Prime Minister of Greece; and the Honorable Angelos Tsoucalas, Mayor of Athens.

At a plenary session held in the afternoon of the first day of the Conference, messages from heads of states were presented. These generally opened by an expression of greeting to the Conference delegates and gratification that the Conference was being held. They also expressed an ardent hope that the purposes of the Conference will be carried out with great urgency and that its decisions and future action will find practical application in international relations. They then pointed out

that only by application of the rule of law can peace be attained; that law is the cornerstone on which specific methods and institutions must be formulated to meet international crises; that the rule of law must be vigorously extended throughout the world, and that the world is looking to the leadership of lawyers to develop a movement of public opinion to support the rule of law. In these messages there were numerous references to the United Nations and to the International Court of Justice, pointing out the rule of law aims of each and supporting each. There was also a valuable message from the Secretary General of the United Nations, who characterized the World Conference as a "noble enterprise" and queried whether the Conference would wish to consider ways in which its projected activities may be related to those of the U. N. General Assembly.

The work program of the Conference was carried out in 12 sessions held on the second, third and fourth days. At these sessions there were discussions of 12 topics that had been carefully chosen to include the most important subjects with which the World Peace Through Law movement would have to deal in detail:

- (1) Increasing Use and Usefulness of the International Court of Justice
- (2) Creation and Jurisdiction of Regional and Specialized Courts
- (3) Law Rules to Encourage International Investment
- (4) Law to Facilitate International Economic Associations and Trade
- (5) Increasing Scope and Effectiveness of Arbitration, Conciliation and Other Means of Resolving International Disputes
- (6) Developing Law Rules and Legal Institutions for Disarmament Programs
- (7) Creating Law for Outer Space and Space Communications
- (8) The United Nations and Regional Political Organizations as a Source of Law Rules and Legal Institutions
- (9) International Co-operation on Legal Education and Research
- (10) Encouraging International Unification of Private Law
- (11) Organizing Lawyers Internationally for Effective-Co-operative Action
- (12) Stating the General Principles of International Law.

In each of the Working Sessions a delegate or invitee called the meeting to order and introduced the presiding officer, who, after some brief remarks of his own, presented the scheduled speakers. Experts were provided for these sessions to answer technical questions. The time allowed for the scheduled speakers was limited to provide an opportunity for remarks or questions by observers or by other Conference participants. The sessions were concluded by rapporteur reports which formed a useful source of the final Conference resolutions. The frank and vigorous Working Session debates provided valuable source material for the future undertakings recommended by the Conference and led to many friendships between lawyers of different nations, which will greatly facilitate international co-operation in the future work program.

In the morning and afternoon sessions of the fifth day of the Conference there was consideration of the lawyers' work program. Great care was taken to have the debate free and open, so that conclusions reached would be the true consensus of the delegates. A striking result was the broad agreement reached by delegates of such different legal, cultural and geographic backgrounds. It made possible the official adoption of a valuable Work Program on the final morning of the Conference and offered real encouragement for success in carrying out Conference objectives.

In addition to plenary and working sessions there was a full program of luncheons and dinners which were addressed by distinguished speakers of international reputation; for example, by A. Matine-Daftary, former Minister of Justice of Iran; by B. P. Sinha, Chief Justice of India; by H. Rivierez, Chief Justice of the Central African Republic; and by Henry R. Luce and John J. McCloy of the United States. These addresses emphasized the enormous difficulties confronting lawyers in their future program attempting to ensure World Peace through Law and the imperative need to achieve this goal. They sketched some of the accomplishments of organizations such as the United Nations and the International Court of Justice and some of the specific needs that remain, and made suggestions for meeting these needs. They emphasized the importance of global acceptance of liberty under law and disarmament plans, which include arrangements for strengthening peacemaking machinery.

The Athens Conference has often been spoken of not as an end but as a beginning. It marked the climax of preliminary efforts to obtain the universal consensus of lawyers to a vast program of research, education, and action. The fact that there were not in attendance delegates from all the Communist countries emphasized the importance of a determined, large majority support of the rule of law. And the Athens Conference certainly produced such a large majority and built up among its members an extraordinary friendliness and a new sense of dedication to world-wide unity.

The Athens Conference must be credited with many outstanding achievements. It created a new World Peace through Law Center to carry out its future program. It instructed the Executive Committee of the World Conference to take the necessary steps to carry out the purposes of the Conference, and approved a preliminary list of proposed committees. The Conference adopted a Proclamation declaring that law must replace force and accepting the challenge to find means to obtain this objective. It approved a Declaration of General Principles for a World Rule of Law. It adopted and referred to the Executive Committee a Lawyers' Global Work Program which aims to suggest some of the steps to be taken, studied or supported by the new Center. And it approved the establishment of a "World Law Day" and a "World Rule of Law Year" devoted to the advancement of the rule of law.

Much inertia and much scepticism about the possibility of carrying out an ambitious work program are silenced by the dynamic and heartening accomplishments of the continental conferences and the World Conference.

It remains for lawyers the world over to support with similar energy, enthusiasm and insight the difficult but rewarding path that lies ahead.

CHARLES S. RHYNE

General Chairman, First World Conference on World Peace Through the Rule of Law

ANNEX

RESOLUTIONS ADOPTED BY THE FIRST WORLD CONFERENCE ON WORLD PEACE THROUGH LAW¹

I

PROCLAMATION OF ATHENS

*Adopted by the First World Conference on World Peace Through Law
Athens, Greece, July 6, 1963*

THIS CONFERENCE OF MEMBERS of the legal profession from more than 100 nations throughout the world, being well aware of and deeply concerned with the fact that violation of the rule of law in international affairs by nations can only lead to disturbance of the peace and destruction of mankind through nuclear holocaust, has concluded and hereby proclaims that law must replace force internationally as the controlling factor in the fate of humanity.

We firmly believe that a world ruled by law is attainable by those to whom this proclamation is addressed—the three billion people who inhabit the earth.

We recognize and willingly accept our special responsibility as professional men technically trained in procedures for the just and peaceful resolution of disputes, to create and support effective and equitable means for the peaceful settlement of transnational differences between men and nations.

We have adopted at this conference a global work program for developing and strengthening rules of international law and international legal institutions and procedures, and we solemnly pledge ourselves to carry it forward with dispatch, enlisting the joint efforts and resources of the one million members of the legal profession of all nations. The urgency of the need and the determined leadership now available as a result of this conference, make us confident that our program of research, education, and action will cause the force of law to replace the law of force in the world community.

We call on the people of all nations throughout the world, and especially their governments, to support this "Proclamation of Athens" to the end that the program here adopted can be translated from idea to reality thereby assuring mankind that the ever-accelerating arms race and the threat of annihilation by war may be ended forever.

¹ Distributed by World Peace Through Law Center, 400 Hill Building (Temporary Headquarters), Washington 6, D. C.

II

DECLARATION OF GENERAL PRINCIPLES FOR A WORLD RULE OF LAW

Adopted at the First World Conference on World Peace Through the Rule of Law

Athens, Greece, July 6, 1963

IN ORDER TO ESTABLISH an effective international legal system under the rule of law which precludes resort to force, we declare that:

(1) All States and persons must accept the rule of law in the world community. In international matters, individuals, juridical persons, states and international organizations must all be subject to international law, deriving rights and incurring obligations thereunder.

(2) The rule of law in international affairs is based upon the principle of equality before the law.

(3) International law and legal institutions must be based on fundamental concepts of fairness, justice, and human dignity.

(4) International law and legal institutions must be capable of expansion, development or change to meet the needs of a changing world composed of nations (whose interdependence is ever on the increase) and to permit progress in political, social, and economic justice for all peoples.

(5) All obligations under international law must be fulfilled and all rights thereunder must be exercised in good faith.

(6) A fundamental principle of the international rule of law is that of the right of self-determination of the peoples of the world, as proclaimed in the Charter of the United Nations.

(7) Each individual is entitled to effective legal protection of fundamental and inalienable human rights without distinction as to race, religion, or belief.

(8) Those who are subject to international law must resolve their international disputes by adjudication, arbitration, or other peaceful procedures.

(9) International obligations, including decisions of international tribunals, must be enforced by appropriate international community action.

(10) The United Nations organization is the world's best hope for international peace under the rule of law and must be supported and strengthened by all possible means, and to this end we reaffirm our support of the principles of the Charter of the United Nations.

III

LAWYERS' GLOBAL WORK PROGRAM TO ADVANCE A WORLD RULE OF LAW

Adopted by the First World Conference on World Peace Through the Rule of Law

Athens, Greece, July 6, 1963

THIS WORK PROGRAM for the lawyers of the world is based upon the ideas expressed and objectives described at the First World Conference on

World Peace Through the Rule of Law, held in Athens from June 30 to July 6, 1963. It is not intended to constitute, in any sense, a summary of the papers which were presented during the Conference but rather a list of some of the subjects lawyers should study in their world-wide joint and co-operative efforts to strengthen world law rules and world legal institutions. While by no means intended to be exhaustive, this Program is designed to suggest some of the many steps which may be taken, studied, or supported by the proposed World Peace Through Law Center and by lawyers and jurists throughout the world to help achieve a just and enduring peace under the rule of law. The order in which the items appear below has no significance other than that they were discussed in this order at the Conference.

We, therefore, refer to the Center the following subjects which have been raised at Athens and urge the Executive Committee of the Center to consider them and establish priorities having regard to the work being done by other international and national organizations, the intention being to support and avoid interference with such organizations.

I. With Respect to the INTERNATIONAL COURT OF JUSTICE, the Work Program should include studies which will:

(1) Encourage States to refer international disputes for adjudication by the International Court of Justice or other international courts, particularly by means of the inclusion in treaties of a provision that disputes relating to their interpretation shall be decided by the International Court of Justice or such other appropriate international tribunals as may be established.

(2) Encourage the respective States to accept the compulsory jurisdiction of the International Court of Justice or, if such jurisdiction has been accepted with reservations, to withdraw reservations which reserve to the respective States the right to determine whether a matter is within their domestic jurisdiction.

(3) Further the establishment of regional chambers of the Court, sitting from time to time at locations more convenient to the litigant States.

(4) Consider the question of rights of appeal from decisions of regional chambers of the Court to the International Court of Justice.

(5) Consider the modification of the Court's present composition in view of the changes which have occurred in the world since the Court's establishment.

(6) Consider whether the various States should adhere to treaties or adopt laws under which decisions of the International Court of Justice, and other international courts, can be enforced through local judicial procedures.

(7) Consider amendment of Article 34 of the Statute of the International Court of Justice to permit certain international organizations to have direct access to the Court as parties on a basis of equality with States.

(8) Encourage greater use of the International Court of Justice by the United Nations itself, particularly through requests for advisory opinions.

II. *With Respect to REGIONAL AND SPECIALIZED COURTS the Work Program should include studies on:*

(1) The feasibility of the establishment of Regional courts for the principal geographical regions of the world, and specialized courts with jurisdiction over specific subject matter.

(2) Whether there should be a right of appeal from decisions of either or both such court systems to the International Court of Justice.

III. *With Respect to the PROMOTION AND PROTECTION OF FOREIGN INVESTMENTS the Work Program should include studies on:*

(1) The establishment by inter-governmental action of institutional facilities for the settlement through conciliation, mediation, and voluntary arbitration of international investment disputes in those cases where adjudication is not yet practicable or desirable, perhaps under the auspices of the International Bank for Reconstruction and Development.

(2) The means for and the establishment of effective procedures for the impartial resolution of international investment disputes.

(3) The recognition of the special rights and needs of the developing nations.

(4) The use of multilateral treaties for the clarification of rights and obligations with respect to foreign investments.

(5) The elimination of double taxation, and the adoption of the principles of due process of law in all matters, including those with respect to taxation.

(6) The repeal of laws that discriminate against foreign investors.

(7) The problems involved in expropriation or nationalization and the provision of prompt, adequate, and effective compensation with due consideration of the varied interests involved.

(8) The work of the International Law Commission in this area.

(9) The principle that international investors should be independent of international politics.

(10) A model international investment code.

(11) Creation of domestic foreign investment committees, composed at least in part of lawyers, to make recommendations and take action in this field.

IV. (A) *With Respect to the DEVELOPMENT OF INTERNATIONAL TRADE AND INTERNATIONAL ECONOMIC ASSOCIATIONS the Work Program should include studies to:*

(1) Stimulate and encourage greater cooperation on trade and economic matters among the newly-developing nations.

(2) Eliminate current legal obstacles to the expansion of international trade, with recommendations for their removal.

(3) Support organizations working on the unification of private international law, especially, but not exclusively, in the areas of arbitral awards, arbitral procedure, contracts, international judicial cooperation, recognition and enforcement of foreign judgments, and sales.

(4) Support the establishment and expansion of common markets whenever appropriate.

(5) Develop international law codes in the areas of law that relate to international business.

IV. (B) *With Respect to the INTERNATIONAL PROTECTION OF INDUSTRIAL PROPERTY, the Work Program should include studies to:*

(1) Encourage States which have not adhered to the Paris Convention for the International Protection of Industrial Property of March 20, 1883 (as revised to date) to join with the eighty states which are now signatories.

(2) Develop uniform laws in the field of industrial property.

(3) Support the establishment of a system of central examination for novelty of inventions to encourage investment and promote international licensing of patents.

(4) Support the creation of a central notification and search office to identify company names and trademarks as well as common denominations.

(5) Encourage Governments to promote international cooperative efforts in the industrial property field in order to remove obstacles to international trade.

(6) Develop a uniform law for the protection of 'know-how' in order to encourage communication of technical knowledge and manufacturing secrets on an international basis and particularly to newly-developing countries.

V. *With Respect to ARBITRATION, CONCILIATION, AND RELATED MEANS OF RESOLVING INTERNATIONAL DISPUTES the Work Program should include studies to:*

(1) Promote through research and study the use of non-judicial means of settling disputes (advisory opinions, conciliation, conferences, good offices, mediation, arbitration, etc.) whenever their use seems appropriate.

(2) Encourage the use of the Permanent Court of Arbitration created by the Hague Conference of 1899.

(3) Further the proposed establishment of continental international arbitration tribunals composed of men of high repute.

(4) Support the principle that fair and effective arbitral clauses should be inserted in all treaties that do not accept the compulsory jurisdiction of the International Court of Justice or its equivalent.

(5) Encourage the reporting of public and private arbitral decisions effectively and universally, and effective enforcement measures with respect thereto.

(6) Encourage the study and possible use of the Model Rules on Arbitral Procedure adopted by the United Nations International Law Commission.

VI. With Respect to DISARMAMENT AND PEACE-KEEPING the Work Program should include studies to:

(1) Educate lawyers themselves, everywhere, and government officials of their respective states, concerning the complex problems involved in establishing an effective disarmament program.

(2) Establish committees to draft a comprehensive disarmament treaty for submission to the various States for adoption.

(3) Study the nature, scope, and functions of an international disarmament agency.

(4) Consider and recommend appropriate peace-keeping machinery which would take effect during the process of disarmament, to protect disarming States from attack.

VII. With Respect to OUTER SPACE AND SPACE COMMUNICATION the Work Program should include studies to:

(1) Encourage states to support the following principles adopted by the United Nations General Assembly:

(a) International law, including the Charter of the United Nations, applies to outer space and celestial bodies; and

(b) Outer space and celestial bodies are free for exploration and use by all States, in conformity with international law, and are not subject to national appropriation.

(2) Clarify the legal problems arising from the exploration and use of outer space, including liability for space vehicle accidents, responsibility of States with regard to assistance to and return of astronauts and space vehicles, and space communications.

(3) Assist in the immediate orderly inauguration of a global system of communications by satellite which will meet the present needs of States and will provide ample opportunities for planned expansion of the services to all States, without now burdening those States having no immediate demand justifying their joining the System at this time.

VIII. With Respect to THE UNITED NATIONS AND REGIONAL POLITICAL ORGANIZATIONS AS SOURCES OF LAW RULES AND LEGAL INSTITUTIONS the Work Program shall include studies to:

(1) Clarify the role of law and legal institutions in the United Nations and their relationship to political factors such as the veto.

(2) To improve the climate of professional attitude toward the United Nations with a view to attracting to it more general support and co-operation from practicing lawyers and judges throughout the world.

(3) Encourage more rapid codification and development of international law by various organs of the United Nations.

(4) Support, in particular, an increase in the work of the International Law Commission by lengthening its sessions and equipping it with additional staff able to prepare preliminary drafts with supporting documentation and commentaries.

(5) Support the use of regional political organizations for developing new rules of international law and legal institutions needed to deal with regional problems, on occasion, or where appropriate, with other problems for which United Nations action would not be appropriate or feasible.

(6) Bring to the attention of the lawyers of the world the new rules of law and legal institutions being developed by the United Nations, its specialized agencies and regional organizations, as an example of the dynamism and constant development of the international legal system.

(7) Encourage and support a thorough historical study and analysis of the utilization of the various articles of the United Nations Charter.

IX. *With Respect to INTERNATIONAL COOPERATION ON LEGAL EDUCATION AND RESEARCH the Work Program shall include studies to:*

(1) Encourage law schools and bar examiners to require from all law students a background in international law.

(2) Encourage and support comparative studies throughout the world of the quality and extent of international law training, and prepare recommendations for improvements.

(3) Encourage expanded programs for exchange of lawyers, law professors, law students, and law books and materials.

(4) Encourage and support the creation of an International Research Center in order to proceed with the numerous research projects which the Conference has approved.

(5) Encourage and support the creation in the various countries of international law research centers.

X. *With Respect to INTERNATIONAL UNIFICATION OF PRIVATE LAW the Work Program shall include studies to:*

(1) Encourage and support the worthwhile work of existing organizations and institutions including the United Nations, that are active in this field.

(2) Encourage and support studies designed to select areas of law most suitable for unification, especially where there are common principles, and in particular in fields of commercial law; to unify the law in such areas; and to develop means of avoiding divergence of interpretation of uniform laws.

(3) Encourage and support studies of the difficulties and obstacles in the way of making certain branches of law uniform and seek means of avoiding or removing them where unification seems wise.

(4) Encourage and support studies of the needs of the more recently developing countries insofar as they relate to possibilities of unification.

(5) Encourage the appointment of permanent national committees of lawyers to study problems of unification and make appropriate recommendations with respect thereto.

(6) Consider the establishment of a permanent top level international consultative committee for the selection of law subjects suitable for unification.

(7) Develop better and broader means, including regular information bulletins, for informing the lawyers and jurists of all countries concerning efforts being made for unification of laws.

XI. With Respect to ORGANIZING LAWYERS INTERNATIONALLY FOR EFFECTIVE COOPERATIVE ACTION the Work Program shall:

(1) Establish a permanent World Peace Through Law Center to further the objectives of the Conference in the fields of research, education and action. Such program should include determination of methods of financing, adoption of a charter and by-laws, selection of a headquarters, employment of necessary personnel, and formulation of policies and programs.

(2) Establish regional World Peace Through Law Centers in the major geographic areas of the world.

(3) Foster the creation of national bar associations in every country and work to aid and strengthen those national bar associations not presently active and strong.

(4) Urge national bar associations to establish committees on world peace through law.

(5) Encourage religious organizations of all faiths to express to their followers the concept of world peace through the rule of law.

(6) Organize periodic regional conferences on world peace through law.

(7) Promote a program of technical assistance in the field of law, by exchanging lawyers between developed and developing countries for education and training, exchanging law books, and furnishing financial assistance.

XII. With Respect to the PROBLEMS OF STATING THE GENERAL PRINCIPLES OF INTERNATIONAL LAW the Work Program shall include studies which:

(1) Support research efforts to determine the general principles of law recognized by the community of nations as well as general principles of international law.

(2) Encourage studies and research in support of the work of the United Nations with respect to the principles of international law concerning friendly relations and cooperation among States, as recommended by Resolution 1815 (XVII) of the General Assembly of the United Nations of December 18, 1962.

IV

RESOLUTIONS CREATING THE WORLD PEACE THROUGH LAW CENTER

Adopted at the First World Conference on World Peace Through the Rule of Law

Athens, Greece, July 6, 1963

THIS WORLD CONFERENCE convened at Athens, Greece on July 1, 1963, in which delegates and observers from more than 100 nations participated,

Resolves:

- I. To adopt the Proclamation of Athens, the Declaration of General Principles, and the Work Program in the form attached to these Resolutions;
- II. To participate vigorously in the Work Program adopted by this Conference so as to achieve world-wide acceptance and application of the rule of law in international relations; and to that end
- III. To encourage the formation and activity of national committees on World Peace Through Law within associations of lawyers and jurists.

IN ORDER TO IMPLEMENT THE FOREGOING RESOLUTIONS, AND RECOGNIZING THE NEED FOR IMMEDIATE AND SPECIFIC ACTION, THIS CONFERENCE FURTHER:

Resolves:

- IV. (1) The World Peace Through Law Center is hereby created to unite the members of the legal profession of the world for the purpose of furthering World Peace Through Law.
- (2) The present Executive Committee of this Conference under the continuing Chairmanship of the Conference General Chairman shall prepare and adopt the Charter and by-laws, designate the first governing board, select the headquarters, the country of incorporation, employ the initial personnel and take any and all necessary action to accomplish the purposes, objectives and resolutions of this Conference.
- (3) The Charter shall include, but not be limited to, the following:
 - (A) All members of the legal profession and specially invited guests participating in this Conference shall be Charter Members upon their written acceptance and in accordance with the Charter and by-laws. Appropriate and additional memberships, and dues shall be determined by the Executive Committee.
 - (B) The Center shall establish a clearinghouse and information center relative to the activities of the legal profession of all nations concerning the progress, ways, means, and implementation of World Peace Through Law.
 - (C) Without duplicating the work of other international or national organizations, the Center may engage in research, conferences—international, regional or national—and other constructive activities in all phases of international law and especially the rule of law in international affairs, together with available institutions and procedures for the settlement of international disputes.
 - (D) The Center shall cooperate with existing organizations of the legal profession, law schools, legal centers, the judiciary,

and other established organizations engaged in the improvement, research and study of international law and legal institutions.

- (E) It shall encourage the teaching and study of international law; recommend and assist exchanges of students, scholars, jurists, and other leaders of the legal profession, especially with the newly independent and emerging nations.
- (F) It shall disseminate the results of such international studies and research through appropriate means and publications to its members, cooperating organizations and all governments.
- (4) The Center shall limit its efforts and objectives to the improvement and use of international law and international legal institutions to the end that international disputes shall be prevented and settled through judicial or legal processes.

V. That the lawyers here assembled approve the establishment of "World Law Day," and declare their support of it.

VI. That the lawyers here assembled approve a "World Rule of Law Year" during which the lawyers of the world will make a concentrated effort to advance the rule of law in international affairs through a coordinated program of research, education, and cooperative action, utilizing existing national and international institutions and organizations, and establishing such new institutions and organizations as may be desirable for the fulfillment of the objectives and purposes of the World Peace Through Law program.

RESOLUTION

A BLUE PRINT FOR CONTROLLED DISARMAMENT

Adopted by the First World Conference on World Peace Through the Rule of Law

Athens, Greece, July 6, 1963

THAT THIS WORLD CONFERENCE of the legal profession from over 100 nations meeting at Athens, deeply conscious of mankind's need for reaching agreement without delay on a plan for controlled disarmament, calls on the Executive Committee to set up a Special Committee of experts in international law and representatives of the practicing profession, as representative of world opinion as possible, to prepare a draft plan for an organization to direct and supervise a disarmament agreement containing provisions for settling disputes and provisions to ensure compliance with the obligations of the agreement, the plan to be submitted to national organizations of lawyers and Governments and to the appropriate organ of the United Nations.

N. V. ALGEMENE TRANSPORT- EN EXPEDITIE ONDERNEMING VAN GEND & LOOS
 c. ADMINISTRATION FISCALE NÉERLANDAISE: A PIONEERING DECISION OF
 THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

The decision of the Court of Justice of the European Communities in the case of *N.V. Algemene Transport- en Expeditie Onderneming van Gend & Loos c. Administration Fiscale Néerlandaise*¹ is unquestionably one of the most important judgments rendered by that tribunal during the first decade of its existence² and should be of great interest to students of international organization and comparative constitutional law. The controversy came before the Court under Article 177 of the Treaty³ which gives the Court jurisdiction to render judgments on preliminary questions relative to (1) the interpretation of the E.E.C. Treaty; (2) the validity and interpretation of measures taken by the community organs; (3) the interpretation of the charters of any bodies established by the Council, whenever those charters so provide.

The article in question (a) *empowers* any tribunal of a member state to submit an issue of the specified type to the Court for decision whenever such issue is raised by one of the parties and the tribunal deems a decision by the Court necessary for the determination of the controversy; and (b) makes such submission *mandatory* when the issue arises in a tribunal the decisions of which, under national law, are not subject to any further review. The instant case was the second matter that came to the Court in that fashion.⁴

The actual subject of the litigation was not a matter of great moment. It involved the legality of customs duties levied by the Dutch Government on the importation by plaintiff into The Netherlands from Germany of certain quantities of aqueous emulsion of urea-formaldehyde. The contested charges were made under the Tariff Ordinance of 1960, which was promulgated on January 20, 1960,⁵ in pursuance of an accord concluded between the Benelux countries on July 25, 1958,⁶ and approved by a Dutch

¹ Court of Justice of the European Communities, 9 Rec. de la Jurispr. (Fr.) 1 (1963) (Case No. 26-62); digested below, p. 194. For an English translation (by one of the authors of this comment), see 2 International Legal Materials (Am. Soc. Int. Law) 505 (1963).

² The Court was constituted as Court of Justice of the European Coal and Steel Community on Dec. 10, 1952, opened its doors to litigants on March 7, 1953, and was reconstituted as the Court of Justice of the European Communities on Oct. 7, 1958; see Riesenfeld, "The Decisions of the Court of Justice of the European Communities, 1954-1960," 56 A.J.I.L. 724 (1962).

³ For an English translation of the article in question see 51 A.J.I.L. 865, 920 (1957).

⁴ The first request for an interlocutory interpretation of the E.E.C. Treaty, submitted to the Court under Art. 177, was the case of *Société Kledingverkoopbedrijf de Geus c. Société Robert Bosch GmbH and Soc. An. Maatschappij tot voortzetting van de zaken der Firma W. van Rijn*, 8 Rec. de la Jurispr. (Fr.) 89 (1962) (Case No. 13-61), involving the effect of Art. 85 of the Treaty of Rome; digested in 57 A.J.I.L. 129 (1963).

⁵ [1960] Staatsblad van het Koninkrijk der Nederlanden (hereinafter cited as Staatsbl.) No. 80.

⁶ [1959] Tractatenblad No. 130.

law of December 16, 1959.⁷ According to that tariff ordinance, the customs duties for the product involved were fixed at 8% *ad valorem*. Plaintiff, the importer, protested against this charge as being illegal for the reason that previously, under a Tariff Ordinance of 1947,⁸ he had been charged with an import duty of only 3% *ad valorem* and that any increase in amount contravened the "customs-freeze" among the member states of the European Economic Community, stipulated in Article 12 of the E.E.C. Treaty. That article provides:

Member States will refrain from introducing as between themselves new customs duties on imports or exports or exactions of equivalent effect and from increasing those which they apply to their mutual commercial relations.⁹

Plaintiff's protest was rejected and the matter came before the Tariff Commission in Amsterdam, an administrative tribunal whose determinations are not subject to any further review. The Dutch Fiscal Administration argued that in reality there was no increase in import duties on plaintiff's imports for the reason that at the time the E.E.C. Treaty entered into force the duty to be levied should have been 10% *ad valorem* (under rubric 332 *bis* of the Tariff Ordinance of 1947) rather than only 3%, as was erroneously collected (under rubric 279a-2 of that ordinance). The Tariff Commission did not render a decision on the merits but, invoking the procedure under Article 177 of the E.E.C. Treaty, submitted the following two questions to the Court:

- (1) Whether Article 12 of the EEC Treaty has an internal effect or, in other terms, whether the parties, on the basis of that article, may assert individual rights which the judge must safeguard;
- (2) If so, whether the imposition of a duty of 8% upon the imports of urea-formaldehyde, effected by the principal petitioner, into the Netherlands from the Federal Republic of Germany, has represented an illegal increase within the meaning of Article 12 of the EEC Treaty, or whether, in the particular instance, merely a reasonable modification of the customs applicable prior to March 1, 1960 is involved which, though constituting an arithmetical increase, nevertheless should not be considered as prohibited by the mandate of Article 12.

According to Article 20 of the Statute of the Court of the European Communities, in proceedings under Article 177 of the E.E.C. Treaty, the parties, the member states and the Commission are entitled to file briefs or written observations with the Court. In the instant case, in addition to the principal parties, the governments of Belgium, The Netherlands and the Federal Republic of Germany as well as the Commission availed themselves of that opportunity. The arguments presented were directed to the Court's jurisdiction over, and the merits of, each of the questions submitted.

Without dwelling on the nuances of the positions taken by the various

⁷ [1959] Staatsbl. No. 469.

⁸ [1947] Staatsbl. No. 438.

⁹ Cf. 51 A.J.I.L. 870 (1957) (with slight changes in the phrasing of the translation).

parties as they are summed up in the Court's opinion, suffice it to say that the governments of Belgium and The Netherlands contested the Court's jurisdiction, under Article 177, over the first question on the ground that it did not involve an interpretation of the treaty but rather its application within the framework of Dutch constitutional law. The Belgian Government in particular argued that the controversy in reality required a resolution by the Dutch judge, under his own constitutional law, of a conflict between two inconsistent international treaties or, more precisely, two statutes approving inconsistent treaties. On the merits the same governments, joined by the Government of the Federal Republic of Germany, claimed that Article 12 of the E.E.C. Treaty established only an obligation of the member states and did not envisage, as a matter of treaty law, any internal effects with respect to their subjects. With reference to the second question, the three governments likewise argued that, in the form posed, it exceeded the scope of jurisdiction under Article 177, because founded upon a question of Dutch tariff law and therefore involving at best an application rather than an interpretation of the treaty. In addition, the Dutch Government in particular maintained that assertions of treaty violations committed by a member state could be litigated before the Court only under Articles 169 and 170 of the treaty upon complaint by a government. The Commission, conversely, in the matter of jurisdiction over the first question, urged that the effect of the treaty provisions on the internal law of the states was not left to the national laws but was determined by the treaty itself and therefore required an interpretation within the meaning of Article 177. On the merits it expounded the thesis that the purpose and result of the formation of the European Economic Community was the creation of a community law with direct applicability in the national tribunals and with prevalence over conflicting national legislation, even if subsequently enacted. Article 12, in its view, partook of this character. With regard to the second question the Commission conceded that in the instant case no prohibited increase had occurred.

The Advocate General, in his conclusions, advanced the position that the Court had jurisdiction under Article 177 over the first question on the ground that it envisaged an interpretation of Article 12, although even after such construction a delicate issue of Dutch constitutional law might remain to be resolved. Conversely he failed to find any jurisdiction under Article 177 over the second question. On the merits of the first question, however, the Advocate General sided with the three governments in maintaining that Article 12 exhausted itself in establishing a duty on the part of the member states.

The Court, in a Community-minded but terse and carefully limited opinion, took a position which fell short of an endorsement of the bold thesis advanced by the Commission, but went significantly beyond the views urged by the governments or by the Advocate General. The Court held, agreeing to that effect with the Advocate General, that it possessed jurisdiction over the first question, since

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it was not called to determine the application of the treaty according to the principles of internal Dutch constitutional law which remains within the province of the national authorities but solely in conformity with the limits of Article 177(a), for an interpretation of the scope of Article 12 of the Treaty within the framework of the Community law and under the aspect of its incidence upon private parties.

In the same context the Court declared further that the choice by a national tribunal of its questions and their significance for the determination of a pending controversy were not matters to be passed upon by the Court.

Turning to the merits of the first question, the Court emphasized that the purpose of the E.E.C. Treaty, confirmed by its preamble, was to institute a common market with direct impact on the Community subjects, and that this conception was effectuated by the creation of Community "organs that institutionalize sovereign rights, the exercise of which affects the member states as well as their nationals." Moreover, the rôle given to the Court by Article 177 itself confirms "that the states have attributed to the Community law an authority which permits it to be invoked by their subjects before the national tribunals." Thus the treaty does not exhaust itself in the creation of reciprocal obligations of the member states; rather

it must be concluded from this state of affairs that the Community constitutes a novel juridical order of international legal character for the benefit of which the states, though only in limited areas, have limited their sovereign rights and the subjects of which are not only the member states but also their nationals; consequently, Community law, independent of the legislation of the member states, creates not only burdens upon the individuals as such but, conversely, is also apt to entail rights which enter into their legal patrimony.

Whether a particular treaty provision entails a direct effect in internal law in the sense that subjects of the member states can claim rights thereunder which a national judge must safeguard, depends on its spirit, its systematic position in the treaty and its terms. From these criteria it must be deduced that Article 12 is to be interpreted in the sense that it produces immediate effects and engenders individual rights which the internal jurisdictions must safeguard.

Arguments to the contrary cannot be derived from Articles 169 and 170, which merely provide additional judicial remedies against treaty violations on the part of a member government without curtailing the control entrusted to the vigilance of the parties affected thereby.

With reference to the second question, the Court construed it to constitute an inquiry as to whether an effective increase of the duty on a particular product, resulting from its reclassification owing to a change in tariff categories rather than from a formal increase of an existing duty, was prescribed by Article 12. So understood the question falls within the jurisdiction of the Court under Article 177 and calls for an affirmative answer without entailing a determination as to whether there was a violation in the instant case.

It can be no surprise that the decision, because of the fundamental character of the issues raised and because of its possibly far-reaching implications, has attracted enormous attention in the professional¹⁰ and non-professional literature¹¹ of the Community countries and elsewhere.¹² Moreover, it has been the subject of long debates at various international conferences in which even the judges of the Court themselves have participated.¹³ Hailed by some as a bold venture into a new European federalism, the opinion actually calls for a much more restrained assessment.

On the one hand, the Court made it abundantly clear that it attached to the Community the character of an independent and novel legal order of international nature with sovereign rights of its own and direct operation upon its subjects, so as to vest them with individual rights and duties capable of being asserted before national tribunals. On the other hand, the Court emphasized that it dealt with the scope of the treaty solely on the plane and within the framework of Community law. Although the Advocate General had alluded thereto, the Court avoided any reference to a possible diversity in the status of international treaties under the constitutions of the member states¹⁴ or to the content and scope of the different laws approving the E.E.C. Treaty.¹⁵ It studiously shunned any discus-

¹⁰ See in particular Bölow, "Zur unmittelbaren Wirkung von Stillhalteverpflichtungen im EWG-Vertrag," 9 *Aussenwirtschaftsdienst des Betriebs-Beraters* (hereinafter cited as AWD) 162 (1963); Ehle, "Wirtschaftelenkung und Verfassungsrechtsschutz im Gemeinsamen Markt," *ibid.* 157; Gori, Note on Judgment No. 26-62, 115 *Giurispr. Ital.* IV 49 (1963); Ophüls, "Quellen und Aufbau des Europäischen Gemeinschaftsrechts," 16 *Neue Juristische Wochenschrift* (hereinafter cited as N.J.W.) 1697 (1963); Samkalden, Note to Judgment No. 26-62, 11 *Sociaal Economische Wetgeving* (hereinafter cited as S.E.W.) 107 (1963), and Note to Judgment No. 28-30/62, *ibid.* 227; Suetens, "Prejudiciële Vragen in het EEG- en EGA Recht," 26 *Rechtskundig Weekblad* 1913 (1963); Trabucchi, "Un nuovo diritto," 9 *Riv. di Dir. Civile* 259 (1963).

¹¹ *E.g.*, Lecourt, "L'Europe dans le Prétore," *Le Monde*, Feb. 23, 1963, pp. 1 and 3.

¹² Hay, "Federal Jurisdiction of the Community Market Court," 12 *A. J. Comp. Law* 21 (1963); Stone, "The Court and American Law," *European Community*, No. 65, at p. 7 (1963); van den Heuvel, "Civil-Law Consequences of Violation of the Anti-trust Provisions of the Rome Treaty," 12 *A.J. Comp. Law* 172, 187 (1963).

¹³ *E.g.*, at the Conference at Cologne, "10 Years of Adjudication by the Court of the European Communities" (April, 1963), and at the Joint Conference at Vienna of the German and Austrian Societies of Comparative Law (Sept., 1963).

¹⁴ For recent discussions of the different forms in which the applicability of treaties to nationals and by national authorities is regulated in the legal systems of the member states of the E.E.C., see Seidl-Hohenveldern, "Transformation or Adoption of International Law into Municipal Law," 12 *Int. and Comp. Law Q.* 88 (1963); Schlochauer, "Das Verhältnis des Rechts der Europäischen Wirtschaftsgemeinschaft zu den nationalen Rechtsordnungen der Mitgliedstaaten," 11 *Archiv des Völkerrechts* 1 (1963); Hayoit de Termicourt, "Le Conflit 'Traité-Loi interne'," 78 *Journal des Tribunaux* 481 (1963); see also Pescatore, "L'autorité en Droit Interne des Traités Internationaux," [1962] *Pasicrisie Luxembourgeoise* 99.

¹⁵ The Italian law of approbation of Oct. 14, 1957, No. 1203, [1957] *Le Leggi* 1484, contains at the same time a provision giving the treaty "full and entire execution" and a delegation of authority to the government to enact regulations with the force of law for implementing a catalogue of provisions in the treaty; see Miele, "L'Esecuzione nell'Ordinamento Italiano degli Atti Internazionali istitutivi della CEE e dell'Euratom," 15 *Diritto Internazionale* 17 (1963). The German ratification law

sion of the much debated nature of the interrelation between Community law and national legal systems,¹⁶ including the impact of the national constitutions.¹⁷ It likewise eschewed any intimation of a primacy of Community law or of the proper solution by a national judge of actual or apparent conflicts between Community law and the mandates of the national constitutions or of national law enacted subsequent to the ratification acts. The Court, evidently intent upon forging an unfragmented body of Community law, deemed it to be impolitic to be enmeshed in a premature entanglement with constitutional niceties, even at the price of appearing cryptic or inconclusive. While definitely more Community-oriented than the briefs of the three governments,¹⁸ the opinion does not venture beyond the line of minimum exposure. Actually no more than that was required, owing to the fortuitous circumstances that the case came up from The Netherlands, where the Constitution offers an open door to the penetration of Community law,¹⁹ and that the troublesome

of July 27, 1957, contains no general transformatory clause, but empowers the government to enact regulations for the fulfillment of certain treaty obligations with the express or presumed approval of parliament. Law of July 27, 1957, II Bundesgesetzblatt 758 (1957).

The Belgian, Dutch and Luxembourg laws approving ratification are straightforward and contain no conditions. Belgian Law of Dec. 2, 1957, *Moniteur Belge* 1180 (1957); Dutch Law of Dec. 5, 1957, [1957] *Staatsbl.* No. 498 (see, however, Law of Dec. 5, 1957, [1957] *Staatsbl.* No. 528, concerning the lack of direct applicability of Arts. 85 and 86 of the Rome Treaty before the promulgation of implementing regulations under Art. 87).

The French law approving ratification likewise contains no qualifying or amplifying provision. Law No. 57-880, Aug. 2, 1957, 40 *Bull. Lég. Dalloz* 480 (1957). During parliamentary debate thereon, however, a motion was adopted in the Conseil de la République to prevent any diminution of sovereignty because of the Treaty's entry into force. See Cocatre-Zilgien, "Les Traités de Rome devant le Parlement Français," 1957 *Annuaire Français de Droit International* 517, 533.

¹⁶ For recent discussions see Goetz, "Europäisches Gemeinschaftsrecht und Deutsches Recht," 9 *Juristenzeitung* 265 (1963); Udina "Sull'Efficacia delle Norme della Comunità Europea nell'Ordinamento Italiano," 15 *Diritto Internazionale* 123 (1961); Zannini, "La Giurisdizione della Corte di Giustizia della Comunità Europea in rapporto agli Ordinamenti degli Stati Membri," 16 *ibid.* 242 (1962); Balladore Pallieri, "Le Comunità Europee e gli Ordinamenti Interni degli Stati Membri," 15 *ibid.* 4 (1961); Schlochau, *loc. cit.* note 14 above. See also Ophüls, *loc. cit.* note 10 above.

¹⁷ For a discussion of the constitutional limits upon Community enactments, see Ehle, *loc. cit.* note 10 above.

¹⁸ It is worth noting that the Italian Council of State had reached the same result as the Court of the European Communities prior to the *Van Gend & Loos* case in the decision of *Soc. biscotti panettoni Colussi Milano c. Ministeri commercio estero e finanze*, II *Foro Italiano* III 143 (1963), involving the direct applicability of Art. 31 of the E.E.C. Treaty (prohibition of new quantitative restrictions and equivalent measures).

¹⁹ About the significance and operation of Arts. 60 and 66 of the Dutch Constitution, see especially Erades and Gould, *The Relation Between International Law and Municipal Law in the Netherlands and in the United States*, especially pp. 198, 307, 393 (1961); and Van Panhuys, "The Netherlands Constitution and International Law," above, pp. 88-108.

consequent international protocol did not have signatories other than member states.

In order to appreciate the architectural skill demanded from the Court in performing its often delicate duties, one must bear in mind that it must work with materials much less robust than those that were available to the Supreme Court of the United States for its great blueprint cases such as *McCulloch v. Maryland*.²⁰ The establishment of the European Communities was not perfected by means of a constitution-making process as was the formation of the United States, which rests upon popular ratification by specially called conventions.²¹ In vain would one look in the E.E.C. Treaty for a supremacy clause such as is enshrined in Article VI of the U. S. Constitution.

It is certain that the creation of a viable Community law will require balanced resort to the lawmaking powers implicit in Article 177,²² and

²⁰ 4 Wheaton 316 (1819).

²¹ Warren, *The Making of the Constitution* 346, 606, 819 (1929).

²² *Accord*: Knopp, *Über die Pflicht deutscher Gerichte zur Vorlage von Auslegungsfragen an den Gerichtshof der Europäischen Gemeinschaften nach Art. 177 des EWG-Vertrages*, 16 N.J.W. 305 (1961). Thus the duty of national tribunals of last resort to submit questions of interpretation applies only to matters that were not already the subject of a determination by the Court, *Da Costa en Schaake N.V., Jacob Meijer N.V., Hoechst-Holland N.V. v. Administration Fiscale Néerlandaise*, 9 Rec. de la Jurispr. 59 (1963) (Cases Nos. 28-30/62). Moreover, only the tribunal where the controversy is pending, and not the parties, is competent to certify preliminary questions to the Court, *Milchwerke Wöhrmann & Sohn K.G. et Alfons Lütticke v. Commission de la C.E.E.*, 8 *ibid.* 965 (Cases Nos. 31 and 32/62); [1963] *Dalloz J.* 490, with note by Chevallier. It is submitted that this restraint is a matter of political wisdom rather than a defect, as suggested by Hay, *loc. cit.* note 12 above.

For a recent decision of a Dutch administrative tribunal of last resort submitting a preliminary question, see *N.V. Internationale Credieten Handelsvereniging Rotterdam en Coöp. Suikerfabriek Puttershoek v. Ministerie van Landbouw en Visserij*, 11 S.E.W. 454 (1963); 6 J.O.C.E. 2284 (Cases Nos. 73-74/63) (from *College van Beroep voor het Bedrijfsleven*). For cases in which a national tribunal of last resort refused to certify a preliminary question suggested by the parties on the ground that it was not necessary to a decision of the controversy, see *K.I.M. Rijwielfabriek N.V. en L.M. Sliotmans v. J.N. Sieverding N.V.*, [1962] *Ned. Jur.* 772 (Hoge Raad, 1961), noted by Samkalden, 11 S.E.W. 227, at 230 (1963); *Technische Handelsonderneming Nibeja N.V. en H.T. Reymers v. Grundig Radio-Werke G.m.b.H.*, [1962] *Ned. Jur.* 787 (Hoge Raad, 1962); *OLG Düsseldorf*, Oct. 21, 1958 ("Sarotti" IV), *WuW/E/OLG* 263, 9 *Wirtschaft und Wettbewerb* [hereinafter cited as *WuW*] 298 (1959). For lower court decisions refusing submission of a preliminary question, see *Henckels & Hammesfahr Holland N.V. v. Henckels Zwillingwerk Nederland N.V.*, [1963] *Ned. Jur.* 569 (Court of Appeals, Arnhem, 1962), noted by Samkalden, 11 S.E.W. 353 (1963), refusing submission on the ground that it was not a court of last resort; *OLG Munich*, May 30, 1963 ("Fotokameras"), *WuW/E/OLG* 556, 13 *WuW* 626 (1963), holding that Art. 177 was not applicable to temporary restraining orders; *Nicolas et Société Brandt*, Court of Appeals, Amiens, May 9, 1963, 37 J.C.P., II *Jur.* 13222 (1963), holding that a conflict between French legislation and Community law raises no preliminary question; *Blume v. Van Praag*, Court of Commerce, Antwerp, Oct. 25, 1962, 26 *Rechtkundig Weekblad* [col.] 1959 (1963), holding that an interpretation of Art. 85 was not necessary to the disposition of the case, which proceeded under Belgian law.

careful meshing of Community and national adjudicatory processes, especially in sensitive areas such as the protection of competition.²³ The *Van Gend & Loos* decision is proof that the Court has set out in pursuit of a truly supra-national Community law. Whether it will be able to hold its course and progress on it with safety and dispatch will largely depend on the political winds blowing from Europe's capitals.

STEFAN A. RIESENFIELD
RICHARD M. BUXBAUM

HAGUE ACADEMY OF INTERNATIONAL LAW—1964 SESSIONS

LECTURES, JULY—AUGUST, 1964

Two sessions of lectures at the Hague Academy of International Law will take place in 1964. The first session, from July 6 to 23, will consist of the following courses: General Course on Principles of Private International Law, by Professor G. Kegel (Germany); African Problems of Private International Law, by Mr. Ph. Francescakis (Greece); Discussion of Major Areas of Choice of Law, by Professor Willis L. M. Reese (United States); The Protection of Minors in Private International Law, by Professor Werner von Steiger (Switzerland); Private International Law in Socialist Countries, by Professor E. Szászy (Hungary); The Relation between Public International Law and Municipal Law, by Professor H. F. Van Panhuys (The Netherlands); The Quasi-Legislative Activities of Specialized Agencies, by Mr. H. Saba (Egypt); Certain Contemporary Developments in International Arbitration, by Charles M. Spofford (United States).

The second session, from July 27 to August 13, will consist of the following courses: The Doctrine of Jurisdiction in International Law, by Mr. F. A. Mann (Great Britain); General Course on Principles of Public International Law, by Professor Rolando Quadri (Italy); Space Law, by Professor Manfred Lachs (Poland); The Scope and Legal Effects of Positions Taken and Unilateral Acts Performed by States, by Professor G. Venturini (Italy); International Law in Europe and Western Asia between 100 and 650 A.D., by Professor Stefan Verosta (Austria); General Rules

²³ Art. 9 of Regulation No. 17, containing the first regulations of the application of Arts. 85 and 86 of the Treaty (prohibition of anti-competitive practices), [1962] J.O.C.E. 204, saves the jurisdiction of the national authorities to apply the provisions of Arts. 85 and 86 "as long as the Commission has not initiated any proceedings under articles 2, 3 or 6 of the regulations." It has been held that this provision compels national courts to stay pending proceedings, if the Commission initiates investigation of the matters pending before the courts, or if an exemption under Art. 85(3) might still be obtained. *Soc. Union Nationale des Économies Familiales v. Constan*, Court of Appeals, Paris, Jan. 26, 1963, [1963] Dalloz Jur. 189; 87 J.C.P., II Jur. 13103 (1963); *Société Pierre Rivière et Cie v. Société Nouvelle de Produits Alimentaires "La Maison du Whisky"*, Commercial Tribunal, Seine, March 12, 1963, [1963] Dalloz Jur. 867; *semble contra*, *Blume t. Van Praag*, Court of Commerce, Antwerp, Oct. 25, 1962, 26 *Rechtkundig Weekblad* [col.] 1959 (1963); *Nicolas et Société Brandt*, Court of Appeals, Amiens, May 9, 1963, 87 J.C.P., II Jur. 13222 (1963).

Concerning Judicial Review of Administrative Acts in the European Communities, by Professor A. de Laubadère (France); The Co-ordination between the United Nations and the Organization of American States for the Peaceful Settlement of Disputes and Collective Security, by Professor Jiménez de Aréchaga (Uruguay).

Application forms, as well as information about scholarships, may be obtained from the Secretary General, Administrative Council, Hague Academy of International Law, Peace Palace, The Hague.

RESEARCH CENTER, AUGUST-SEPTEMBER, 1964

The eighth annual session of the Research Center of the Hague Academy of International Law will be held at The Hague from August 18 to September 26, 1964. The subject for research will be: "Comparative Study of Existing International Tribunals and Their Competence." The Directors of Studies will be Professor J. Dupuy, of the Faculty of Law of the University of Aix-en-Provence (Nice) (French-speaking section), and Professor B. Boutros-Ghali, of the Faculty of Economics and Political Science, Cairo University (English-speaking section).

The purpose of the Center is to enable persons who have already reached an advanced stage of study or who are engaged in research or teaching in the field of international law to spend six weeks in research and seminar discussion at the Academy. The extensive facilities of the Peace Palace Library are at the disposal of participants.

Most of the expenses of attendance are borne by the Academy out of a special grant made by the Rockefeller Foundation. Participants will receive a contribution towards their traveling expenses and a living allowance of 20 guilders per day during their stay.

There are no age limits for participants, but the general level ranges between 25 and 40 years of age. The number of participants for 1964 is limited to 30, of which 15 will carry on research in the French-speaking section, and 15 in the English-speaking section.

Requests for application forms should be made to the Secretary General, Administrative Council, Hague Academy of International Law, Peace Palace, The Hague, and completed forms should reach the Academy not later than March 1, 1964.

E. H. F.

ACADEMY OF AMERICAN AND INTERNATIONAL LAW

An Academy of American and International Law will be conducted from June 8 to July 24, 1964, by the International and Comparative Law Center of the Southwestern Legal Foundation, at the Southwestern Legal Center on the campus of Southern Methodist University, Dallas, Texas. The creation of the International and Comparative Law Center was approved by the Board of Trustees of the Southwestern Legal Foundation in April, 1962. The Center serves as an educational arm of the Foundation, aimed at the study of international and comparative law with a view to achieving improved international relations. The program of the Foundation in the field of international and comparative law will be expanded and conducted under the auspices of the Center and its Advisory Board.

The Center will conduct an annual Academy of American and International Law for a period of several weeks each summer, at which it is anticipated that public officials, lawyers, economists and business men from various nations will have an opportunity to study and discuss significant economic aspects of public and private international law, and American and international legal and business institutions. The program of courses is designed to discuss the legal framework essential to economic and social development, with emphasis upon a review of the international legal order and the function of law in international affairs. The courses will be given by eminent professors and practicing attorneys in the field of Anglo-American and international law, and will cover the following subjects: Constitutional law, basic principles of Anglo-American law, United States business organizations, philosophy of United States taxation, United States labor and social legislation, public international law, international business transactions, private international law, international judicial procedure, land use planning and agrarian reform, international monetary policies, law and ethics, and the legal profession. There will also be included a symposium on rights and duties of foreign investors and of states in which they do business. In addition, small informal discussion groups will be arranged with the faculty members.

Thirty fellowships are available for outstanding applicants, and more may be available, funds permitting. A fellowship includes tuition, fees, books, and room and meals in Lawyer's Inn, a residence hall for male students. Transportation to and from applicants' home countries is not provided. For information regarding travel grants, applicants should inquire of the Cultural Officer of the United States Embassy or Legation, or the Director of the Fulbright Commission or Foundation in their respective countries.

Certificates of attendance will be issued to those completing all courses offered by the Academy.

Applicants must reside or have domicile outside the United States. They must have a college degree, an excellent scholastic record, and experience in one of the following fields: public service, law, economics, teaching or business. They must demonstrate ability to read, speak and understand the English language.

No application forms are required, but applicants should address a letter in English to the Director of the Academy, stating their purpose in seeking a fellowship, and enclosing a recent photograph, a certified transcript of grades received at an institution of higher learning, and a statement of ability to read, speak and understand English. Applications should also be supported by two letters of recommendation (in English), preferably one from a former teacher or a prominent United States citizen residing in the United States and the other from a practicing lawyer or employer. Applications must be filed not later than March 1, 1964.

Further information may be obtained by writing to the Director, Academy of American and International Law, International and Comparative

Law Center, The Southwestern Legal Foundation, Hillcrest at Daniels, Dallas, Texas—75205.

E. H. F.

NINTH INTERNATIONAL CONGRESS ON CRIMINAL LAW

As announced in the Society's *Newsletter* for October, 1963, the Ninth International Congress on Criminal Law will be held at The Hague from August 24 to 30, 1964, under the auspices of the International Association of Criminal Law of Paris. The Congress will discuss four subjects: Aggravating Circumstances, except consideration of additional charges and recidivism; Offenses against Family and Sexual Morality; The Rôle of the Prosecuting Organs in Criminal Proceedings; and International Consequences of Criminal Judgments. Each subject will be discussed in a separate working section on the basis of a general report prepared in 1963 at a meeting of the General Reporters with the authors of national or individual reports on the respective subjects. The General Reporters are: Professor L. Lernell, of the University of Warsaw, on Aggravating Circumstances; Professor M. Ploscowe, of New York University, on Offenses against Family and Sexual Morality; Mr. A. J. M. van Overveldt, Solicitor General, Court of Appeal of 's Hertogen-bosch, Netherlands, on The Rôle of the Prosecuting Organs in Criminal Proceedings; and Professor H. H. Jeschek, of the University of Freiburg, Germany, on International Consequences of Criminal Judgments.

The proceedings will be conducted in English or French, with simultaneous interpretation facilities available at the plenary and section meetings.

A program of excursions and social events is planned for those attending the Congress.

Persons interested in taking part in the Congress were requested to file provisional registration forms with the Secretariat of the Congress prior to December 1, 1963. Those so registering will receive in January, 1964, the advance program and final application and reservation forms. The registration fee will be about D. Fl. 125 for those participating in the Congress, and D. Fl. 75 for persons accompanying them.

A Netherlands Organization Committee, under the chairmanship of Professor J. M. van Bemmelen of Leyden University, is making arrangements for the Congress. Inquiries should be addressed to the Secretariat of the Congress, 14 Burgemeester de Monchyplein, The Hague, The Netherlands.

E. H. F.

ANNUAL MEETING OF THE SOCIETY

The 58th Annual Meeting of the Society will be held at the Mayflower Hotel in Washington, D. C., from Thursday, April 23rd through Saturday, April 25th, 1964. The tentative program provides that substantive panels will be held Thursday afternoon and evening, Friday morning and afternoon, and Saturday afternoon. The annual dinner will be held on Friday evening, at which time President James N. Hyde and another distinguished

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speaker will address the Society. On Saturday morning, April 25, the Society will hold its business meeting for the election of officers for the coming year as well as for the transaction of other necessary business.

The meeting will have as the general theme: *Causing Compliance with International Law*. The panels will consider widely varying aspects of this common problem. Currently in process of formation are panels focused on the following subjects:

1. *The meaning of compliance.* There is often confusion between the problem of causing another government to comply with a particular interpretation of international law and the problem of causing it to accept a fair procedure for defining an international obligation and to respect that decision. Richard Falk, with a paper on "Adversary or Impartial Compliance," will be among those on the panel.

2. *Enforcing international law by denying legal effect to acts contrary to it.* The *Sabbatino* case provides an opportunity for considering the extent to which having foreign courts examine the validity under international law of governmental acts will tend to cause compliance with international law and the extent to which it may be inconsistent with other efforts such as lump-sum claim settlements.

3. *Economic sanctions.* The cutting off of trade or economic aid has been recently discussed or employed as a means of protecting foreign investments in Latin America, of protecting human rights in South Africa, of modifying the conduct of Cuba, of discouraging aggression, and of causing governments to respect limits on their territorial waters. Howard Taubensfeld and others will consider the wisdom and effectiveness of such sanctions.

4. *Compliance during hostilities.* Richard Baxter will present a paper on what can be learned from Korea, Vietnam and other experiences during the last dozen years about the problem of causing respect for the laws of war. The panel may also consider the international enforcement of a cease-fire and techniques for causing respect for limits on limited war.

5. *Conference on Teaching and Research: The Study of Threats.* This year the annual conference on teaching and research will be concerned with problems of imbuing the teaching of international law with the best understanding which the social sciences have produced of how threats actually operate. Dean G. Pruitt will give a paper on Foreign Policy Decisions, Threats and Sanctions. Jan Triska will present a paper prepared in collaboration with Robert C. North reporting on aspects of ongoing research on differences between Soviet and Chinese perceptions of threats.

6. *Using the domestic legal system to protect international rights.* The virtues and methods of weaving international obligations into the general fabric of domestic law will be contrasted with those of having them protected by special promises.

7. *Public opinion as a force for compliance.* To what extent, in what way, and on what kind of questions will a resolution of the General Assembly or a report of the International Commission of Jurists alter a government's perception of what it ought to do or otherwise affect its conduct?

On what kinds of questions is the "public opinion" of different groups significant?

8. *Persuading governments to arbitrate.* Governments usually honor their admitted legal obligations. Arrangements for arbitration of economic disputes and the World Bank's arbitration proposals will be explored for light on the critical enforcement problem of inducing a government to accept a procedure for defining its legal obligations.

Members of this year's Committee on the Annual Meeting include Herbert W. Briggs, Wesley L. Gould, G. W. Haight, Louis Henkin, Hans A. Linde, Soia Mentschikoff, and Willis L. M. Reese.

Out-of-town members are urged to attend the annual meeting and to make hotel reservations as soon as possible. Members wanting to make room reservations at the headquarters hotel should write to Room Reservations, Mayflower Hotel, Washington, D. C., 20006, mentioning that they are attending the Society's annual meeting. Reservation cards will be distributed with the January *Letter to Members*. Hotel rooms in Washington are fully booked through Wednesday of the week in which the Society's meeting is scheduled, because of a large convention. Therefore, those attending the Society's meeting are urged to arrange not to arrive until the morning of Thursday, April 23.

ROGER FISHER

Chairman, Committee on Annual Meeting

AWARD OF MANLEY O. HUDSON MEDAL

The Executive Council of the American Society of International Law, at its meeting on November 9, 1963, voted to confer upon Philip C. Jessup, former President of the Society and now Judge of the International Court of Justice, the Manley O. Hudson Medal for pre-eminent scholarship and achievement in international law and in the promotion of the establishment and maintenance of international relations on the basis of law and justice.

The medal was established in 1955 through a special endowment fund donated to the Society by Mr. Ralph G. Albrecht, of New York City, to honor the late Manley O. Hudson, who was also a President of this Society and a Judge of the Permanent Court of International Justice. It is conferred in recognition of pre-eminent contributions to international law comparable in distinction to those of Judge Hudson himself, who was the first recipient of the award in 1956. Lord McNair, formerly Judge of the International Court of Justice, received the medal in 1959.

In recommending Judge Jessup for the honor, to be given this year, the Society's Committee on the Hudson Medal stated:

The literature in the field of international law and the diplomatic history of the United States and of the United Nations in the after-war years bear eloquent witness to his contributions. . . . In character and attainments Judge Jessup seems to your committee admirably to personify the qualities for which the Hudson Medal should be awarded and for the recognition of which qualities the award itself was initially established.

ELEANOR H. FINCH

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section has been prepared by a committee consisting of RICHARD B. BILDER, HAROLD S. BURMAN, STANLEY L. COHEN, THOMAS T. F. HUANG, SYLVIA E. NILSEN, and HERBERT K. REIS under the chairmanship of ERNEST L. KERLEY, all of the Office of the Legal Adviser, Department of State. Mr. ALFRED P. RUBIN of the Office of General Counsel, Department of Defense, has provided the committee with material originating in the Department of Defense.

TERRITORY

Acquisition and loss—cession

The Department of State issued the following press release:

A Convention between the United States of America and the United Mexican States for the Solution of the Problem of The Chamizal was concluded today in Mexico City. Ambassador Thomas C. Mann signed for the United States, and the Foreign Minister of Mexico, Manuel Tello, signed for Mexico. A copy of the English version of the Convention is attached.¹

This convention comprises essentially the proposed terms of settlement announced by the Department of State and the Mexican Ministry of Foreign Relations on July 18 (Department of State Press Release No. 375), and approved by the Presidents of the two countries.

The convention will now be submitted to the respective Senates of the two countries for advice and consent to ratification. If it meets with the approval of the two Senates, the Department will seek enabling legislation and appropriations from the United States Congress to provide for execution of its terms so far as the United States is concerned. Thereafter, in accordance with the convention, the United States Section of the International Boundary and Water Commission would proceed to acquire the lands and structures to be transferred to Mexico, and when the lands have been evacuated, and the structures passing intact to Mexico have been paid for by a Mexican banking institution, these lands and structures would be transferred to Mexico. The Mexican Government would at the same time transfer to the United States approximately one half of Cordova Island, a Mexican enclave north of the present channel of the Rio Grande. The International Commission would then relocate the Rio Grande at El Paso so that all Mexican territory in that area would be south of the new river channel.

This is the first bilateral treaty concluded with the Government of Mexico since 1949 and the first major boundary agreement reached since

¹ Reprinted below, p. 336.

1933. The Department of State looks upon the Chamizal Convention as a notable achievement in inter-American relations and as a major contribution in the peaceful settlement of boundary disputes.

(Dept. of State Press Release No. 448, Aug. 29, 1963; 49 Dept. of State Bulletin 480 (1963).)

Polar and subpolar regions—inspection to verify peaceful purposes of Antarctic installations

The Department of State issued the following press release:

STATEMENT CONCERNING THE UNITED STATES DECISION
TO CONDUCT AN ANTARCTIC INSPECTION

The United States will conduct an inspection in Antarctica during the 1963-1964 austral summer season (November-March). Planning for the conduct of such an inspection has been under way for some time and the United States has advised the other signatory powers of its intention to inspect.

The inspection is in keeping with provisions of the 12-power Antarctic Treaty, signed on December 1, 1959, which was subsequently ratified by the twelve powers and entered into force on June 23, 1961.¹ The treaty stipulates that "Antarctica shall be used for peaceful purposes only."² Article VII provides for inspection "to promote the objectives and ensure the observance"³ of the treaty.

This inspection is not based on any anticipation that there have been

¹ The Antarctic Treaty, Dec. 1, 1959, 12 U. S. Treaties 794; T.I.A.S., No. 4780; 54 A.J.I.L. 477 (1960).

² Art. I: "1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons."

³ Art. VII: "1. In order to promote the objectives and ensure the observance of the provisions of the present Treaty, each Contracting Party whose representatives are entitled to participate in the meetings referred to in Article IX of the Treaty shall have the right to designate observers to carry out any inspection provided for by the present Article. Observers shall be nationals of the Contracting Parties which designate them. The names of observers shall be communicated to every other Contracting Party having the right to designate observers, and like notice shall be given of the termination of their appointment.

"2. Each observer designated in accordance with the provisions of paragraph 1 of this Article shall have complete freedom of access at any time to any or all areas of Antarctica.

"3. All areas of Antarctica, including all stations, installations and equipment within those areas, and all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica, shall be open at all times to inspection by any observers designated in accordance with paragraph 1 of this Article.

"4. Aerial observation may be carried out at any time over any or all areas of Antarctica by any of the Contracting Parties having the right to designate observers.

"5. Each Contracting Party shall, at the time when the present Treaty enters into force for it, inform the other Contracting Parties, and thereafter shall give them notice in advance, of

treaty violations by any signatory power. Indeed, the United States believes that any inspection conducted under the treaty, whether by the U. S. or any other signatory power, will in fact reinforce the basis of mutual confidence that prevails in Antarctica. In this respect the United States has informed the other signatory powers that it will welcome inspection of its stations.

The twelve parties to the treaty are Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the U.S.S.R., the United Kingdom, and the United States.

(Dept. of State Press Release No. 469, Sept. 13, 1963; 49 Dept. of State Bulletin 513 (1963).)

SOVEREIGNTY

Military forces stationed abroad—duty of non-interference

On July 16, 1963, the Secretary of Defense issued a memorandum to the Secretaries of the Military Departments, the Director of the Defense Supply Agency, and the Administrative Assistant to the Secretary of Defense with regard to participation by military personnel in civil rights demonstrations. On August 22, 1963, the Joint Chiefs of Staff issued the following amplification of that memorandum:

In applying policy in reference message to overseas areas, it must be recognized that a well settled principle of international law is that one nation may not interfere with the internal affairs of another. In all countries where our forces are stationed, we are guests of a host nation. In most countries our rights and privileges are specifically delineated by Status of Forces Agreements. Our personnel do not have the right or privilege of participating in mass picketing, demonstrations or any other group or individual action designed to alter the policies, practices, or activities of the local inhabitants who are operating within the framework of their own laws. Accordingly, such actions by members of the US Armed Forces in foreign countries are prohibited.

(Unclassified JCS message 2190, Aug. 22, 1963, amplifying unclassified message DEF 344531, July 18, 1963.)

EXTRATERRITORIAL JURISDICTION

Exercise of judicial functions—judicial institutions and officers—military

In response to a letter from a private law firm, the Chief, General Law Branch, Military Affairs Division, Army Judge Advocate General's Office,

"(a) all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory;

"(b) all stations in Antarctica occupied by its nationals; and

"(c) any military personnel or equipment intended to be introduced by it into Antarctica subject to the conditions prescribed in paragraph 2 of Article I of the present Treaty."

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stated:

It has long been the position of the Department of the Army that its members may not, in their official capacity, undertake to serve civil or criminal process issuing from a State or Federal court. Commanding officers, however, may make members available for accepting process, provided the members agree thereto and it will not interfere with military duties. If the member stationed overseas wishes to accept service, and the rules of the issuing jurisdiction permit, he may arrange with another member acting in an unofficial (non-military) capacity to serve and make return of process. In addition, services could be effected by a civilian or official of the foreign state concerned, if such would satisfy your local law.

(Opinion JAGA 1963/3647 dated Feb. 28, 1963, on file in the Office of the Judge Advocate General, Department of the Army. This opinion is also reported in brief in Department of the Army Pamphlet No. 27-101-123 (63 JALS 10-11).)

STATE RESPONSIBILITY

Nationalization—compensation

The Department of State issued the following press release:

Early in June the Government of Ceylon announced its decision to give the state-owned Ceylon Petroleum Corporation a monopoly of the internal distribution of petroleum products as of January 1, 1964. On July 5, 1963, the American Ambassador to Ceylon acting under instructions presented a note to the Prime Minister of Ceylon. The attention of the Government of Ceylon was invited to the fact that the proposed action would be contrary to assurances given in 1962 that the private oil companies would be permitted to operate in Ceylon on the basis of fair competition. To date no reply to this note has been received.

On July 3 the Government of Ceylon issued a communique announcing its intention to introduce in Parliament legislation to enact into law its decision to have the internal distribution of petroleum products assigned solely to the Ceylon Petroleum Corporation. The communique also stated that "the amending act would have effect notwithstanding anything to the contrary in the principal act or any undertaking given by the government in regard to the import, sale and distribution of petroleum." On July 17 the government in fact introduced such a bill.

The Government of the United States does not question the right of a sovereign nation to nationalize property belonging to American citizens or companies, provided adequate and effective compensation is promptly paid in accordance with international law. The United States Government, however, regrets this most recent decision of the Government of Ceylon on two principal grounds. First, as indicated above, this action is at variance with assurances given earlier by the Government of Ceylon. Second, compensation has not yet been paid to the American companies for their properties which were taken over in 1962. The proposed action of the Government of Ceylon will deprive the companies of the use of the

remainder of their properties throughout the island and therefore will give rise to further and more complicated questions of compensation.

The United States Government is continuing its endeavors to obtain compensation for the fair value of the properties of the American oil companies taken over in 1962. It will also continue to seek in Ceylon and elsewhere to make it possible for American citizens and companies to conduct their business on the basis of fair competition.

(Dept. of State Press Release No. 383, July 23, 1963; 49 Dept. of State Bulletin 245 (1963).)

RECOGNITION OF GOVERNMENTS

Criteria for recognition—United States recognition of Provisional Government of Ecuador

The Department of State issued the following press release:

The Department of State has cabled our Ambassador in Quito, Maurice M. Bernbaum, directing him to acknowledge the note of July 12 from the Military Junta of Ecuador. By means of this acknowledgment we are resuming relations with Ecuador and are recognizing the Military Junta as the provisional Government of Ecuador. This action was taken after consultation with other Hemisphere Governments in the light of the following factors:

The United States Government has ascertained that the authority of the Military Junta has been accepted and recognized throughout the national territory and has noted the Junta's stated intention to respect Ecuador's international obligations.

The note of July 12 declared that a Military Junta constituted by the Combined Command of the Armed Forces of Ecuador has assumed the responsibility of governing the Nation until such time as it would be possible to organize elections in which the people of Ecuador would be able to exercise their will freely within the provisions of a new constitution.

The United States Government has noted with special satisfaction the solemn assurances offered by the Military Junta of its determination to restore Ecuador to constitutional government at the earliest possible moment. In public statements the Junta has indicated its belief that this goal can be achieved in substantially less than two years. The Junta also has declared its intention to provide a new constitution and lay the basis for the return to civilian government via constitutional procedures. While these assurances offered by the Junta have lessened the concern which naturally arose in the United States following the events of July 11, the United States Government reiterates its firm belief, shared elsewhere in the Hemisphere, that military seizures of political power should not become an acceptable substitute for constitutional procedures.

(Dept. of State Press Release No. 399, July 31, 1963; 49 Dept. of State Bulletin 282 (1963).)

Mode—conclusion of a treaty

On August 1, 1963, the following exchange took place at the President's press conference:

QUESTION. Mr. President, Senator Dirksen and some West German officials have expressed concern that if the nuclear test ban¹ is signed amongst others by this Government, by the Federal Republic of Germany, and by the East German regime, that this will amount to a tacit recognition of East Germany. What is your thinking on this point?

THE PRESIDENT. That is not correct. This matter was discussed and the position of the United States and Britain was made very clear to the Soviet Union, and as a matter of fact, the Soviet Union mentioned a regime which it did not recognize and did not wish to recognize. So that a procedure was developed whereby a regime which is not recognized by one of the other parties to the treaty can file its assent with one of the three parties. This act would not constitute recognition by the remaining signatories. The fact of the matter is that we signed a part of a multilateral treaty on Laos which the Red Chinese also signed, but we do not recognize the Red Chinese regime. This is a matter of intent. Diplomatic procedure, custom, and law provides that recognition is a matter of intent. We do not intend to recognize the East German regime and, therefore, the language which is in the treaty was part of the treaty when it was tabled more than a year ago, and it has been before us for a year and it does not provide for recognition of East Germany and we will not recognize it, and we believe strongly in the reunification of Germany as a free, democratic country. That is our policy in the past and our present policy and our future policy and would not be affected by this test ban agreement.

I do think that it is important that we have as great a participation in this nuclear test ban agreement as possible. We have received no encouragement, but we would like the Red Chinese to come into the agreement. It looks like they will not, but it would obviously be in the interest of world peace, but that does not constitute recognition.

(Hearings on the Nuclear Test Ban Treaty Before the Senate Committee on Foreign Relations, 88th Cong., 1st Sess. 14 (1963).)

Mode—conclusion of a treaty

During the press briefing of August 2, Robert J. McClosky, Department of State News Officer, made the following statement:

On the matter of recognition, I think the President really answered that yesterday. But within that context, I would offer some details: We understand the Federal Republic's concern that this treaty should work no recognition or change in status for East Germany. This question is one of great importance for the Federal Republic, and it is entirely right and proper that they should study the matter carefully and satisfy themselves fully on it.

¹ Reprinted in 57 A.J.I.L. 1026 (1963).

Under Secretary Harriman and his advisers had this problem very much in mind during the negotiation of the treaty.

Now, it is a well-established proposition of international law that recognition is not accorded to an unrecognized regime when that regime acts to become a party to a multilateral treaty, along with states that do not recognize it. Similarly, such action by an unrecognized regime does not result in any recognition or acknowledgment of the existence of the state which the regime purports to govern.

Diplomatic recognition of a government and also recognition or acknowledgment of the existence of a state is a matter of intention. No government is held to recognize unless it intends to do so.

The United States does not recognize that East Germany constitutes a state.

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We are confident that when the Government of the Federal Republic of Germany completes its study of the international law and practice on this question, it will reach the same conclusion.

(Hearings on the Nuclear Test Ban Treaty Before the Senate Committee on Foreign Relations, 88th Cong., 1st Sess. 15 (1963).)

Mode—conclusion of a treaty

The Legal Adviser of the Department of State transmitted the following opinion to the Senate Committee on Foreign Relations:

AUGUST 12, 1963.

OPINION OF THE LEGAL ADVISER

Subject: Questions of Recognition in Relation to the Nuclear Test Ban Treaty.

Article III of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space, and Underwater, provides that the Treaty shall be open to all States for signature, subject to later ratification, or for accession. It designates the United States, the United Kingdom, and the Soviet Union as depositary governments.

The question has arisen whether recognition is accorded to an unrecognized regime that subscribes to the obligations of the Test Ban Treaty. The answer is no; no change in the status of such a regime can occur.

I

In international law, the governing criterion in determining recognition is intent. 1 Hackworth, Digest of International Law, 166. The intention is ordinarily express, but recognition can also be implied from acts if they manifest unequivocally the intention of a government to recognize a state or regime. It is, however, a well-established proposition of international law that participation with an unrecognized regime in a multilateral treaty open for general adherence does not give rise to such an implication of recognition.

"The legal position with respect to multilateral treaties may be correctly summarized to the effect that neither signature nor adherence on the part either of the nonrecognizing or the unrecognized State result by themselves in bringing about recognition." Lauterpacht, *Recognition in International Law*, 374.

The American Law Institute Restatement of the Foreign Relations Law of the United States says:

"§107. Manifestation of Intention to Recognize: General

"(1) Recognition is effected by manifestation of intention by the government of a state to treat an entity as a state, or to treat a regime as a government. Such manifestation may be made by an express indication that recognition is extended or by implication from certain relations or associations between the state and the entity or regime, unless such an implication is prevented by disclaimer of intention to recognize.

* * *

"(3) Except as stated in §108 [which refers to participation in international organizations], participation by a state in a multilateral international agreement in which an entity not previously recognized by it also participates does not necessarily imply recognition of the entity as a state, or recognition, as its government, of the regime that makes the agreement for it." Restatement, *Foreign Relations* §107 (proposed off. draft 1962).

Continental writers take the same position. For example:

"It seems, therefore, that the prevailing practice is, not to restrict the effects of a multilateral treaty to the relations between recognized contracting parties, but to admit the validity of the commitment of a government that is not recognized, even with respect to the States that refuse to recognize it without, nevertheless, that government's obtaining implicit recognition." Charpentier, *La Reconnaissance internationale et l'évolution du droit des gens*, 61 (1956).

II

The practice of the United States has been consistent with this rule that participation in a multilateral treaty to which the United States is a party, especially a treaty open for general adherence, does not accord recognition to regimes or authorities that the United States does not recognize.

"It is not considered * * * that adherence to a multilateral treaty of which the United States is a signatory or to which it is a party, by an unrecognized government, involves recognition of the latter by the United States. It is erroneous to attribute to the Government of the United States the doctrine that adherence to a multilateral treaty by governments to which previous recognition had not been accorded, constitutes recognition of such governments. Adherence by another government is its own unilateral act. Intention is a matter of primary importance in recognition,

and intention on the part of the United States to recognize such a government could not be imputed to it from an act of the other government.”

1 Hackworth, Digest of International Law, 354.

The United States has also taken the position that no disclaimer is necessary in order to avoid recognition.

In 1929, in connection with the International Conference on the Safety of Life at Sea, Secretary of State Kellogg said:

“It is the view of the Government of the United States that neither participation of the United States through an American delegation in a Conference in which delegates representing the Soviet regime are also participants, the signing by American plenipotentiaries of a multilateral Convention which is signed also by delegates of the Soviet regime, nor the ratification of a Convention signed by plenipotentiaries of the United States and representatives of the Soviet regime constitute recognition of the so-called Government of the Union of Russia, and that such actions by the United States or its plenipotentiaries are not fairly open to construction by Foreign Governments as constituting such recognition by the United States.”

In 1932, Green Hackworth, then Legal Adviser, stated in connection with the International Sanitary Convention for Air Navigation:

“* * * the mere signing of a multilateral treaty to which a nonrecognized government is also signatory does not constitute recognition of that government. * * *

“Recognition, as has repeatedly been stated, is primarily a matter of intent. Intent to recognize cannot be validly imputed from the mere failure to raise objection or make reservation where no direct contractual obligation is undertaken.”

The United States has also taken the position that, within the framework of a general multilateral treaty, it could even have dealings with a non-recognized regime without thereby recognizing it. It has been our view that any possible implication resulting from such dealings would be effectively negated by an appropriate disclaimer.

As depositary of the 1949 Geneva Conventions on Red Cross and Prisoners of War, the Swiss Government received acceptances from five regimes not then recognized by the United States. The United States Government, in replying to notifications of these acceptances, acknowledged that the nonrecognized regimes had committed themselves to apply the conventions.

More recently, the United States signed the Protocol on the Neutrality of Laos in 1962, which was also signed by Communist China and North Vietnam. Despite this cosignature, the United States continues to refuse to recognize both these regimes.

The United States is a party to some eleven conventions or treaties also subscribed to by the so-called German Democratic Republic.* The treat-

* Convention for the unification of certain rules relating to international transportation by air; International Load Line Convention; Convention on safety of life at sea;

ment given by the United States to these efforts of the "GDR" to become a party to multilateral treaties has depended upon the nature of the particular treaty. In most cases (e.g., aviation, shipping, and industrial property), the United States, on receiving a notification from a depositary government that the "GDR" purported to accede, has replied by stating that, since the United States does not recognize the so-called GDR, the United States attached no significance to the purported action. However, in the case of the 1949 Geneva Conventions for the Protection of War Victims, the United States responded to a notification that the "GDR" had purported to accede by stating:

"The Government of the United States of America does not recognize the 'German Democratic Republic.' Bearing in mind, however, the purpose of the Geneva Conventions that their provisions should protect war victims in armed conflict, the Government of the United States * * * notes that the 'Government of the German Democratic Republic' has accepted the provisions of the Geneva Conventions * * *, and has indicated its intention to apply them, subject to certain reservations* * * as to which the attitude of the * * * United States parallels its attitude towards reservations to the Conventions as communicated at the time of deposit of the United States instruments of ratification."

The practice of other countries has been similar. The Federal Republic of Germany, for example, responded to the Swiss notification of the attempted East German adherence to the Prisoners of War Convention with a note of the same tenor as the United States note quoted above. When the International Sugar Agreement was signed in London in 1953, the Soviet Union, Poland and Czechoslovakia declared that their signatures did not imply recognition of the authority of the Republic of China over Formosa. Treaty Series, No. 28 (1956), Cmd. 9815, at 223.

III

The United States has also considered that, when acting as depositary of a multilateral treaty, it could receive and circulate communications from regimes it did not recognize without thereby extending recognition. For example, in the case of the International Civil Aviation Convention, Trans-Jordan forwarded a notice of adherence when the United States did not recognize the Trans-Jordan government. The United States accepted the notification, but pointed out in its notes to other governments that the United States had not accorded political recognition to Trans-Jordan and

Geneva Convention relating to the treatment of prisoners of war; Red Cross Convention for the amelioration of the condition of the wounded and sick in armed forces in the field; Red Cross Convention for the amelioration of the condition of the wounded, sick, and ship-wrecked members of armed forces at sea; Convention relating to the protection of civil persons in time of war; Agreement for the suppression of the circulation of obscene publications; Convention for the protection of industrial property; Convention relating to the suppression of the abuse of opium and other drugs; Convention for limiting the manufacture and regulating the distribution of narcotic drugs.

that application of the Convention between the United States and Trans-Jordan was not to be understood as implying political recognition of Trans-Jordan by the United States.

The United Kingdom adopted the same view as depositary of the Load Line Convention when the East German authorities filed a notification of adherence. The United Kingdom circulated the notice, emphasizing that it was acting solely in its capacity as depositary, and that its action in no way implied recognition of the East German authorities.

In the case of the Test Ban Treaty, however, it is understood among the original parties that no depositary need accept a signature or communications from a regime that it does not recognize. Thus the contacts between the United States as depositary and unrecognized regimes will be kept to an absolute minimum, and below the level which the general rules of international law would permit in a depositary without implying any change in recognition status of unrecognized subscribers to the Treaty.

(Hearings on the Nuclear Test Ban Treaty Before the Senate Committee on Foreign Relations, 88th Cong., 1st Sess. 15-17 (1963).)

TREATIES

Interpretation—Nuclear Test Ban Treaty

The Legal Adviser of the Department of State transmitted to the Senate Committee on Foreign Relations the following opinions concerning the interpretation of provisions in the Nuclear Test Ban Treaty:¹

AUGUST 14, 1963.

OPINION OF THE LEGAL ADVISER

Subject: Scope of the term "Underwater" in article I of the Test Ban Treaty.

Article I of the Nuclear Test Ban Treaty provides *inter alia*:

"Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:

"(a) * * * *or underwater, including territorial waters or high seas*;"

The question has been raised whether all bodies of water, including inland waters, are within the scope of the italicized clause. The answer is, yes.

If a nuclear test or explosion is "underwater," it is prohibited by the Treaty.

The phrase "including territorial waters or high seas" is illustrative, and not limiting. It was inserted in the Treaty to remove any question that tests on the high seas were prohibited, and that a party conducting such tests would be considered to have at least temporary control of the area in

¹ Aug. 5, 1963, T.I.A.S., No. 5433; 57 A.J.I.L. 1026 (1963).

which the test is conducted. Without this phrase, it might have been contended that tests on the high seas were not under the "jurisdiction or control" of a party within the meaning of Article I, and thus were not prohibited.

The present Treaty differs from the August 27, 1962, draft treaty tabled in Geneva by the United States and United Kingdom delegations. That treaty banned, in addition to tests in the atmosphere or outer space, tests "in territorial or high seas." Underwater tests in inland waters were not prohibited by this language. The change made by the present treaty makes clear that tests in inland water are prohibited.

A similar point arises with respect to the prohibition of tests in the atmosphere and outer space. Article I bans tests "(a) in the atmosphere; beyond its limits, including outer space; * * *." Here also, the phrase "including outer space" is illustrative and not limiting. In this case, it was so worded to prevent any implication that there was an area in space not covered by the words "atmosphere" or "outer space."

Both analysis of the text and the drafting history of the Treaty make it clear that the negotiators intended to prohibit all nuclear tests except underground tests which do not cause radioactive debris to be present outside the territorial limits of the state in which the test is conducted.

(Hearings on the Nuclear Test Ban Treaty Before the Senate Committee on Foreign Relations, 88th Cong., 1st Sess. 61-62 (1963).)

AUGUST 14, 1963.

OPINION OF THE LEGAL ADVISER

Subject: Meaning of the Words "Or Any Other Nuclear Explosion" Appearing in Article I, Paragraphs 1 and 2 of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater.

Article I, paragraph 1, of the Treaty provides:

"1. Each of the parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, *or any other nuclear explosion*, at any place under its jurisdiction or control: * * *"

Article I, paragraph 2, provides:

"2. Each of the Parties to this Treaty undertakes furthermore to refrain from causing, encouraging, or in any way participating in, the carrying out of any nuclear weapon test explosion, *or any other nuclear explosion*, anywhere which would take place in any of the environments described or have the effect referred to in paragraph 1 of this article."

The question has been raised whether the words "or any other nuclear explosion" impose any limitation on the use of nuclear weapons by the parties in war.

The answer is no.

I. THE TEXT OF THE TREATY

The text of the Treaty and its internal construction provide ample grounds for answering the question in the negative.

The title of the Treaty is "Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater." This title delimits the operative scope of the Treaty. It shows that the Treaty was intended to deal with weapon tests and not with the use of nuclear weapons in combat or in connection with armed hostilities. The limited scope of the Treaty in this respect is reinforced by its Preamble. The second paragraph looks forward to more general disarmament, eliminating the incentive to the production and testing of nuclear weapons. If this Treaty banned the use of such weapons in wartime, the incentive for further production and testing would already be gone. Similarly, the third paragraph of the Preamble, looking to the future negotiation of a comprehensive test ban, shows that this Treaty is limited in its application to nuclear weapons tests.

The Agreed Communique issued when the Treaty was initialled refers to a series of meetings to discuss "questions relating to the discontinuance of nuclear tests." It notes that agreement was reached on the "text of a treaty banning nuclear weapons tests in the atmosphere, in outer space, and underwater." It refers to the agreement in several places as "the test ban treaty," and it refers specifically to discussions relating to a non-aggression pact. Had the negotiators agreed to ban the use of nuclear weapons in war it would surely have been mentioned in the Agreed Communique.

Moreover, the general scheme of the Treaty is inconsistent with an interpretation of the words, "other nuclear explosion" to cover wartime use of nuclear weapons. The Treaty has no effect on laboratory development of nuclear weapons. It permits weapons tests and other explosions underground, so long as the radioactive debris is confined within the territorial limits of the State in which the explosion is conducted. The Treaty does not restrict weapons production, as appears from the second paragraph of the Preamble. The Soviet Union has rejected any proposal even to restrict the production of fissionable material for weapons purposes. Finally the Treaty does not require the destruction of any stockpiled weapons. It is hardly conceivable that a treaty which permits the development, testing, stockpiling, and production of nuclear weapons should be construed as banning their use in wartime.

II. NEGOTIATING HISTORY

The conclusions derived from the text of the Treaty are supported by a review of the negotiating history. That history reveals that the words "or any other nuclear explosion" were inserted to prevent evasion of the Treaty by the explosion in peacetime of tested nuclear weapons, whether for peaceful purposes or otherwise.

The basis for the Moscow negotiations was the draft of the limited

nuclear test ban treaty tabled in Geneva on August 27, 1962, by the United States and United Kingdom delegations. Article I of that draft prohibited nuclear weapon tests. Explosions were dealt with in Article II. Such explosions were permitted, but were to be subjected to controls because of the difficulty of distinguishing peaceful purpose explosions from weapons tests.

In the course of the Moscow negotiations, the Soviets rejected Article II of the August 1962 draft completely. This rejection would have left a loophole in the Treaty if Article I had remained confined to "nuclear weapon test explosions." A party might have conducted explosions revealing valuable military data or even weapon tests on the pretense that they were in fact peaceful purpose explosions and not "nuclear weapon test explosions." In order to close this loophole, the phrase "any other nuclear explosion" was inserted in Article I at the appropriate points. Its purpose is to prevent, in the specified environments, peacetime nuclear explosions that are not weapons tests. That is its only significance.

III. GENERAL UNDERSTANDING

This construction of the phrase "or any other nuclear explosion" is supported by the public statements of United States and other officials prior to the signature and ratification of the Treaty. Thus, in his radio address presenting the Treaty to the American public, the President said:

"[N]o nation's right of self-defense will in any way be impaired. Nor does this treaty mean an end to the threat of nuclear war. It will not reduce nuclear stockpiles; it will not halt the production of nuclear weapons; it will not restrict their use in time of war."

The President's message transmitting the Treaty to the Senate for advice and consent to ratification makes the same point,¹ as does Acting Secretary Ball's letter transmitting the Treaty to the President.² Secretary of State Rusk reiterated the point³ at the signing ceremony in Moscow, and again in his testimony before the Senate Foreign Relations Committee. There he said:

"This Treaty does not affect the use of nuclear weapons in war. It has to do with nuclear weapon testing in time of peace."

¹ "While it will not end the threat of nuclear war or *outlaw the use of nuclear weapons*, it can reduce world tensions, open a way to further agreements, and thereby help to ease the threat of war."

² "The phrase 'any other nuclear explosion' includes explosions for peaceful purposes. Such explosions are prohibited by the treaty because of the difficulty of differentiating between weapon test explosions and peaceful explosions without additional controls. The article does not prohibit the use of nuclear weapons in the event of war nor restrict the exercise of the right of self-defense recognized in article 51 of the Charter of the United Nations."

³ "[The treaty] is only a first step. It does not end the threat of nuclear war. It does not reduce nuclear stockpiles; it doesn't halt the production of nuclear weapons; it does not restrict their use in time of war."

This understanding of the import of the Treaty is not confined to United States officials alone. For example, United Nations Secretary-General U Thant, appearing in Moscow at the Treaty signing, listed a number of "other equally important measures aimed at the relaxation of tension." Among these he included the following:

"I would also hope that the proposal, initiated in the fall of 1961, for convening a special conference for signing the convention on the prohibition of the use of nuclear and thermonuclear weapons for war purposes, will now receive wider support."

It would obviously be unnecessary to hold such a conference if the test ban treaty itself outlawed the use of such weapons in war.

IV. TACTICAL WEAPONS

There has been some suggestion that the phrase "or any other nuclear explosion" might outlaw the use of tactical, as opposed to strategic, weapons in wartime. There is no basis in the Treaty for making any distinction whatever between tactical and strategic weapons. The analysis in this Opinion applies fully to tactical as well as strategic weapons.

(Hearings on the Nuclear Test Ban Treaty Before the Senate Committee on Foreign Relations, 88th Cong., 1st Sess. at 76-78 (1963).)

Withdrawal

The Legal Adviser of the Department of State transmitted the following opinion to the Senate Committee on Foreign Relations:

AUGUST 12, 1963.

OPINION OF THE LEGAL ADVISER

Subject: Right of the United States to withdraw from the nuclear test ban treaty in the event of violation by another party.

Article IV of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Underwater provides, *inter alia*:

"Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the treaty three months in advance."

The question has been raised whether the United States would have to give 3 months notice prior to withdrawing if another party conducted nuclear weapon tests in the atmosphere, or committed some other act in plain violation of the treaty. The answer is "No."

A breach of treaty obligations by one party is considered in international law to give other parties the right to terminate their obligations under the

treaty. Article IV is not intended as a restriction of that right. The three original parties recognized that events other than violations of the treaty might jeopardize a country's "supreme interests" and require that country to resume testing in the prohibited environments. Article IV permits withdrawal, upon 3 months' notice, in this case. If another party violated the treaty, the United States could treat the violation as an "extraordinary event" within the meaning of article IV, or it could withdraw from the treaty immediately.

I. THE GENERAL RULE

In international law, violation of a treaty by one party makes the treaty voidable at the option of the other parties. I Lauterpacht, "Oppenheim's International Law" 947 (8th ed. 1955); see also Restatement, Foreign Relations, sec. 162 (proposed official draft 1962). Whether there has been a violation, and whether it is serious enough to justify termination is for each party, acting in good faith, to decide. The right to void the treaty must be exercised within a reasonable time after the violation has become known, I Lauterpacht, 948.

The right of unilateral abrogation for cause has apparently never been adjudicated in an international court.¹ It has, however, been confirmed by publicists generally, and by United States, British, and Soviet authorities, among others.

The British view is "that, in general terms, such a right exists; [and] that the exercise of this right is optional at the discretion of the party wronged." McNair, "The Law of Treaties, British Practice and Opinions" 515 (1st ed. 1938).² Soviet authorities have taken the same position:

"The annulment of a treaty by one signatory in the event of the non-fulfillment by the other of key terms is held to be legal," Academy of Sciences of the U.S.S.R., Institute of State and Law, "International Law" 280.

The United States has consistently affirmed its unilateral right to terminate treaties in the event of violation by another party. Green Hackworth, then Legal Adviser of the Department of State and later a judge of the International Court of Justice, declared in 1935,

"The weight of opinion as expressed, at least in the United States, appears to incline to the view that a state may by its own unilateral act terminate a treaty as between itself and a state which it regards as having violated such treaty." Memorandum of the Legal Adviser of the Depart-

¹ It has, however, been alluded to in at least two cases before the Permanent Court of International Justice, "Diversion of Water From the River Meuse," P.C.I.J., ser. A/B, No. 70, 50 (1937); *Case concerning the Factory at Chorzow*, P.C.I.J., ser. A, No. 9, 81 (1927).

² The second edition of McNair deals with the law of treaties generally, rather than with British practice. In the second edition, he limits the exercise of the right to cases of "fundamental breach." *Id.* at 571 (2d ed., 1961).

nment of State, February 27, 1935, V Hackworth, "Digest of International Law" 346 (1943).

In 1791, James Madison wrote that a breach of a treaty by one party "discharges the other," which is then "at liberty to take advantage or not of the breach, as dissolving the treaty," V Moore, "Digest of International Law" 321 (1906).

At least four Secretaries of State and one President have expressed the same view. Secretary of State Frelinghuysen termed the Clayton-Bulwer treaty "voidable at the option of the United States" because Great Britain had "persistently violated her agreement not to colonize the Central American coast." Quoted in *Hooper v. U.S.*, 22 Ct. Cl. 408, 417 (1887). And in a memorandum for the President in 1896 concerning that treaty, Secretary of State Olney said Great Britain "undoubtedly did not fully comply with the provisions of the treaty" and that this "might well have been made the ground for an annulment of the treaty altogether,"³ III Moore, 205. Secretary of State Lansing took the same position in a communication to the Swiss Minister in Washington concerning the effect of German violations of the treaty with Prussia of 1828, II Hyde, "International Law Chiefly as Interpreted and Applied by the United States" 1542 (2d rev. ed. 1945). The right of abrogation upon breach by another party was affirmed in a dictum by President Coolidge in his award as arbitrator in a dispute between Chile and Peru. Opinion and award of the arbitrator, 19 Am. J. Int'l L. 393, 398 (1925). Secretary of State Hughes also signed the award.

Finally, the Supreme Court has also declared the principle. Mr. Justice Iredell, in *Ware v. Hylton*, said it was "a part of the law of nations, that if a treaty be violated by one party, it is at the option of the other party, if innocent, to declare, in consequence of the breach, that the treaty is void" (3 Dallas 199, 261 (1796); see also *Charlton v. Kelly*, 229 U.S. 447 (1913)).

The most restrictive position on the right of unilateral abrogation for cause is taken by the Harvard Law Research Draft Convention on the Law of Treaties, which rejects the right and substitutes instead provisional suspension pending referral to an international tribunal, 29 Am. J. Int'l L., Supp. 1077, 1094 (1935). This position has been rejected by subsequent writers, and finds no support in international practice.

II. INTERNATIONAL PRACTICE

The right to abrogate or annul a treaty on the ground that another party has committed a breach has been exercised rarely. The United States appears to have invoked it only once. In 1798, when relations be-

³ The United States alleged that Great Britain had violated the treaty by exercising sovereignty over British Honduras, and by treating that territory as a British colony. The British considered the allegation "wholly untenable," on the ground that the treaty was not intended to cover British Honduras. However, they also assumed that the United States would be entitled to abrogate the treaty if Great Britain had violated it, McNair, 567-568 (2d ed.).

tween France and the United States were strained, Congress passed an act, signed by the President, declaring that—

"Whereas the treaties concluded between the United States and France have been repeatedly violated on the part of the French Government; and the just claims of the United States for reparation of the injuries so committed have been refused, and their attempts to negotiate an amicable adjustment of all complaints between the two nations have been repelled with indignity: * * * the United States are of right freed and exonerated from the stipulations of the treaties and of the consular convention, heretofore concluded between the United States and France,* * *" 1 Stat. 578, V Moore, 356.⁴

France did not recognize the U.S. termination. For an account of subsequent negotiations see V Moore, "History and Digest of the International Arbitrations to Which the United States Has Been a Party" 4429 (1898).

In 1933, a Greek Court refused to extradite Samuel Insull, then under indictment in the United States for violation of the bankruptcy laws. The United States denounced the treaty but did not abrogate it. In a communication to the Greek Minister of Foreign Affairs, the American Minister to Greece, termed the decision "utterly untenable and a clear violation of the American-Hellenic Treaty of Extradition * * *" and stated:

"Accordingly I am instructed to give formal notice herewith of my Government's denunciation of the treaty with a view to its termination at the earliest date possible under its pertinent provisions," 28 Am. J. Int'l L. 307, 311 (1934).

The issue was later resolved by a protocol to the extradition treaty, IV Hackworth, "Digest of International Law" 118.

In 1870, Russia denounced the Black Sea clauses of the Treaty of Paris on the ground that the other parties had violated several of its essential clauses. For an account of British practice, see McNair, 540-570 (2d ed.).

Unilateral abrogation has normally been met by vigorous protests from the other parties. However, the protests have been the result of disagreement over the facts rather than over the principle of law. See II Hyde, 1543, McNair, 568 (2d ed.).

III. MATERIALITY OF THE BREACH

Most publicists limit the right of abrogation to cases of a substantial breach by the other party. Hyde says abrogation by one party is justified by the "failure of a contracting state to observe a *material stipulation* of its agreement * * *," although he also notes the futility of attempting "to enunciate rules pointing decisively to the circumstances when abrogation by one party is to be excused." II Hyde, 1541. [Italics supplied.] The rule is sometimes stated in terms of the nonfulfillment of "key terms" (U.S.S.R., "International Law" 280) or "breach of a stipulation which is

⁴ The treaties with France were abrogated by act of Congress. However, the President may, acting alone, declare a treaty inoperative or suspended. See 40 Ops. Att'y Gen. 119, 123 (1941). See also "Restatement," sec. 167.

material to the main object," Hall, "A Treatise on International Law" 409 (8th ed. Higgins 1924). Under the proposed draft restatement, termination of the entire agreement is justified only when the violation "has the effect of depriving the aggrieved party of an essential benefit of the agreement," "Restatement," section 162. The draft articles on the Law of Treaties of the International Law Commission, prepared by G. C. Fitzmaurice, require a "fundamental breach of the treaty in an essential respect, going to the root or foundation of the treaty relationship between the parties, * * *" II Yearbook of the International Law Commission 31 (1957), A/CN.4/SER.A/1957 (Add.1).

Hackworth, however, does not so limit the right of abrogation, and Lauterpacht states:⁵

"There is no unanimity on this point, since some make a distinction between essential and nonessential provisions of the treaty, and maintain that only violation of essential provisions creates a right for the other party to cancel the treaty. Others oppose this distinction, maintaining that it is not always possible to distinguish essential from nonessential provisions, that the binding force of a treaty protects nonessential as well as essential provisions, and that it is for the injured party to consider for itself whether violation of a treaty, even in its least essential parts, justifies its cancellation," I Lauterpacht, 947.

The primary undertakings of the nuclear test ban treaty are contained in articles I and IV. Article I obligates the parties not to conduct nuclear weapon tests or other nuclear explosions in the atmosphere, underwater, or in outer space. Underground explosions are permitted if they do not spread radioactive debris beyond the territory of the country in which they are conducted. Parties are also prohibited from "causing, encouraging, or in any way participating in" the carrying out of prohibited tests or explosions by others. Article IV requires 3 months' notice of withdrawal in the case of an "extraordinary event" jeopardizing "supreme interests." Breach of any of these obligations, all of which are fundamental, would justify withdrawal from the treaty under appropriate circumstances.

IV. MULTILATERAL TREATIES

The right of a party to terminate its obligations under a multilateral treaty because another party has breached it depends upon the nature of the treaty. A breach by one party obviously does not give any other party the right to bring the whole treaty to an end. At most, the aggrieved party may consider itself released from its obligations under the treaty.

In the case of multilateral treaties creating obligations necessarily dependent on the corresponding performance of other parties, a breach by one party justifies withdrawal by any other party. A disarmament treaty has

⁵ In the first edition of his "Law of Treaties," McNair said flatly, "* * * it is not possible to say that some stipulations are essential ones and some are not, and that only a breach of one of the former class gives rise to the right; it must be assumed that each stipulation forms part of the consideration which induced the other party to enter into the treaty," at 515.

been cited as an example of such a treaty in an analysis of unilateral withdrawal from multilateral treaties, II Yearbook of the International Law Commission 52-55 (1957). The nuclear test ban is of the same character. The undertaking of each party to refrain from testing nuclear weapons is given in return for a similar undertaking by each of the other parties.

However, in the case of a multilateral treaty consisting of a mutual and reciprocal interchange of benefits and concessions, such as a copyright or consular convention, a breach by one party does not justify general withdrawal by another party. Rather, it justifies only a reciprocal breach of obligations. For example, if state A refused to honor its obligations to state B under a copyright convention, state B could be released, if it chose, from its obligations to state A. It would not, however, be released from its obligations to other parties to the convention. *Ibid.*

(Hearings on the Nuclear Test Ban Treaty Before the Senate Committee on Foreign Relations, 88th Cong., 1st Sess. 37-40 (1963).)

Human rights—slavery, forced labor, political rights of women

In a letter to the President of the Senate, dated July 22, 1963, the President stated:

JULY 22, 1963

DEAR MR. PRESIDENT: I have today transmitted to the Senate three conventions with a view to receiving advice and consent to ratification. These are:

1. The Supplementary Convention to the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery,¹ prepared under the direction of the United Nations in 1956, to which 49 nations are now parties.

2. The Convention on the Abolition of Forced Labor,² adopted by the International Labor Organization in 1957, to which 60 nations are now parties.

3. The Convention on the Political Rights of Women,³ opened for signature by the United Nations in 1953, to which 39 [40] nations are now parties.

United States law is, of course, already in conformity with these conventions, and ratification would not require any change in our domestic legislation. However, the fact that our Constitution already assures us of these rights does not entitle us to stand aloof from documents which project our own heritage on an international scale. The day-to-day unfolding of events makes it ever clearer that our own welfare is inter-related with the rights and freedoms assured the peoples of other nations.

These conventions deal with human rights which may not yet be secure in other countries; they have provided models for the drafters of constitutions and laws in newly independent nations; and they have influenced

¹ S. Exec. L, 88th Cong., 1st Sess.

² S. Exec. K, 88th Cong., 1st Sess.

³ S. Exec. J, 88th Cong., 1st Sess.

the policies of governments preparing to accede to them. Thus, they involve current problems in many countries.

They will stand as a sharp reminder of world opinion to all who may seek to violate the human rights they define. They also serve as a continuous commitment to respect these rights. There is no society so advanced that it no longer needs periodic recommitment to human rights.

The United States cannot afford to renounce responsibility for support of the very fundamentals which distinguish our concept of government from all forms of tyranny. Accordingly, I desire, with the constitutional consent of the Senate, to ratify these Conventions for the United States of America.

Sincerely,

JOHN F. KENNEDY

(49 Dept. of State Bulletin 322 (1963).)

EXTRADITION

Extraditable offenses—procedural safeguards

The Department of State issued the following press release:

The Secretary of State today informed the Ambassador of Venezuela that the United States has agreed to the request of the Government of Venezuela for the extradition of Marcos Perez Jimenez.

The request was made in August 1959 under the Extradition Treaty of 1922 between the United States and Venezuela¹ in which the two countries bind themselves, on a reciprocal basis, to extradite persons charged with committing any of the crimes enumerated in the Treaty. At the conclusion of the extradition hearing on the Venezuelan request, United States District Judge George W. Whitehurst, sitting as extradition magistrate, found that the evidence presented by Venezuela showed probable cause to believe Marcos Perez Jimenez guilty of the crimes of embezzlement or criminal malversation, breach of trust and receiving money unlawfully obtained; that there was no legal impediment to his extradition; and that, therefore, the requirements of the Treaty had been met. Thus, under United States law, the Secretary of State was authorized to extradite Marcos Perez Jimenez for trial on only the crimes of embezzlement or criminal malversation, breach of trust and receiving money unlawfully obtained and, under the Treaty, Venezuela could try him only for those offenses were he to be extradited.

In habeas corpus proceedings, brought by Marcos Perez Jimenez to challenge the decision of the extradition magistrate, the decision of the magistrate was upheld by the United States District Court for the Southern District of Florida and by the United States Court of Appeals for the Fifth Circuit.² The habeas corpus proceedings were finally terminated when on June 17, 1963 the Supreme Court denied a petition for rehearing

¹ Treaty of Extradition, and Additional Article, Jan. 19 and 21, 1922, 43 Stat. 1698, Treaty Series, No. 675; 18 A.J.I.L. Supp. 174, 179 (1924).

² See 57 A.J.I.L. 670 (1963).

of a petition for certiorari to review the decision of the Court of Appeals.

In addition to the record of the extradition hearing and the habeas corpus proceedings, the Secretary has had before him written submissions from the attorneys for Marcos Perez Jimenez and from the Government of Venezuela. The Secretary also met with attorneys for Marcos Perez Jimenez at their request at which time they presented arguments in opposition to extradition. Finally, the Government of Venezuela presented a note giving assurances that should Perez Jimenez be returned to Venezuela careful security measures would be taken to insure his physical safety, that he would be given a fair trial and given all the rights accorded an accused under the laws of Venezuela, including the right to full and effective defense and including the right to be defended by counsel of his own choosing and that, in accordance with Article XIV of the Treaty, he would be tried only for those offenses for which extradition was granted.

(Dept. of State Press Release No. 417, Aug. 12, 1963; 49 Dept. of State Bulletin 364 (1963).)

DIPLOMATIC PRIVILEGES AND IMMUNITIES

Exemption from judicial process—special missions

In the case of *Chong Boon Kim v. Kim Yong Shik* and *David Kim*, the following suggestion of immunity was submitted to the Circuit Court of the First Circuit, State of Hawaii:

SUGGESTION OF INTEREST SUBMITTED ON BEHALF OF THE UNITED STATES

HERMAN T. F. LUM, United States Attorney for the District of Hawaii, files this Suggestion of the Interest of the United States at the direction of the Attorney General of the United States made pursuant to 5 U.S.C. 316, and respectfully submits to the court as follows:

1. The United States Department of Justice has been informed by the Department of State that service of process in this action has been effected upon His Excellency, Kim Yong Shik, the Foreign Minister of the Republic of Korea, on the occasion of his transit through the State of Hawaii while on an official visit to the United States. (A photostatic copy of the letter from the Department of State is enclosed.)

2. Under customary rules of international law, recognized and applied in the United States, the head of a foreign government, its foreign minister, and those designated by him as members of his official party are immune from the jurisdiction of United States federal and state courts.

3. The Department of State recognizes the diplomatic status of His Excellency, Kim Yong Shik, on the occasion of his visit to the United States in July, 1963. The undersigned respectfully requests that this determination of the United States Government be given effect.

HERMAN T. F. LUM
United States Attorney

Of Counsel:

JOHN W. DOUGLAS
Assistant Attorney General

BRUNO A. RISTAU
Attorney, Department of Justice

On September 9, 1963, the court dismissed the action as to Kim Yong Shik, on the basis of lack of jurisdiction.

Customs—importation of lottery tickets

In a reply, dated July 25, 1963, to a letter from the Office of the General Counsel of the United States Post Office Department, dated July 1, 1963, the Department construed Section 288(b) of the International Organizations Immunities Act¹ to the effect that mail to a person entitled to the benefits of that Act is subject to the statutory restrictions applicable to mail addressed to private individuals within the United States. Accordingly, Federal law relating to the importation or interstate transportation of mail containing lottery matter applies to such a person.

(Copy of letter on file in the Office of the Legal Adviser, Dept. of State.)

CONSULS

Conservation of estates—extraterritoriality—Treaty of 1836 between Morocco and the United States

In an unclassified instruction to the American Embassy in Rabat, Morocco, dated September 17, 1963, the Department took the position that Article 22, the "estates" clause, and all other provisions of the Treaty of Peace between Morocco and the United States,² including the most-favored-nation provision of Article 24, remain in force for all purposes other than the exercise by the United States Government in Morocco of extraterritorial jurisdiction over its citizens and protégés. The Department interpreted the United States note to Morocco, dated October 6, 1956, pursuant to the Congressional Joint Resolution of August 1, 1956,³ which provided for the relinquishment of "consular jurisdiction" granted by agreements with Morocco, as limited to extraterritorial jurisdiction. Inasmuch as provisions relating to the right of consular officers to take charge of the effects of their deceased countrymen and provisions relating to rights of inheritance are common to consular conventions or similar agreements throughout the world, it was considered that such provisions do not have an extraterritorial character.

(Unclassified Airgram A-14, September 17, 1963).

¹ 59 Stat. 669 (1945); 22 U.S.C. § 288 (1959); reprinted in 40 A.J.I.L. Supp. 85 (1946).

² Treaty of Peace with Morocco, Sept. 16, 1836, 8 Stat. 484; Treaty Series, No. 244-2.

³ 70 Stat. 773 (1956).

JUDICIAL DECISIONS

BY JOHN R. STEVENSON *
Of the Board of Editors

NOTES ON PUBLIC INTERNATIONAL LAW CASES

Military necessity—no duty to compensate for battle damage

The Burmah Oil Company brought an action against the Crown, claiming reparation for the damage resulting from the destruction on March 7, 1942, by the British Army of Burmah's oil installations near Rangoon to prevent their falling into the hands of the advancing Japanese Army. The Scottish Court of Session held that, where the Crown takes a subject's property, either for use or for destruction, the subject is entitled to compensation, except when the taking is in the course of battle, in which event "the loss is just an accident of war" for which no compensation can be claimed. The court, in denying compensation, found that the destruction in this case "was so intimately tied up with the actual fighting in the retreat from Burma that it must be regarded as battle damage, and not as a facet of the strategic conduct of the war." *Burmah Oil Company (Burma Trading) Limited v. The Lord Advocate*, 1963 Scots Law Times 261 (Scot. Ct. of Session, 1st Div., March 14, 1963).

Deportation—determination of nationality of deportees

The Attorney General's findings that deportable aliens, who were born on the Chinese mainland, were natives and citizens of "China" for the purpose of their deportation were held by the Court of Appeals to be properly construed as findings that they were natives and citizens of the government recognized by the United States as the legal government of the Republic of China, at least without proof of their allegiance to the unrecognized government. Nationality and citizenship for the purposes of §243(a) of the Immigration and Nationality Act of 1952, 8 U.S.C.A. §1253(a) (which provides that "... deportation of such alien shall be directed to any country of which such alien is a subject national or citizen, if such country is willing to accept him into its territory") are not to be determined exclusively by the locus of birth, but political matters must be considered.

The court rejected the appellants' contention that it was necessary to obtain the consent of Communist China to the deportation in order to fulfill the statutory requirement of obtaining the consent of the govern-

* Assisted by Peter S. Paine, Jr., and William J. Williams, Jr., of the New York Bar, and Robert A. R. MacLennan, of the English Bar.

ment of the deportee. Although Communist China may sometimes be a "country" for deportation purposes, the statute would be deprived of effectiveness where there are two "governments," if the Attorney General were required to secure the consent of the unrecognized government. Such requirement would subvert in a substantial sense the foreign policy of the United States and obstruct the intention of Congress to reduce the number of undeportables. *Lee Wei Fang, et al. v. Kennedy*, 317 F. 2d 180 (U.S.Ct.A., D.C. Cir., March 25, 1963).

Sovereign immunity not self-executing—act of state doctrine applicable to suit for damages against Cuban Government for expropriating plaintiff's property

United States citizens holding the majority of the stock of a Cuban corporation brought an action in the Florida courts to recover damages for the expropriation of the corporation's property in Cuba by the National Institute of Agrarian Reform, an agency of the Cuban Government. On appeal from a judgment of the Circuit Court of Dade County for the plaintiffs, the Florida District Court of Appeal reversed the judgment and dismissed the complaint.

In reaching this determination, the court held, first, that, although the doctrine of sovereign immunity prevented courts from entertaining jurisdiction over a foreign state or its property, the doctrine is not self-executing. "The procedure for raising a question of sovereign immunity is by making it a subject of diplomatic representation to the United States Department of State; and the claim, if recognized, may be set forth and supported in an appropriate suggestion to the court by the Attorney General of the United States." No such action having been taken, the trial court could not have recognized the defense, nor could it be considered on appeal. The court noted that a suggestion for sovereign immunity from execution was filed by the Attorney General subsequent to the judgment in the court below, but this was not to be considered an immunity from suit.

Turning to the "act of state" doctrine, the Court of Appeal distinguished the present case from the decision in *Banco Nacional de Cuba v. Sabbatino*, 307 F. 2d 845 (U.S.Ct. A., 2d Cir., 1962).¹ Whereas in the *Sabbatino* case the Cuban bank was invoking the aid of a United States court to enforce a foreign decree which was obnoxious to the public policy of the forum,

In the case before us, American nationals seek to enforce a claim of conversion in Cuba because of the alleged invalidity of a decree of the Cuban Government. There is a recognizable distinction between the refusal to enforce a foreign law which is repugnant to the public policy of the forum . . . and refusal to pass on the validity under the law of a foreign state of the acts of its officials. . . .

The court further held that a telegram from the Executive Department of the United States Government stating, "Effect in U. S. of decrees, etc.

¹ 56 A.J.L.L. 1085 (1962).

of Castro regime is question for court in which case heard," merely indicated the Government's intention not to interpose in the litigation and did not mean that the Government intended that the "act of state" doctrine should not be applied. The court held that it was bound by the decisions of the United States Supreme Court to apply the doctrine, and that to declare the expropriation invalid because of its being discriminatory, arbitrary and confiscatory, would be to deny the sovereignty of Cuba. *National Institute of Agrarian Reform v. Kane*, 153 So. 2d 40 (Fla. Dist. Ct. of App., May 14, 1963).

Bretton Woods Agreement—Cuban exchange control law upheld

Plaintiff, a Cuban national and refugee, sued defendant, an American life insurance company, in the Louisiana courts for the cash surrender value in U. S. dollars of a policy issued to him in Cuba through the Company's Havana agent in 1928. A 1959 Cuban law, enacted at a time when the plaintiff was still resident in Cuba, made it illegal for corporations doing business in Cuba to make book entries or payments which would result in funds becoming available abroad to Cuban nationals without the express consent of the Cuban Government.

The Louisiana Court of Appeals, in reversing the decision below in favor of the plaintiff, held that Article VIII §2(b) of the Bretton Woods Agreement and implementing Acts of Congress required courts of the United States to deny enforcement of contracts which would frustrate the exchange control regulations of another party to the Agreement. The court refused to accept the proposition that Louisiana law ought to be applied to the contract, stating "the present law of Cuba, which nationalized under Cuba's police powers the insurance business, including defendant's company, at a time when plaintiff was a resident and national of Cuba, is the applicable law." The court further pointed out that a different result would, in effect, cause the defendant to pay twice, since the reserves which it maintained in Cuba to insure the payment of its Cuban obligations, including the policy in question, had been taken over by the Cuban Government. *Theye y Ajuria v. Pan American Life Insurance Co.*, 154 So. 2d 450 (La. Ct. of Appeal, 4th Cir., La., June 14, 1963).

Sovereign immunity—waiver

In June, 1959, a Cuban corporation, owned by United States citizens, filed a libel *in rem* in the Maryland District Court against a vessel belonging to the Cuban state and *in personam* against the vessel's former owner, a Cuban bank owned and controlled by the Cuban state, seeking damages for the alleged breach of two lease-purchase contracts with the bank covering several vessels.

The bank and vessel appeared specially in September, 1959, raising several objections to jurisdiction which were overruled by the court. The Republic of Cuba itself appeared in October, 1960, claiming ownership of the vessel and filing an answer to the amended libel.

Neither the bank nor the Republic of Cuba raised or suggested the defense of sovereign immunity until May 11, 1962, when the Czechoslovakian Ambassador, acting on behalf of Cuba, appeared to assert sovereign immunity. The court held that it was too late for the Republic of Cuba to assert sovereign immunity with respect to the vessel in question, which had been seized long before sovereign immunity was raised and was itself the *res* claimed by the Republic of Cuba at the time it filed its answer. *Flota Maritima Browning v. Motor Vessel Ciudad*, 218 F. Supp. 938 (U.S. Dis. Ct., Md., July 1, 1963).

Extradition—the “political offense” exception

In proceedings to extradite Ortiz Gonzalez, a Dominican national charged with murder in the Dominican Republic, the court considered whether the alleged crime fell within the exception in the United States-Dominican Extradition Convention (August 26, 1910, 36 Stat. 2468), which excludes extradition “for any crime or offense of a political character . . . (and) . . . acts connected with such crimes or offenses.” Accepting the definition of the English court in *In re Castioni*, [1891] 1 Q.B. 166, that those offenses are political which “were incidental to and formed a part of political disturbances,” the court found that the torturing and killing of two prisoners under the Trujillo regime had not occurred in connection with a political disturbance or uprising. Nothing suggested that Ortiz’ motivation was so essentially political as to justify the relaxation of the “political disturbance” requirement. Rather, Ortiz’ conduct appeared to stem from “a personal commitment to a system of military discipline.”

Although the court based its holding that the offense was not “political” on the absence of an “uprising” or “political disturbance,” in an interesting footnote (no. 9 at p. 721) Tyler, J., emphasized that the “political offense” concept is essentially a flexible one. Referring to the case of *Ex parte Kolczyński*, [1955] 1 Q.B. 540¹ (holding that mutiny by the crew of a small Polish fishing trawler was a “political offense,” notwithstanding that it was not an incident of a political uprising), he considered it to show that the only indispensable ingredient of the political offense is that it be politically motivated and directed towards political ends, and that the political-offense exception can be applied with greater liberality where the demanding state is a totalitarian regime, seeking the extradition of one who has opposed that regime in the cause of freedom. *In Re Gonzalez*, 217 F. Supp. 717 (U.S. Dist. Ct., S.D.N.Y., May 23, 1963).

Sovereignty in the Canal Zone

The plaintiff sought an injunction restraining the Governor of the Canal Zone from flying the Panamanian flag alongside and at an equal height with the United States flag, using Panamanian postage stamps and recognizing the exequaturs of the Republic of Panama issued to foreign consuls

¹ 49 A.J.I.L. 411 (1955).

to the same extent as they are recognized in the Republic, on the grounds that such acts violated United States law and infringed United States sovereignty in the Zone.

The Canal Zone District Court, denying the injunction, held that none of these acts were in violation of U. S. law and that the issue of impairment of sovereignty in the Canal Zone was a matter, not for the courts, but for the executive and legislative branches of the Government in their conduct of foreign relations. While the court felt that the acts complained of were confusing and reflected a position of weakness that could lead to further misunderstandings and discord, it concluded:

What nation is sovereign is between the treaty making powers of the nations involved and is not a question that is up to the courts. A decision by the courts that the United States is or is not sovereign in the Canal Zone would be unilateral in effect. It would be binding on the people of the United States but would have no force on the people of other nations.

Doyle v. Fleming, 219 F. Supp. 277 (U.S. Dist. Ct., Canal Zone, July 8, 1963).

Diplomatic premises—extent of inviolability

Pursuant to the formal written request of the Minister of the Iranian Embassy in Washington, D. C., metropolitan police officers entered the Iranian Embassy and arrested and bodily removed fourteen Iranian students who had entered the Embassy to deliver a petition protesting an Iranian land reform referendum, and had refused to leave upon the demand of the Minister.

In upholding their conviction for unlawful entry, the court held, on the basis of international law as a "part of the law of the land," that "(1) a foreign embassy is not to be considered the territory of the sending state; and (2) that local police have the authority and responsibility to enter a foreign embassy if the privilege of diplomatic inviolability is not invoked when an offense is committed therein in violation of local law." *Fatemi v. United States*, 192 At. 2d 525 (D.C. Ct. A., July 12, 1963).

Iron Curtain Act—not in violation of treaty

Belemecich, a Pennsylvania domiciliary, died intestate, his heirs at law being residents of Yugoslavia. In proceedings over his estate of some \$70,000, in which the Consul General of Yugoslavia appeared as attorney-in-fact for the intestate heirs, the Supreme Court of Pennsylvania held that the so-called Iron Curtain Act (Penna. Stat. §1156) providing for payment into the State Treasury, without escheat, of money or other property due distributees who would not have had actual benefit, use, enjoyment or control of the funds involved, was a custodial rather than a confiscatory statute and therefore was not repugnant to the 1887 treaty between the United States and Serbia (a predecessor state of Yugoslavia) providing for reciprocal rights of inheritance between citizens of the two

countries. *In Re Belemecich's Estate*, 192 At. 2d 740 (Sup. Ct. Pa., July 2, 1963).

NOTES ON PRIVATE INTERNATIONAL LAW CASES

Warsaw Convention—pilot's willful misconduct

A pilot's intentional violation of landing instructions given him by an airport tower constituted "willful misconduct" within the meaning of Article 25 of the Warsaw Convention and, as a result, the defendant airline could not rely on the Convention to limit or exclude its liability for the accident. *Berner v. British Commonwealth Pacific Airways Ltd.*, 219 F. Supp. 289 (U.S. Dist. Ct., S.D.N.Y., June 28, 1963).

Jurisdiction—extraterritorial application of U.S. criminal statutes

In the course of deciding that a court-martial convened in Japan lacked jurisdiction to try the defendant for larceny of Army property committed in Japan during a prior enlistment, the Court of Military Appeals concluded that a United States District Court possessed jurisdiction to try a member of the Armed Forces for larceny of Army property while in Japan. *United States v. Steidley*, 14 U.S.C.M.A. 108 (Ct. of Mil. App., June 28, 1963).

Automobile guest statute—law of the place of the tort not controlling

In an automobile negligence action by a guest against the host motorist's executrix, the New York Court of Appeals held that New York, as the place where the parties resided, the car was registered, the insured guest-host relationship arose and the trip began and was to end, rather than Ontario, the place of the accident, had dominant contacts and a superior claim for the application of its law. Accordingly, the Ontario Highway Traffic Act [Ontario Rev. Stat. (1960), Ch. 172], exempting the owner or driver of a private motor vehicle from liability for injury or death of any passenger, did not bar plaintiff's negligence action.

The court expressly endorsed the "center of gravity" doctrine, which it had pioneered in the field of contracts, as

affording the appropriate approach of accommodating the competing interests in tort cases with multi-State contacts. Justice, fairness and "the best practical results" . . . may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.

Babcock v. Jackson, 12 N.Y. 2d 473 (N.Y.Ct. of Appeals, May 9, 1963).

Indian law applicable as law of place of making contract

Plaintiff sued defendant corporation for damages for breach of certain contracts entered into and to be performed in India. The Court of

Appeals upheld the District Court's holding that, under the choice of law rules of Pennsylvania, "substantive contract questions were to be determined by the law of India, the place where the agreement was made." *Cook v. Damodar Valley Corp.*, 317 F. 2d 412 (U.S. Ct. A., 3d Cir., May 23, 1963).

Effect of war on deposits in Japanese banks—rates of exchange for redemption of receipts

The appellants had deposited dollars in the United States branches and affiliates of Japanese banks prior to World War II for conversion into yen deposits in Japanese banks at the then prevailing rate of exchange. It was held that they were entitled to receive dollars for their yen receipts from a fund owned by the banks and held by the Office of Alien Property. Although the obligations of the Japanese banks persisted during the war, the remedy was postponed due to the war measures of the U. S. Treasury Department in closing the banks' United States branches, sequestering their assets and preventing transactions by or on behalf of Japanese nationals. The redemption of the receipts held by the appellants could have been achieved only in Japan, but this, too, was prevented by the wartime ban on commercial intercourse with Japan, and hence the rate of exchange at which the yen obligations could be converted into dollars would be the first rate available after termination of hostilities, and not, as the appellants contended, at the rate prevailing on December 7, 1941, the last day the United States branches and affiliates were open for business. Interest continued to run throughout the war at the rate fixed in each receipt until payment of the principal, and should be paid at the same rate of exchange. *Aratani et al. v. Kennedy*, 317 F. 2d 161 (U.S. Ct. A., D.C. Cir., March 28, 1963).

DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES *

European Economic Community—proceeding under Article 177 for preliminary decision interpreting treaty—Article 12 held to create rights enforceable by individuals in courts of member states

N.V. ALGEMENE TRANSPORTEN EXPEDITIE ONDERNEMING VAN GEND & LOOS v. NETHERLANDS FISCAL ADMINISTRATION. Case No. 26/62, 9 Sammlung der Rechtsprechung des Gerichtshofes 1(1963). CCH 1963 Common Market Reports ¶8008.

Court of Justice of the European Communities. Judgment of Feb. 5, 1963.

* Reported by Thomas Buergenthal, Assistant Professor of Law, School of Law, State University of New York at Buffalo. Quotations are taken from the English translation found in Commerce Clearing House 1963 Common Market Reports.

Pursuant to Article 177¹ of the European Economic Community Treaty, a Netherlands customs tribunal of last resort, the Tariefcommissie of Amsterdam, applied to the Court of Justice of the European Communities seeking an interpretation of Article 12 of the treaty. Article 12 provides:

Member States shall refrain from introducing, as between themselves, any new customs duties on importation or exportation or charges with equivalent effect and from increasing such duties or charges as they apply in their commercial relations with each other.

The litigation underlying this request was commenced by a Dutch company, which challenged a Netherlands customs duty imposed on a product it imported from the Federal Republic of Germany. The importer maintained that the Dutch Government had violated Article 12 of the treaty in that it reclassified the product in question pursuant to a Benelux tariff schedule, which entered into force in The Netherlands in 1960, with the result that this product was as of that date subjected to an import duty of eight rather than three percent of its value.

In its submission the Dutch tribunal requested the Community Court to decide (a) whether Article 12 created rights which private parties could enforce directly in the courts of the member states, and (b) in the event that the answer to the first question was in the affirmative, whether a tariff increase resulting from a product reclassification necessarily amounted to a violation of Article 12.

The Netherlands Government moved to have the case dismissed because, it asserted, the Community Court lacked jurisdiction to determine whether Article 12 could be invoked by individuals in Dutch courts, since this was a question to be resolved by Dutch courts under the constitutional law of The Netherlands. The Community Court rejected this contention, however, on the ground that it was merely being asked to interpret the scope of Article 12 within the framework of the treaty and as Community law. Accordingly, the Court ruled that it had jurisdiction to hear the case.

In answering the first question submitted by the Dutch tribunal, the Community Court held that Article 12 of the treaty not only binds the signatory governments but must be considered as being directly applicable law which individuals may invoke in the courts of the member states.

¹ Article 177 provides:

"The Court of Justice shall be competent to make a preliminary decision concerning:

(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community; and
(c) the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide.

"Where any such question is raised before a court or tribunal of one of the Member States, such court or tribunal may, if it considers that its judgment depends on a preliminary decision on this question, request the Court of Justice to give a ruling thereon.

"Where any such question is raised in a case pending before a domestic court or tribunal from whose decisions no appeal lies under municipal law, such court or tribunal shall refer the matter to the Court of Justice."

The Court reached this conclusion after an analysis of the purpose, structural context and wording of Article 12. In this connection the Court emphasized that the European Economic Community was a new international institution to which the member states had delegated certain of their sovereign powers and which imposed duties and granted rights not only to states but also to individuals:

These rights are created, not only when they are explicitly stated by the Treaty, but also through obligations which the Treaty lays down in a very definite manner for individuals as well as for the Member States and the Community institutions.

After pointing out that the text of Article 12 bears out the contention that it was designed to be directly enforceable in the courts of the member states, the Community Court emphasized that a contrary interpretation would leave private parties without a direct remedy to protect their rights. Here the Court also noted that, unlike the Commission of the European Economic Community and the member states, individuals may not appeal to the Community Court if they believe that a member state is violating the treaty to their detriment. By enabling them to challenge governmental action in national courts as a violation of Article 12, the Court emphasized, the treaty established an effective guarantee of the rights of individuals supplementing the remedies available to the Commission and the member states under Articles 169² and 170³ respectively.

With regard to the second question submitted by the Dutch tribunal, the Court stated unequivocally that a tariff increase taking place after the entry into force of the treaty was illegal under Article 12, whether it was caused by a product reclassification or by an actual increase of the customs duty.

² Article 169 provides:

"If the Commission considers that a Member State has failed to fulfil any of its obligations under this Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments.

"If such State does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice."

³ Article 170 provides:

"Any Member State which considers that another Member State has failed to fulfil any of its obligations under this Treaty may refer the matter to the Court of Justice.

"Before a Member State institutes, against another Member State, proceedings relating to an alleged infringement of the obligations under this Treaty, it shall refer the matter to the Commission.

"The Commission shall give a reasoned opinion after the States concerned have been required to submit their comments in written and oral pleadings.

"If the Commission, within a period of three months after the date of reference of the matter to it, has not given an opinion, reference to the Court of Justice shall not thereby be prevented."

European Economic Community—Article 177—submission for preliminary decision not inadmissible even if prior judgment rendered on same question—function of Community Court under Article 177 to assure uniform interpretation of Community law

DA COSTA & SCHAAKE N.V. *et al.* v. NETHERLANDS FISCAL ADMINISTRATION. Joint Cases Nos. 28-30/62, 9 Sammlung der Rechtsprechung des Gerichtshofes 63(1963). CCH 1963 Common Market Reports ¶8010.

Court of Justice of the European Communities. Judgment of March 27, 1963.

A month after appealing to the Community Court under Article 177 of the European Economic Community Treaty for an interpretation of the two questions it submitted to the Court in the case reported above, the Tariefcommissie of Amsterdam found that the answers to these questions were also relevant in related litigation pending before it. Accordingly it again submitted these same questions to the Community Court. After the Court rendered its judgment in the prior case, the Commission of the European Economic Community moved to have this submission of the Tariefcommissie dismissed on the ground that it had lost its purpose. The Court denied this motion, however, on the theory that Article 177 authorized national courts to submit questions of treaty interpretation to the Community Court whenever they deemed such action advisable. In other words, while the Court noted that one or more of its prior decisions may deprive a new submission of its purpose, it refused to consider this factor as a basis for holding an appeal under Article 177 to be inadmissible. In doing so, the Court emphasized that the function it performs under Article 177 is limited to the interpretation of Community law by looking to the spirit and text of the treaty. The application of this law to the actual facts which gave rise to the request for interpretation of the treaty by the Community Court, however, is a task left to the national courts. Its own function under Article 177, the Community Court noted, is to assure the uniform interpretation of Community law in all six member countries. With regard to the two questions submitted by the Dutch tribunal for interpretation, the Court limited itself to pointing to its prior decision and repeating its holding therein.

BOOK REVIEWS AND NOTES

LEO GROSS

Book Review Editor

Problèmes d'Interprétation Judiciaire en Droit International Public. By Charles De Visscher. Paris: Editions A. Pedone, 1963. pp. 269.

With the ripe wisdom of experience, Judge Charles De Visscher has written a reflective study of problems of judicial interpretation in the field of international law which will be of practical utility to counsel appearing before the International Court of Justice and an enlightening guidepost for all international lawyers. The intimate knowledge of the international judicial process which gives this book its unique value was gained by the author from his experience as Judge of the Permanent Court of International Justice and, later, of the International Court of Justice, as well as from serving as counsel on behalf of various states before the Permanent Court of International Justice prior to his election thereto in 1937.

With the observation that, except for the interpretation of treaties, neither case law nor doctrine has thoroughly probed the complexities of the process of judicial interpretation, Judge De Visscher suggests that in the perspective of public international law the mission of interpretation is to establish the juridical significance of all behavior of states in their mutual relations. While devoting almost half of his study to the judicial interpretation of treaties, he also discusses the legal significance and interpretation of unilateral attitudes, such as prolonged non-assertion of a right, silence, acquiescence, abstention, or general toleration, and unilateral acts such as notification, promise, protest, recognition, renunciation and declarations accepting compulsory jurisdiction. The function of interpreting customary international law presents special problems, which are examined, and the book concludes with a brief section on the interpretation of international judicial decisions themselves.

Throughout the volume, the case law of the Hague Courts is analyzed with perspicacity and illumined by the reflections of the author. Although practitioners before international tribunals will find in this volume an indispensable handbook, it will appeal to a much wider audience.

International lawyers already familiar with the controversies as to the function of interpretation in relation to treaties will find new insights in this study. Rejecting the view that interpretation of a text is comparable to the demonstration of a theorem of geometry, a mere problem of formal technique, Judge De Visscher regards interpretation as an art, poetically stated as "thought in motion." Although doctrine sometimes regards the intention of the parties to a treaty as the essential criterion of interpreta-

tion, this view, says the author, causes confusion by reversing the proper order: discovery of the intention of the parties is the object of interpretation, the thing to be demonstrated. The text agreed on by the parties is always the basis of the interpretative process and the one fundamental rule is that the text must be read in the usual meaning of the terms employed, in the context of the entire treaty, and in the light of its object or purpose. Although, logically, this can be conceived of as one intellectual operation, the interplay of the three criteria varies.

Defending the Court against the reproach that it has sometimes taken the clarity of a text as a point of departure rather than making it the object of its conclusion, the author observes that an interpretation of treaties based on the natural and ordinary meaning of terms should not be confused with a purely grammatical interpretation. The logic of judicial reasoning must inform the letter, and the Court knows that there are clarities of language which conceal thought. At the same time, care must be taken not to substitute a search for the "real" intention of the parties for the proper task of interpretation, which is to discover the meaning of the text. In the exploratory judicial reasoning designed to discover the meaning of a text, Judge De Visscher refuses to write off the famous canons of interpretation which often appear to be mutually contradictory. Reducing them to their proper proportions, he finds utility in their concurrent application, not as presumptions, but as provisional working hypotheses which the judge sifts through his mind. This, he suggests, is the function Vattel intended them to serve.

An insight into the finesse with which an experienced judicial mind approaches an alleged "rule" of interpretation may be gained from the author's comments on the *ut res magis valeat quam pereat* canon (that the thing may rather have effect than be destroyed). Sometimes called "the principle of effectiveness," it has also been used as a justification for "extensive" or "liberal" interpretation. Although a court will decisively reject an interpretation which deprives a text of all meaning, there is no *a priori* reason, writes Judge De Visscher, why the "maximum effectiveness conceivable" should be given to the terms of a treaty, or even why an "extensive" interpretation should be placed on its terms. The judge will take the text as his point of departure and the object or purpose of the treaty as a provisional term of reference; his function will be to determine the obligations assumed by giving the terms employed an *adéquate*¹ interpretation. There can be no question of extensive interpretation except where, of two possible interpretations, one corresponds to the purpose of the treaty and the other tends to frustrate it. Even here, the judge must exercise caution: if it appears plausible that the parties did not intend to engage themselves beyond a certain point, a strict interpretation is in order; consideration of the purpose of the treaty does not necessarily lead to an extensive interpretation: it may lead to a strict interpretation; extensive interpretation, where justified, results from the interpretative process.

¹ In French, the word can mean "complete" or "entire," as well as "adequate."

The reviewer must resist the temptation to set forth more of Judge De Visscher's reflections; the reader must discover the treasures for himself and is unlikely to be content merely with one reading of this wise book. No one familiar with other writings of Charles De Visscher or who is privileged to know the man himself needs to be told that this is not a mere work of theory: it is vibrant with life and reality.

HERBERT W. BRIGGS

Law and Organization in World Society. By Kenneth S. Carlston. Urbana: University of Illinois Press, 1962. pp. xvi, 356. Index. \$6.50.

This book presents a pioneering effort to integrate detailed examination of a discrete socio-political-legal issue, namely, nationalization of concession agreements, with a general theory of law, organization and international society. Combining a social science functional-structural orientation with organization theory and a decision-making frame of analysis, the author tries to integrate law with modern behavioral sciences so as to arrive both at better understanding of reality and at action-oriented recommendations. To do so, the author proceeds in three main steps: First, the economic, social, socio-psychological and political background and functions of concession agreements and their nationalization are examined (Chapters 2, 3, 4). Then a general theory of law and the international system are presented in the form of formal principles and propositions which are discussed and explained in detail (Chapters 5, 6 and part of 7). Finally the concession problem is again taken up, to be reformulated and analyzed in terms of the general theory (part of Chapter 7), and a concluding statement on a general theory of law is presented (Chapter 8).

There can be no doubts concerning the originality and innovating nature of the book, which serves as an excellent example of an interdisciplinary approach to the study of international law and international relations. But this is not a pure blessing. Indeed, its very innovating and interdisciplinary nature may well limit the actual usefulness of the book and its impact. Falling into the no man's land between established disciplines, it will be regarded by many lawyers as appropriate reading for international relations experts and by the latter as appropriate reading for the lawyers, while sociologists will be prevented by the title from looking at it. The somewhat over-elaborate terminology (including, for instance, the unnecessary borrowing of Parsonian terminology, pp. 42 ff.) and the over-formal structure of principles and propositions add to the barriers which may frighten many readers away. This is a pity, because reading the book and thinking it through would do a lot of good to over-pragmatic or over-legalistic lawyers, on one hand, and to the proponents of the new "conflict models" and "simulation games" approaches to the study of international relations, on the other hand. Bearing in mind the requisites of academic communication, it might have been better to give up the rigorous analytical structure and to put forth the main ideas in a somewhat shorter book. But this is a matter of taste.

More serious are a number of substantive points on which the author puts forth doubtful propositions. Especially disturbing, in the reviewer's opinion, is a somewhat one-sided view of development processes. Thus, the author over-emphasizes the importance of raw materials (*e.g.*, pp. 13 ff.) while ignoring the rôle of human resources, and seems to over-estimate the suitability of Western democratic values and patterns for countries with a totally different socio-economic reality (pp. 225 ff.). Similarly, some of the evaluative comments on international private corporations must be regarded as in need of more supporting evidence. (*E.g.*, see the statement on pp. 77-78, where "serving the public" and not maximalization of profits is presented as being in fact the primary criterion for decision-making in international private corporations.) Unavoidably in an interdisciplinary endeavor, some of the material taken from other disciplines may also be regarded as incomplete, for instance, the psychological assumptions relied upon by the author (pp. 68 ff.).

This criticism involves relatively minor facets of the book, in no way impairing its central message and pioneering character. This book constitutes an important contribution to the seeking of new approaches to the study of the international system and to the social study of law, deserving careful consideration by all who are interested in these areas.

YEHEZKEL DROR *

Peace Theory: Preconditions of Disarmament. By John W. Burton. New York: Alfred A. Knopf, 1962. pp. xii, 201.

Mr. Burton, a former Australian diplomat who is now a research fellow at the Australian National University, has written a highly ambitious book. His purpose is to define the conditions of peaceful international relations; his theme is that the problem can be solved—like the problem of unemployment, which he frequently mentions—only if it is seen both as a social and as a theoretical one; his study is an attempt at devising a theory of peace that will allow men to eliminate war (which has become unacceptable as an instrument of national policy in the nuclear age) and to resolve conflicts.

Mr. Burton's theory of conflict (which he calls behavioristic for reasons this reviewer failed to grasp) is original. Hostility arises from the frustrations experienced by a state because of another state's lack of adjustment to changes that affected or were promoted by the first one: hence a risk of cumulative responses leading to tension and war. From this theory, Mr. Burton draws two sets of deductions. First, he is hostile to any "peace solution" that rests on controls and enforcement (for instance, disarmament and an international force); such techniques only seek to prevent war without resolving conflict, and tend to breed hostility and retaliatory responses. Secondly, what must be established among nations is what he calls a condition of peace—a condition in which changes will not

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lead to hostile responses. This can be achieved, according to Mr. Burton, by "conditioning" national policies in the direction of political non-discrimination, non-intervention in domestic affairs, i.e., neutralism. Not surprisingly, Mr. Burton disapproves of the political activities of the United Nations, and would prefer the development of regional and functional agencies capable of "conditioning" national policies in the way he favors. He hopes for an ultimate break-through from functionalism into political fields.

That a condition of peace is a function of national policies is a truth all too often neglected by the enthusiasts of world forces or of a world state. What causes wars is not merely the absence of superior power but also the absence of consensus among nations, and the whole range of concrete grievances that divide them. However, Mr. Burton's theory suffers from a weakness that has affected much functionalist thinking in international relations: a deep, if implicit, belief in a gradual mutation of the nature of the international competition, if only the "right" kind of national policies and international bodies came to prevail. There is something both a bit too vague and too bloodless, or too unpolitical, about Mr. Burton's theory. He is much too discrete about the kinds of national policies that would provoke peaceful responses. Also, is it not both the structure of the international milieu and the nature of the ends (material and spiritual) sought by states which condemn the world to conflict and create the risk of war? A universe of states that would all be neutralist strikes this reviewer as even more Utopian than the world state Mr. Burton dismisses; the latter implies an end of the game, whereas Mr. Burton's conception supposes that the game would go on, with the same players but somehow with entirely new motives and rules. That new rules have become necessary because of nuclear weapons is obvious; but Mr. Burton, who criticizes scholars who over-emphasize strategy, is himself guilty of underestimating the rôle of force as both the goad and the ever-present means of competition in world affairs. His theory reminds one of Rousseau's; but Rousseau was more logical in his Utopianism, since he advocated not merely "neutralism," but the reduction of contacts among nations to the strictest minimum. To use Kenneth Waltz's now famous categories, Mr. Burton's theory of conflict is a "second image" theory, but the image is not well focused and the picture is incomplete.

STANLEY HOFFMANN

The Position of the Individual in International Law. By Carl Aage Nørgaard. Copenhagen: Ejnar Munksgaard, Ltd., 1962. pp. iv, 325. Kr. 36.50.

This is a study of what is perhaps the most difficult problem of conceptualization in international law. The author brings to it a highly analytical and logical mind. He utilizes a number of basic analytical concepts with precision and elegance as he examines the relevant data with thoroughness. The result is a solid contribution to international legal theory.

• The conditions of the problem of defining the position of the individual in international law are that international law represents a rule-generating and rule-applying system, that states, either directly or indirectly, represent the only valid source for rule generation, that rules are increasingly generated by international bodies created by states, that a rapidly increasing number of rules generated by international bodies apply to individuals sometimes in their capacity as organs or officials of states and sometimes in their private capacity, that violations of such rules are sanctioned sometimes by international courts and sometimes by national courts, and that invocation of the decision-making processes of international bodies, including international courts, is increasingly being allowed to individuals.

Analytical concepts previously employed to deal with such a variety of categories of data have been inadequate. First of all, it is necessary to arrive at a very precise definition of the nature of international law, for, in addition to law binding upon states in their relations with one another, which is the classic definition, there is now law derived from states but binding upon individuals and also law binding upon states in favor of individuals. Questions hitherto asked as to whether the individual is a subject, an object, a beneficiary, or an addressee of the rules of international law are inadequate to deal with the complexity of the empirical data which must now be investigated and to which theory must be accommodated.

Such bodies of law as that of the European Communities and of international organizations regulating the legal status of their officials, the movement to protect through law the interests of minorities, primitive peoples, labor groups, and human rights, the regulation of international rivers, the Nuremberg Trial, and the movement to establish an international criminal court, may well be said to represent an emerging new legal order, in addition to that of classic international law consisting of the rules governing inter-state relations. The author notes that Alf Ross has categorized this new order as the internal law of a community of states, emanating from them and regulating the legal status of subordinate individuals. The concept of trans-national law, as exemplified in Philip C. Jessup's *Transnational Law* (1956), is not mentioned by the author. From analysis of the data, the author concludes that the rules of law of this character represent a continuum from the more primitive to the more highly developed rules; that it is premature, in the absence of a clearly indicated basis of division, to classify them in a separate category from international law; and that they must accordingly be regarded as part of international law in that they are not national law.

To handle the variety of legal situations investigated, the author categorizes a person in law as a "subject of rights" when a rule exists for his benefit. He is a "subject of duties" when a rule prescribes conduct which he must follow. A right may be protected by the capacity to bring a claim as a case before a tribunal. In such case, the person is a "subject of proceedings." If he may only send a petition to an international organ, he is merely the "subject of petitions." On the other hand, if a person's

failure to perform a duty is sanctioned by an ability to bring him before an international tribunal and to hold him responsible, he is a "subject of responsibility." If his infraction of a rule is only subject to investigation by an international organ and not to a binding judgment, he is a "subject of examinations." A person assumes full status in a legal system and becomes a "subject of law" when he is either a "subject of rights and proceedings" or a "subject of duties and responsibility."

The author's principal theoretical conclusions are that, in his capacity as an organ or official of a state, the individual ought to be characterized as a subject of duties under international law. In his private capacity, the individual is made the subject of duties, notably in such spheres as piracy, breach of blockade, and carriage of contraband. The individual may be a subject of rights, in his capacity as an organ or official of a state, notably when he acts as a head of state, a diplomatic envoy, or a member of armed forces. In his private capacity, he is a subject of rights in a vast number of rules regulating his status in such rôles as that of inhabitant of trust territories, refugee, worker, employer, and possessor of human rights. The author finds relatively few instances in which the individual is accorded a legal position in classic international law, as distinguished from his current expanding protection under treaty arrangements. It should be realized, however, that the rules of international law concerning the responsibility of states, not mentioned by the author, reflected a degree of protection for the rights of the individual which the current international movement for the protection of human rights has not yet been able to attain. In the author's terminology, the individual is in this sphere of law clearly a "subject of rights." Mention might also be made in this connection of the practice of humanitarian intervention.

The instances in which the individual may be a subject of petitions, such as in the minorities and mandates systems, the trusteeship system, the International Labor Organization, and the European Commission on Human Rights, are thoroughly reviewed. Similarly explored are the situations in which the individual is a subject of proceedings and a subject of responsibility, such as the Nuremberg Trial, the proposed international criminal court and international prize court, the Central American Court of Justice, the Mixed Arbitral Tribunals, the special arrangements in Germany after World War II concerning external debts and restitution, the regulation of the Rhine and the Danube, the European Communities, security control in the field of nuclear energy, and the tribunals created for the protection of international civil servants against abuse of administrative power.

The author concludes that in a number of cases, of which the law of the European Communities is most important, the individual now

holds a position which adequately can be characterized as subject of international law. Although the individual has had, and holds, this position only in a limited number of cases, it is noteworthy that as the international legal order has increasingly developed from a primitive to a more advanced stage, the closer the contact has grown between international law and the individual. (p. 310.)

Thus states are no longer the sole subjects of international law; individuals are becoming so in an increasing degree.

The author wisely adheres to the principle of parsimony of conceptualization, as he resists the temptation to create new categories at a stage when the data do not yet clearly point to the shape of the categories. His approach thus creates the least stress upon traditional international law, while it provides a pragmatically sound way of handling the empirical data as it now stands. The author also refrains from the lyrical, vague flights of conceptualization which at times have been manifested by writers in this field. As international bodies which generate and apply rules of law applicable to individuals multiply in number and as the rules generated by all such bodies increase in number, there will eventually be a need to reshape traditional concepts of international law. When that takes place, the empirical groundwork and analytical method of the author will be found to be indispensable.

KENNETH S. CARLSTON

The Law of International Air Transport. By Bin Cheng. London: Stevens & Sons Ltd.; New York: Oceana Publications Inc., 1962. pp. xlii, 726. Index. \$30.00.

Commercial operating rights in international air transport rest largely on a vast network of bilateral agreements, nearly a thousand of which have been concluded since World War II. Unlike multilateral treaties on civil aviation such as the Chicago Convention, these "bilaterals," as they are familiarly called in aviation circles, are virtually *terra incognita* to most international lawyers. They embody distinctive concepts and standards the interpretation and application of which often cause difficulties.

The larger part of Dr. Cheng's book consists of a pioneering effort to explore the law embodied in the bilateral air transport agreements to which the United Kingdom is or has been a party. With considerable justification, Dr. Cheng regards the British "bilaterals," in all their variety, as a representative cross-section of the world-wide network of agreements. In interpreting them, he tends to emphasize textual exegesis and the "plain" meaning of the words used rather than the major purposes and expectations of the parties. But he is to be congratulated on the thoroughness and precision of his analysis, matched by no other writer, of the various "freedoms of the air," traffic rights, capacity criteria, and types of traffic covered by the agreements. It is noteworthy that his treatment of the so-called "sixth freedom" tends to support the position understood to have been taken by the United States Government. There is, however, no analysis of the various meanings of "origin and destination."

Dr. Cheng also presents a very useful systematic exposition of the multilateral treaties on the public law of civil aviation to which the United Kingdom is a party, particularly the Chicago Convention, and of the structure and functions of the International Civil Aviation Organization. The legal problems of non-scheduled flights are discussed at considerable

length. Too little attention is paid, however, to the question whether certain provisions of the Chicago Convention, notably those on the nationality of aircraft, are or have become declaratory of customary international law. On the more general problems, such as the legal personality of international organizations and the rule of unanimity in the revision of treaties, the author's leanings are conservative. In dealing with the peculiar legal results of practical application of Article 94 of the Chicago Convention, which provides for the amendment of the Convention by specified majorities of the parties with binding effect on the ratifying states only, he fails to note the discussions of this matter in ICAO organs. (See, *e.g.*, excerpts collected in ICAO document C-WP/3456.) The view that customary international law entitles a state to suspend its obligations under a treaty whenever a national emergency so requires (pp. 115, 483) is questionable.

The title of the book is misleading. The author deals only with international law, except for a brief but informative excursus into British law. Furthermore, he does not deal with treaties, such as the Warsaw Convention, which govern private law relationships in air transport. A more accurate title would have been "The Public International Law of Air Transport."

True to his design to present the law as it is, Dr. Cheng generally refrains from appraising it. Comments on the practical consequences of legal norms are brief, infrequent, and not buttressed by factual data. The author notes without critical evaluation many of the reasons commonly given for the extreme protectionism which characterizes national air transport policies. He is naïve in suggesting that heavy investment in "infrastructure" (airports, etc.) and route development is the principal reason why airlines desire protection against foreign competition (p. 8). A glance at airline financial reports would show that most of the airline investment is in flight equipment rather than in ground facilities, which are commonly provided by governments. There is little reference to the actual utilization of many of the treaty clauses discussed or—perhaps unavoidably—to their practical construction by the parties. The general policy preferences of the author are difficult to understand. Although he seems to favor more "liberal" air transport policies, he also advocates, in consonance with the view prevalent in Europe, measures of "rationalization and order" (*e.g.*, p. 493) which would amount to cartelization. In this connection, he makes the dubious suggestion that the application by the United States of its antitrust laws to break up pools between foreign airlines on routes to and from its territory would be contrary to the Chicago Convention and "extraterritorial" (pp. 383-384).

No outright errors of fact have been found in this generally excellent work. There are, however, a few gaps and omissions. The rate-making machinery of the International Air Transport Association is barely mentioned, and there is no account of its enforcement procedures, although the "quasi-public" nature of IATA's functions is recognized. In discussing the attitude of the U. S. Civil Aeronautics Board toward the prob-

lem of ownership and control of foreign-flag airlines (pp. 266, 377), the author overlooks the Board's opposition to such ownership and control by American citizens, even if the latter are not connected with United States air carriers, as exemplified by the series of decisions involving TAN, a Honduran airline (see, *e.g.*, 31 CAB 246). He fails to note (p. 397) a C.A.B. decision interpreting the term "homeland" as used in the Chicago International Air Transport Agreement (6 CAB 815).

The practical value of the book is enhanced not only by the customary tables of treaties and cases cited, but also by an extensive bibliography, texts of some of the international agreements discussed, exhaustive lists of British "bilaterals," and other informative appendices.

O. J. LISSITZYN

The Organization of American States. The Inter-American Regional System. By Charles G. Fenwick. Washington, D. C.: Office of Publication Services, Pan American Union, 1963. pp. xxxiii, 661. Index. \$5.00.

Here is a treasure trove of well-arranged source material for students of international law and international organizations, world-wide as well as regional. The purpose of the volume, "to relate present activities [of the inter-American regional system] to the historical development of the system and to make clear the relation of particular functions to the principles and policies of the system as a whole," is opportune, for the book appears at a time when, with the advent of the Alliance for Progress, the world is focusing on the "efforts of the American nations to cooperate in improving the promise of life for all their peoples."

Although the author states in his preface that the volume was "prepared chiefly for use in courses on inter-American relations in the colleges and universities of the United States," its usefulness extends much further, for it combines materials which could be found by conventional research with the insight of a man who has been instrumental in the formulation of much of the material outlined, first as the American member of inter-American committees and then as Director of the Department of Legal Affairs of the Pan American Union until his retirement last year.

As pointed out by William Sanders, Assistant Secretary General of the Organization of American States, in his excellent introduction, the regional association of the twenty-one American states is the oldest governmental organization of its kind. It has a fascinating history which Dr. Fenwick traces from 1822, placing emphasis, as he should, on the transition from the old concept of the Monroe Doctrine as a unilateral declaration to the multilateral regional system, now firmly established in the Charter of the Organization of American States, signed in April, 1948, and ratified by all twenty-one of the American Republics, the last one to ratify being Argentina in 1956.

The author is most adept at tracing in case-study form various ways of promoting what is popularly called the "rule of law." He contrasts the

results obtained by those who were prepared to reach their goals by successive steps, each step within the realm of the possible, with the failure of those who sought to achieve the end result in one instrument and that to be enforceable by compulsory process. In reading of the successive Pan American conferences and other regional meetings, one comes to appreciate the strength of the inter-American system as a force in the promotion of co-operation among American states and in the avoidance and settling of inter-state disputes. The record of this system, first adopting one method and then another in settling disputes between members of the American community, is indeed an impressive one. It is one from which other regions and indeed our world-wide community can profit.

The historical review of inter-American unity is followed by an analysis of the Organization of American States, and a very helpful diagram is provided in the Appendix, showing the relationship of the various components headed by the Inter-American Conference and centering around the Council of the Organization. Moving from a discussion of inter-American regional law, the author devotes a number of chapters to the functions and activities of the Organization. One deals with specific settlement of disputes and another with regional collective security. There follow chapters on development and codification of international law, promotion of economic interests, the promotion of social interests and the promotion of cultural interests. The volume ends with a chapter on the relations of the Organization of American States with the United Nations and other international bodies.

In future editions of this book, it is to be hoped that certain pertinent information will be added by way of footnote or appendix. For instance, now and again it is stated that such and such a treaty, though signed by 18 states, had been ratified by only 13. The treaty by its terms is effective as between those who have ratified it. The reader is left to look elsewhere for the names of those countries as to which it is effective. This information can be obtained by securing the latest Pan American pamphlet on the status of inter-American treaties and conventions. But this is not conveniently available to many readers.

In later editions it would be helpful, particularly for the students for which the book is chiefly written, to give at the end of the historical treatment a hypothetical case and show the various organs to which it would be referred under the present organization. There has been such a variety of ways of coping with different problems in the past that one becomes confused as to how things are dealt with in the present.

It is, however, difficult to find fault with this admirable work. Students, scholars and statesmen are indebted to the Pan American Union for arranging for its publication and distribution at a moderate price; and are indebted above all to Dr. Fenwick for letting them share in his knowledge, experience and wisdom in inter-American legal affairs.

JOHN G. LAYLEN

International Organizations and Space Cooperation. By Leonard E. Schwartz. Durham, N. C.: World Rule of Law Center, Duke University, 1962. pp. ix, 108. \$5.00.

This little book, by a member of the staff of the World Rule of Law Center at Duke University, contains basic information about the structure and activities of governmental and non-governmental organizations involved in space activity, and, although it contains no bibliographical references or index,¹ it is a useful introduction to a rapidly growing human endeavor. During the past decade international scientific co-operation has made a substantial contribution to world order by vividly demonstrating the community of interests shared by scientists. The world at large is the beneficiary of this development, so well illustrated in the success of the International Geophysical Year and succeeding collaborative efforts, because Western and Soviet-bloc nations co-operate to an unusual extent largely as a result of the work of scientists who have developed effective methods for continuing co-operative projects. Co-operation among scientists is traditional, and several international scientific organizations have existed for a century, but the space age has given them new prestige, new problems to solve and a greater urgency to solve them. To the non-scientists, these organizations are little known.

About half of the book is devoted to the organization and activities of non-governmental organizations involved in international space science, namely, the International Council of Scientific Unions, several of the international scientific unions, and the committees appointed and supported by them, the principal committee described here being that on space research, commonly referred to as COSPAR. A short résumé of the International Geophysical Year, the International Year of the Quiet Sun, and the World Magnetic Survey is included. Governmental organizations are of lesser importance in science, although the contribution of the International Telecommunication Union, the World Meteorological Organization, the United Nations and UNESCO should not be overlooked. As the author's summary of their activities reveals, scientists prefer to eschew involvement in political controversy and often resent what they believe to be political interference. The author's outline of these governmental organizations more familiar to the general reader is succinct, essential for the purposes of his book, but much less significant, inasmuch as the material relating to them is more readily available. It is his description of the non-governmental scientific organizations that renders this volume a special addition to international law literature.

Appropriately, COSPAR receives major emphasis. It was established in 1958 along the general lines of the special committee of scientists appointed

¹ Because there is virtually nothing in legal publications relating to international science, reference must be made to scientific publications. Of general interest are the periodicals *Science* and *Nature*. The ICSU Review, a quarterly journal (Elsevier Publishing Company, P.O. Box 211, Amsterdam, The Netherlands), is of special interest to the student of international science, inasmuch as it is the official publication of the International Council of Scientific Unions.

to organize the International Geophysical Year, but as a result of objections by Soviet scientists that COSPAR was not sufficiently representative (a critique once offered by United States Congressmen with reference to the committee organizing IGY), a revision of its charter from the International Council of Scientific Unions was accomplished to ensure Soviet participation. This is one of the relatively rare instances when political controversy has marred the otherwise pristine atmosphere of scientific meetings. Because participants in COSPAR are eminent scientists, and because of the technical nature of their subjects, the decisions of this and similar bodies are very influential upon governments which must rely on the opinions and recommendations of experts. It is therefore misleading to conclude that the customary law relating to the use of space is solely the product of international agreements without noting the effect of the non-governmental bodies described in this book. For example, the risk of contamination of space is of serious concern, and the discussions of the Committee on Contamination by Extra-Terrestrial Exploration (CETEX) which the author describes are relevant in determining legitimate methods and procedures of space use. CETEX is composed of seven scientists representing seven international scientific unions and includes a United States and a Soviet citizen. Its recommendations regarding undesirable aspects of the use of space and the risks of contamination have been influential in forming the opinion of the scientific community, which in turn has a substantial effect upon the claims and policies of governments.

A distinguished government lawyer recently stated before a meeting of this Society that "the conscious contribution of scientific organizations to the development of international law has been rather small."² Although the conscious contribution may be small, their unconscious contribution is substantial. If the decisions of these highly competent non-governmental bodies are in fact influential, then we have cause for concern if decisions regarding a common resource, space, are made without special regard to their effect upon the development of customary law. Accordingly, scientists need to be educated a little more about the process of making international law, and lawyers ought to know a little more about the scientific community and its organization. This book helps fulfill the latter function. Non-governmental associations do participate in the making of significant decisions, and, by drawing attention to these associations, Mr. Schwartz has done much for the study of international lawmaking. More remains to be done, for he does not significantly analyze the work of scientific organizations or suggest their place in the development of international law.

Among the difficulties of a law-trained observer in studying the phenomena of international science is that he is professionally biased to favor emphasis on the organization structure of the scientific community and is apt to neglect the assumptions which underlie its success. These as-

² Johnson, "Scientific Organizations and the Development of International Law," 1960 Proceedings, American Society of Int. Law 206-207.

sumptions relate to the nature of science and its characteristics. Science is international by definition. Scientific knowledge knows no boundaries and is contributed by individuals from all nations and cultures. Accordingly, to the extent that law inhibits the communication of ideas, it hinders the development of science, and to the extent it encourages international scientific intercourse it enhances the development of science. The needs imposed by a commitment to scientific thinking and the community of beliefs shared by scientists form the constitution of the scientific establishment and enable them to overlook differences of politics and nationality.³ International scientific co-operation is therefore easier to achieve than international political collaboration. Unfortunately for science, men are never insulated from politics, and national rivalries already have influenced scientific collaboration in space affairs. We may confidently predict a difficult course for the organizations Mr. Schwartz so helpfully describes.

Just as the industrial revolution introduced new problems for law to solve in the 19th century, space science today promises a new challenge to legal order. These challenges are not always extra-terrestrial, but are often down-to-earth problems, such as the appropriate allocation of the radio frequency spectrum, the prompt exchange of scientific data, the attainment of common standards, and the conservation of shared resources. The problems that science has thrust upon us and the knowledge that it has contributed to us confirm Willard Hurst's observation that "[b]y cumulation of knowledge and ordered feeling man has lifted himself to new levels of capacity to control himself and his environment."⁴

GORDON B. BALDWIN

Documents on German Foreign Policy, 1918-1945. Series C (1933-1937).

The Third Reich: First Phase. Volume IV: April 1, 1935-March 4, 1936. (Dept. of State Pub. No. 7439.) Washington, D. C.: U. S. Government Printing Office; London: H. M. Stationery Office, 1962. pp. lxxviii, 1272. \$4.75.

This volume of German diplomatic correspondence ends on the eve of the occupation of the Rhine zones, and it began just after Hitler had re-armed in March, 1935, the League of Nations Council had condemned that action, and France, Italy and the United Kingdom at Stresa bolstered up the Locarno system in the premises. The year's high politics both moved Germany forward as a "Power" and introduced diplomacy to National Socialism, for diplomatic letters began to end with "heil Hitler." The twelve-month period must have been very satisfying to the Führer, for on May 21, 1935, he made a speech which set the themes for most of the year's negotiations, and in October he was free of the restrictions of the League Covenant. In the period only the armament phase of relations really changed: The German armed forces were reorganized by the

³ See Polanyi, *The Logic of Liberty* 26 (1951), for a splendid discussion of the scientists' community of beliefs.

⁴ Hurst, *Law and Social Process in United States History* 105 (1960).

Wehrgesetz of May 21, 1935, and the German Navy was given 35:100 ratio with the British by the agreement of June 18, with notes of July 4 and August 26, all of which engendered interesting correspondence.

Franz von Papen in Austria was at that time almost the only completely Nazi diplomat of high rank. Austria was invited to recognize National Socialism as the "State doctrine of the German Reich," regarding itself as a "German State." Schuschnigg upheld Austrian independence very well during this period in which Berlin deferred solution of the "Austrian question." German relations with other small states centered on the German minorities, the Baltic states, including Lithuania and the Memel Territory, Czechoslovakia and the Sudeten Germans, Poland and the Danzig Nazi régime, Switzerland, where the German colony was diverse, and Hungary, where other questions also arose. The pattern of the *casus belli* of 1938 with Poland over Danzig was clearly delineated in the questions that arose in 1935-1936.

But Germany under Hitler devoted 1935-1936 to creating an image of itself as a "great Power" with armament. After Germany in March, 1935, repudiated the armament clauses of the Peace Treaty, France, Italy and the United Kingdom at Stresa, April 15-17, declared the Locarno system to be intact, and Italy and the United Kingdom reiterated their guaranties of frontiers. On May 2 France and the Soviet Union signed a Treaty of Mutual Assistance which Germany immediately regarded as probably involving a "unilateral interpretation of Locarno" (p. 131). On May 16 Czechoslovakia signed a pact of mutual assistance with the Soviet Union. On May 21 the Führer emitted 13 points of policy hinged to statements that Germany had nothing to gain by a "European war of any kind" and was ready to conclude non-aggression pacts "with all our neighbors, Lithuania excepted." On May 25 circular notes were sent out in which were discussed Franco-German relations as affected by the Soviet mutual assistance treaties, and a memorandum on "The Relationship of the Franco-Russian Treaty to the Rhine Pact of Locarno"; and to London a draft of a pact between the Western European Powers to reinforce the Locarno treaties and to prevent air attacks.

The circulars went to London, Rome, Paris, Moscow, Warsaw and Brussels primarily, and the first three of those capitals spent much of the rest of their time discussing bilaterally with Berlin how they could construct multilaterally an Eastern pact to include the Soviet Union, a Danubian pact to stabilize Central Europe, and/or a Rhine pact to improve on Locarno, and how to work an air pact into one or all of them. What the several hundred notes, letters and memoranda on these projects amounted to was an effort to reinsure against violation of whatever non-aggression or collective security agreements each "Power" might be a party to. What momentum discussion of these pacts ever had was gradually lost as Italy's attack on Ethiopia (here called Abyssinia) from March, 1935, diverted more and more of the attention of the League of Nations, France and the United Kingdom as well as Italy. Discussion—it was never negotiation—

of the pacts was in abeyance when Germany occupied the Rhine zones, and was not resumed afterward.

DENYS P. MYERS

A Guide to the Use of United Nations Documents. (Including Reference to the Specialized Agencies and Special U.N. Bodies.) By Brenda Brimmer, Linwood R. Wall, Waldo Chamberlin, Thomas Hovet, Jr. Dobbs Ferry, N. Y.: Oceana Publications, 1962. pp. xv, 272. Index. \$6.00.

This concise *Guide* will no doubt be most helpful to three groups of readers: (1) the general user of United Nations documents—a type which for purposes of this review note includes members of U.N. delegations, functionaries of the United Nations and other inter-governmental organizations, newspaper correspondents, broadcasters and telecasters concerned with the United Nations; (2) librarians; and (3) persons engaged in special research projects relating to the United Nations.

The chapters dealing with the Documentation system (Chapter 1), those dealing with Tools and Guides to U.N. documents (Chapters 5, 7 and 8), and the seven Appendices not only will be welcomed by all persons who for the first time face the complexities of U.N. documents, but most probably by everybody who has occasion to use these documents, since many of the intricacies of, and changes over time in, the U.N. documentation are usually realized only by those who have a special responsibility for processing, distributing or safeguarding U.N. documents.

Chapter 6 offers bibliographical guidance to the "Background of the U.N." (League of Nations, Dumbarton Oaks Proposals, Committee of Jurists, U.N. Conference on International Organization, Preparatory Commission) and Chapter 9 to the Specialized and Related Agencies.

The section of the *Guide* which should be of special interest to librarians (Chapters 3 and 4) deals realistically with the problems of acquisition and administration of large, medium and small U.N. collections; beyond that it contains helpful hints for users of such collections.

In Chapter 2 (The Method of Research) the authors discuss in considerable detail two research techniques: one styled the "Step Process" or chronological approach, *i.e.*, an indication of 16 steps to trace information from the time of the San Francisco Conference on International Organization (1945) to the present; the other "Working-Back Approach," *i.e.*, the chronological approach in reverse, comprising 7 steps (or 8 steps, if information relating to Atomic Energy is involved). The treatment of these two approaches, especially on pages 56-78, illustrates by reference to related documents and to some secondary sources significant phases in the history of the United Nations and the type of documents which are likely to be helpful for purposes of research.

The *Guide* reflects the quite extraordinary familiarity of its authors with the material at hand and, as stated at the outset, its great usefulness is beyond doubt. It is therefore likely that its first edition will soon be

exhausted; in the circumstances, a few comments are submitted in the hope of enhancing the value of the second and future editions. Occasionally a closer integration of the contents of the various chapters may be desirable. While there is a statement on page 90: "Sales publications were originally broken down into fifteen [*sic*] broad categories, some of which have now become defunct," there are seventeen such categories listed by reference to their roman numerals (exclusive of multiple categories, such as VI.A and VI.B) on page 18 and page 166, and there is, as far as could be ascertained, no indication as to which of these categories has been discontinued. It may also be helpful to include at certain points cross-references, in parentheses or footnotes, *e.g.*, on pages 56-57, where references are made to certain publications which are not easily identified. Also it may be advisable to check once more the references to publications of and relating to specialized agencies; for example, the entry (on page 200), "Articles of Agreement of the IFC and Explanatory Memorandum (IBRD April 11, 1955, 47 p.)," should be listed under official references to the World Bank (IBRD), perhaps on page 195, rather than under the official publications of the International Monetary Fund. It may also be desirable to indicate somewhere that the International Atomic Energy Agency (IAEA) is, strictly speaking, not a specialized agency in the sense of Articles 57 and 63 of the United Nations Charter.

However this may be, the authors have succeeded in guiding the reader through the enormous output of documents emanating from the United Nations and the other major inter-governmental agencies. Apart from explaining the documentation system as such, their detailed discussions of "tools and guides" and their references to secondary sources will no doubt be appreciated by everybody concerned with these documents.

HANS AUFRICHT *

Fontes Juris Gentium. Series A, Sectio I, Tomus 5. *Handbuch der Entscheidungen des Internationalen Gerichtshofs 1947-1958*. By Hermann Mosler (ed.). Berlin, Cologne, Munich and Bonn: Carl Heymanns Verlag, 1961. pp. xxviii, 663. Index. DM. 118.

This sizeable tome continues the work of the first three volumes, published between 1930 and 1935, of Series A, Section I, of the *Fontes*, which were devoted to the Permanent Court of International Justice (established in 1920) and the Hague Permanent Court of Arbitration (established in 1899). (A volume 4, which has just appeared, covers the last few years of the Permanent Court.) The present Digest, dealing with the court of the United Nations, uses the same method as its predecessors. It reproduces, in a systematic arrangement according to subject categories, the views expressed in the Court's judgments, advisory opinions and orders, including, very commendably, the separate opinions of individual

* Counselor, Legal Department, International Monetary Fund, Washington, D. C. The views expressed are those of the reviewer and not necessarily those of the International Monetary Fund.

judges. The period covers some thirty decisions, which are listed chronologically and indexed on pages 599 to 610, beginning with the *Corfu Channel* case and ending with the *Case concerning the Application of the Guardianship Convention of 1902*. The excerpts are rendered in the French and English languages side by side; a German text is added to the headings and sub-headings. Pronouncements that are of interest from several points of view appear in a number of different places. This causes a measure of duplication which is probably inevitable under the method chosen and certainly more satisfactory than an apparatus of cross-references.

If any criticism is to be made, it arises from the abstract approach which seems to be typical of civil-law thinking. To an Anglo-American lawyer it is somewhat tantalizing to read what the Court or an individual judge *said* on a certain problem, without being told how the problem arose, what the dispute was about, and what the Court *did* in a given case. One wonders whether it would not have been possible to include, say in the index of the cases, a résumé, however brief, of the facts of each case and of the decision, if only to indicate which party won. Granted that "reading even longer excerpts is not a substitute for studying the decisions and advisory opinions themselves" (Preface, p. xiii), yet some first aid along the lines suggested might make the reading of the excerpts more meaningful. This reservation aside, the editorial treatment is excellent and worthy of the Max Planck Institute as well as of the scholar, Erich Kaufmann, to whom the volume is dedicated.

M. MAGDALENA SCHOCH

The Indian Yearbook of International Affairs, 1962. Vol. XI. Edited by T. S. Rama Rao. (Published under the auspices of the Indian Study Group of International Law and Affairs.) Madras: University of Madras, 1962. pp. xii, 516. Index. Rs. 15.

The distinguished position occupied by the *Indian Yearbook of International Affairs* is due in no small measure to Professor Charles Alexandrowicz, who initiated it and edited it for ten years while at the University of Madras. In this volume Dr. A. L. Mudaliar, the Vice Chancellor of that University, and T. S. Rama Rao, the present editor, pay tribute to him on his departure from Madras to the University of Sidney.

The present volume includes nineteen articles, a third of them written by non-Indian scholars, four on public international law, two on private international law, two on international organization, five on the constitutional law of India and other countries, two on international politics and economics in Asia, and four on international sociology. Special attention is given to the issues of major Indian interest, such as Asian governments and disputes, colonialism, racialism, and nationalism.

For the international lawyer the most interesting contributions are those by M. K. Nawaz on colonies and self-government in the United Nations, and a summary of Indian decisions on public international law, and those

by the editor on river water disputes among Indian states and on legal aspects of the Indo-Chinese border dispute.

In the latter, Dr. Rama Rao defends the Indian claim on grounds of traditional acceptance of the Himalayan watershed; on principles of acquiescence, recognition, prescription, and estoppel, applicable to the behavior of the Communist, as well as earlier Chinese Governments; and on treaties of 1684, 1842, and 1847 in regard to Ladakh, 1890 in regard to Sikkim, and 1914 in regard to Assam (MacMahon line), all said to be valid because, if not ratified by China, they were ratified by Tibet. The latter is claimed to have had treaty-making capacity at the time, either because it was an independent state or because China had admitted this capacity, if Tibet was under its suzerainty. The article includes acute discussion of international law principles concerning recognition, succession, suzerainty, treaty validity and interpretation, and good faith, especially in relation to the Indo-Chinese Panch Shila treaty of 1954. The Chinese contentions are fairly presented in most instances, but attention is not drawn to their similarity, in regard to the invalidity of "imperialistic" acquisitions, to the Indian contentions in other situations such as Goa.

As a minor matter the reviewer urges Indian writers to avoid identification of the British "Sir" with the Indian "Shri," leading to such inelegancies as Sir [Mr.] Owen Lattimore (p. 262), and Sir [Charles] Bell (p. 245).

The volume includes a review section and index. Under the new editor the *Yearbook* has maintained its high standards of scholarship.

QUINCY WRIGHT

Pregled Razvoja Međunarodno-Pravnih Odnosa Jugoslavenskih Zemalja od 1800 do Danas. I Sveska: *Pregled Međunarodnih Ugovora i Drugih Akata od Međunarodno-Pravnog Značaja za Srbiju od 1800 do 1918 Godine.* II Sveska: *Pregled Međunarodnih Ugovora i Drugih Akata od Međunarodno-Pravnog Značaja za Jugoslaviju od 1918 do 1941 Godine.* Belgrade: Institute of International Politics and Economics, 1953 and 1962. Vol. I: pp. 242, Index; Vol. II: pp. liv, 509, Index.

The Survey of the Development of International Legal Relations of Yugoslav Lands from 1800 to the Present, an ambitious undertaking of the Yugoslav Institute of International Politics and Economics, has now been completed up to 1941. Representing the labors of the Institute's Editorial Commission (Department) and its research people to date, the two volumes—the first covering the period from 1800 to 1918 and the second from 1918 to 1941—are calendars of international legal acts affecting the historical Yugoslav lands and territories before 1918 and Yugoslavia after its establishment in 1918. Listed chronologically, these acts are divided, within each year, into two major groups: (A) international treaties, agreements, conventions and other international legal instruments, bilateral as well as multilateral; and (B) domestic legal acts "containing elements of international legal significance."

. Each entry in group (A) consists of a title, date and place of signature; and dates of approval, sanction, ratification, exchange or deposit of instruments of ratification, if any or if found. This information is followed by citation of the source or sources. No actual texts appear in the *Survey*. In cases where a document was identified but no data concerning it discovered, the item is listed chronologically at the end of the month or year suspected to be the month or year of signature. The international documents included are those concluded, acceded or adhered to by Yugoslavia or, prior to its existence, by the several lands or territories (subjects of international law) which later became Yugoslavia.

Group (B) is selective rather than (even in aspiration) complete. The criterion of selection the Editorial Commission decided upon, as far as this reviewer is able to determine, was the perceived "significance" of the individual entries as translations of the international documents into the municipal order, implementing domestically as binding norms the provisions of the respective international instruments. This "significance" appears to oscillate principally between what may be judged "important" from the international legal point of view, and what may be so considered from the municipal legal viewpoint. The editors are vague on their choice; they simply state in the Introductory Note that "in view of their large number, we have made a rather strict selection" of the domestic legal acts included. The laws, statutes, decrees, provisions, regulations, orders and announcements listed in this group in the first volume carry no references to the international documents which initiated their enactment at home; in the second volume this omission was corrected and the relationship is indicated.

All entries, irrespective of the A or B designation, are listed serially. The full entries are bilingual; French translations are provided for all the texts, including the Preface, Introductory Note and the indexes. In both volumes the Preface and, in the second volume, the Introductory Note are also translated into English. The Prefatory and Introductory Notes in both volumes are illuminating and to the point. The indexes are accurate and very useful. All in all, the research workers of the Institute examined 123 different sources, foreign as well as local—collections of treaties, official journals, statutes, historical studies, archival materials—in order to assemble the almost 3,000 items in the two volumes.

This is a welcome reference work and a fine example for other national research institutions to follow. As the Director of the Institute, Professor Milan Bartoš, pointed out in the Preface to the first volume,

This work requires much strength, expert knowledge, huge efforts, patience and objectivity. And eventually, the only result is a register of small commercial value, so that work of this type brings neither glory nor profit. However, this work represents a public service, which will free those coming later from unnecessary efforts. It removes the monopoly of individual knowledge, as well as the taboo of uninformed critics. Through such work the facts become the common property of knowledge.

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Too often, he asserts, "historians have been encouraged by official sources to embellish history, especially documentary national history."

At the same time, given the enormous complexity of historical development of this important Balkan country, the Institute's research workers undertook a difficult, if not impossible, task. The result, while comprehensive, is at the same time far from complete, even for the periods already covered. For some periods no printed sources exist; in the several hostilities which took place on what is now Yugoslav territory, manuscripts and archives were often destroyed; the frequent changes of sovereignty necessitate a search for documents in foreign archives—Austrian, Hungarian, Turkish, German, Italian, etc.—yet some of these have been inaccessible for the periods in question. Much remains to be done, therefore, and much cannot and will never be done.

In form, several changes and additions would make the volumes much more attractive and useful to users: (1) Serial numbers of individual items might serve as a brief identifying reference for the respective items if they were made to consist of (a) a date of signature or promulgation in condensed numerical form, and (b) an abbreviated indication of the type of item. This would eliminate the need for the present consecutive numbering of the items, a headache in itself. (2) For easier reference, all pages should give, in addition to page number, the year and groups of the items on the page. (3) Two additional indexes—index of countries with whom agreements were concluded, and subject matter index of the kind of agreements concluded (cultural relations, shipping, consular agreements, etc.)—would improve the reference value of the work. (4) Finally, the bibliography, if brought up to date, would reveal other useful sources of material recently published abroad.

At least one, and possibly several volumes are presently being prepared by the Institute to bring the documentary international legal chronology of Yugoslavia up to date.

JAN F. TRISKA

Strafrechtliche Verantwortung im Völkerrecht. Zum Gegenwärtigen Stand des Völkerrechtlichen Strafrechts. By Gerhard Hoffmann. Frankfurt am Main and Berlin: Alfred Metzner Verlag, 1962. pp. 211. Index. DM. 24.60.

Privatdozent Hoffmann starts his study of "Criminal Responsibility in International Law" with the question whether *theoretically* international law can establish penal norms, as distinguished, *e.g.*, from rules of criminal procedure. His answer is yes. The three other sections of the book explore, as stated in its subtitle, "the present stage" of international criminal law. Intricate considerations lead him to conclude that "true" (*echtes*) international criminal law does not, or, in any case, not yet, exist: behavior objectionable under international law is only penalized by national law. This, he finds, is true of "delicts of limited significance," such as piracy or the slave trade, and of "delicts of universal significance,"

namely, in essence, the three categories of offenses tried by international tribunals at Nuremberg and Tokyo—crimes against peace; war crimes; and (war-connected) crimes against humanity.

Logically, Hoffmann searches further: What, then, is the *significance* of the alleged non-existence of “true” international penal law? What is the relation between international rules, and the duty not to violate them? There are many paradoxes in the book: the greatest is that by analyzing international penal law (which, whatever one may think of it, is a device to strengthen respect for international law), the author comes to question the very validity of international law altogether.

Hoffmann no longer fully accepts the transformation theory (“rules of international law become binding only if transformed into municipal law”) which, especially since Triepel, was dominant in Germany. His theoretical bases may be called eclectic. His formulations thus tend to become highly complex and his conclusions ambiguous.

His point of departure is that the duty to *desist* from prohibited acts flows as a “secondary duty” from the “primary duty to *suffer punishment*” for the violation. At one point (p. 20) he admits that this looks at first sight nonsensical (*sinnwidrig*). In support he quotes Kelsen—for whom, however, the validity of a norm derives from the existence of *any* sanction. If, instead, Hoffmann’s doctrine of *punishability* as a precondition for illegality is combined with his other doctrine, namely, that only national law establishes punishability, would it follow that international law by itself obliges nobody to desist? Some formulations (e.g., p. 109) seem to indicate this unacceptable conclusion. Elsewhere Hoffmann rejects it. Regarding war crimes he postulates “a *simultaneous* duty, pursuant to *international* law, to desist” (p. 75, italics added). The contradiction remains unsolved. It is compounded by other arguments; for example, that if the international rules of warfare applied directly, belligerents could punish, through their own over-severe codes, acts *not* prohibited internationally, so that prisoners of war would be “helplessly exposed to the whim of [enemy] legislation.” (p. 69.) On the contrary: only if international rules govern, can judicial murder under the guise of punishing unilaterally invented war crimes be prevented. In fact, the author agrees with Lauterpacht that foreigners can be punished under national law only for war actions also violative of international law (p. 75). The validity or primacy of the latter, which causes the author so much difficulty, would thus be established.

The all-important question is, did the defendants who were found guilty at Nuremberg and Tokyo do wrong? Hoffmann calls the acts punished by these international tribunals execrable (*verabscheuungswürdig*). For example, aggressive war was, he states, by the 1930’s outlawed and a crime—but a “crime” between quotation marks, not a genuine (*echtes*) crime. For penalties had not been internationally stipulated *expressis verbis*. This is true. He rejects the proposition that international law develops by case and precedent: he goes so far as to argue that international law, not having stipulated punishability, also, strictly speaking, did

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not impose a duty to desist from aggression! Yet, he continues, the tribunals were entitled to punish aggression (crimes against peace) because they did so under correct criminological principles of municipal law and by pooling their separate and several procedural jurisdictions.

All this is confusing, not only from the standpoint of legal theory. In the minds of persons less well-meaning than the author, it is apt to foster a notion which, in the atomic age, is more dangerous than ever, namely, that, even on essentials, international law is shrouded in ambiguities.

On some points of great concrete importance, Hoffmann's views are untenable: *e.g.* (p. 44), that war crimes can never be committed by top policy-makers (whereas their war crimes are most reprimandable and forbidden first of all), but only by recipients of superior orders (whereas subordinates may well commit war crimes spontaneously); or that, in turn, crimes against peace and against humanity can only be committed by persons who perform acts of state. As stated convincingly, *e.g.*, in the Nuremberg and Tokyo International Military Tribunal judgments and in those in the *Krupp* and *I. G. Farben* cases, only evidence and not status determines responsibility under those counts. It is strange to see the author assert that the international rules of warfare cover only "war-connected behavior" of the military (*im Kriegshandwerk begriffen ist*); hence, they never cover acts of the military which are unconnected with war events (*Kriegsnebenhandlungen*), or any acts committed by civilians ("the international law of war is not addressed to civilians"—*Kriegsvölkerrecht den Zivilisten nicht anspricht, e.g.*, p. 69). All German-imposed death sentences on enemy civilians in occupied territories for internationally illegal behavior would thus constitute the war crime of murder.

All in all, the professional reader will find in this searching work much stimulation (for example, Hoffmann has some thoughtful things to say about the desirability of "criminalization" of international law), and many inconsistencies and contradictions, caused mainly by the author's wavering between pluralistic and monistic views on the relations between international and national law; but the biased seeker for escape from international responsibilities will be able to draw conclusions which the author would probably be the first to reject.

JOHN H. E. FRIED

BRIEFER NOTICES

The British Year Book of International Law, 1961. Vol. 37. (London, New York, Toronto: Oxford University Press, 1962. pp. viii, 614. Index. \$16.00; £5.) International lawyers accustomed to the high standards of legal scholarship and the invigorating re-assessment of accepted legal concepts in previous volumes of the *British Year Book of International Law* will not be disappointed by the 1961 volume. It is a pleasure to find that the judicial duties of Sir Gerald Fitzmaurice have not prevented him from writing a perceptive appraisal of "Hersch Lauterpacht—The Scholar as Judge," an appraisal which will be continued in the 1962 volume. Professor R. Y. Jennings, who, with Sir Humphrey Waldock, is co-editor

of the *British Year Book*, has contributed a most useful article on "State Contracts in International Law" in which he concludes, in part, that neither international law nor respect for the proper law of contracts inhibits the recognition of international law remedies for international contractual relationships.

Practitioners before the International Court of Justice or other international tribunals will find worthy of careful study the eighty-page article by Dr. Jean Hardy on "The Interpretation of Plurilingual Treaties by International Courts and Tribunals." Although other writers like Manley O. Hudson had called attention to problems raised by the judicial application of multilingual texts, Dr. Hardy provides the most comprehensive and incisive analysis of the case law and guiding principles of the subject which has been published. Other studies of monographic length contained in the 1961 *Year Book* are by Finn Seyersted on "United Nations Forces: Some Legal Problems" (with a later chapter promised on the application of the laws of war to international military operations) and by Ian Brownlie on "The Use of Force in Self-Defence," a comprehensive study which has already received frequent citation. Rosalyn Higgins discusses "The Legal Limits to the Use of Force by Sovereign States: United Nations Practice" adapted from a book she has just published on *The Development of International Law through the Political Organs of the United Nations*. J. F. McMahon writes on "The Court of the European Communities: Judicial Interpretation and International Organization." The volume is completed with Notes, Judicial Decisions and Reviews of Books, of which the review of Lord McNair, *The Law of Treaties, 1961*, by Sir Gerald Fitzmaurice should not be overlooked.

HERBERT W. BRIGGS

L'Assemblée Commune de la Communauté Européenne du Charbon et de l'Acier. Aspects Européens. By P. J. G. Kapteyn. (Leyden: A. W. Sythoff, 1962. pp. 270. Index. Fl. 27.50.) Mr. Kapteyn's book was the author's thesis for his doctorate in law at the University of Leyden; but it is not primarily a study of the legal powers and procedures of the Common Assembly of the Coal and Steel Community which existed from 1952 to 1958; it is a study of its political rôle as a representative assembly and as an organ of the Community. Mr. Kapteyn does not resort to the sociological methods of analysis used by Ernst B. Haas in his works on European assemblies; their conclusions are, however, quite close. There are three main points in Mr. Kapteyn's study. First, there developed gradually within the Assembly a predominance of supranational political loyalties over national alignments: in the distribution of Assembly functions, in the activities of the committees and of the Assembly, the main groups were not the national ones, but the socialist, Christian-democrat, and liberal ones; by 1958 the Assembly, from this viewpoint, resembled a federal parliament. Secondly, the Assembly co-operated closely with the High Authority and conceived of itself as a body devoted to the promotion of a supranational Europe and to the buttressing of the High Authority. Thirdly—and here lies the author's most valuable insight—what allowed the Assembly to act as an expression of the "common good" rather than as the mouthpiece of national grievances was its very isolation from the public opinions of the member nations—an isolation that made both for the Assembly's boldness on behalf of Europe and for its paucity of powers and responsibilities. It is a useful lesson about a vicious circle that has not been broken by the Europeans since 1958 either.

STANLEY HOFFMANN

Die Internationale Politik 1956/57: Die Begegnung mit dem Atomzeitalter. 2 vols. Edited by Wilhelm Cornides with the collaboration of Arnold Bergsträsser, Walter Hofer, and Hans Rothfels. (Munich: Verlag R. Oldenbourg, 1961. pp. xx, 800, and 148. Index.) This is the second yearbook of international affairs published by the Research Institute of the German Society for Foreign Policy in Bonn. Dr. Cornides and more than a dozen collaborators have done an admirable job of surveying and digesting the events of two particularly tense years of the postwar world. They have focused their study on the "encounter with the atom age"—a viewpoint justified by the ballistic missile break-through, discussed in the first section of the volume. Dr. Cornides' study of the changes in world politics in 1956–1957 is essentially an analysis of East-West relations both in the military area and on the diplomatic front. It is followed by a series of area studies that cover events in the Western Hemisphere (most of this section is devoted to a discussion of U. S. foreign policy), in Western Europe, in the two Germanys, in the Soviet bloc, in the Far East, in Southeast Asia, in the Middle East (mainly a study of the Suez crisis), and in Africa.

A thorough and perceptive analysis of world politics, with a second volume entirely devoted to a brief bibliography, a chronology and abundant notes, this yearbook takes as its focus the competition among nations and the conflicts that derive from it. As a result, it pays relatively little attention to international organization (even in the study of Suez) and practically none to international law.

STANLEY HOFFMANN

The International Legal Status of Austria 1938–1955. By Robert E. Clute. (The Hague: Martinus Nijhoff, 1962. pp. xiv, 157. Index. Gld. 18.75.) The present study deals with the legal problems involved in Austria's international status from the "*Anschluss*" in 1938 until the conclusion of the State Treaty in 1955. Austria's neutralized status, based upon the State Treaty, thus lies outside the scope of the monograph. The author, after a careful examination of all pertinent facts and relevant legal principles, concludes that the "*Anschluss*" was an illegal act, and asserts the continuity of the Austrian state throughout the periods of the German and the Allied occupation. He then analyzes the impact of the Austrian case on the traditional law of succession and recognition. In another chapter he discusses Austria's relationship with international organizations in the years under examination. A special merit of the study is the author's interest in the question whether the way in which the members of the international community reacted to the unlawful conquest of Austria by Germany indicates new trends in international law. He suggests that the enunciation in the thirties of the principle of non-recognition of unlawful acquisition of territory or other illegal gains has resulted in greatly increasing the legal difficulties of the aggressor. "The legal delaying tactics of the international community," he says, "maintain the *de jure* status of the victimized state until an occasion arises to obtain redress from the aggressor and to rectify the unlawful act by means of a *restitutio in integrum* in accordance with the legal maxim *ex injuria jus non oritur*." But he himself adds that such delaying tactics would not be helpful in case of a prolonged domination of the involved territory. In the appendix there are listed cases from national courts of seven countries relevant to Austria's legal status from 1938 to 1955.

ERICH HULA

. *Between Arab and Israeli.* By Lieutenant-General E. L. M. Burns. (London: George C. Harrap & Co. Ltd.; New York: Ivan Obolensky, 1962. pp. 336. Index. 25 s.; \$6.50.) Here is a factual, dispassionate, soldierly report of General Burns' activities, first as Chief of Staff of the United Nations Truce Supervision Organization and later as Commander, United Nations Emergency Force, in the Middle East. The objectivity of the account is apparent on its face: General Burns bluntly records breaches of faith and violations of the General Armistice Agreements by both sides. If he himself made a mistake in his appraisal of a situation or in his course of action, he is frank to confess it.

The value of the book for the international lawyer lies in its first-hand account of the actual problems encountered in the administration of an armistice and in the organization and operations of a United Nations force. If any lesson has been learned from the attempted suspension of hostilities between Israel and the Arab states, it is that an armistice must be placed under effective international supervision—effective in the sense that the agency charged with the task must have sufficient personnel and adequate powers to carry out its task. It must also have political backing to provide sanctions, if the armistice is violated. The serious consequences of Israeli reprisals against the unlawful acts of *fedayeen*, to which the Arab nations sometimes turned a blind or a winking eye, suggest that the provision of the Hague Regulations that "Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately"¹ may be in need of revision.

Because nothing succeeds like success, the account of the United Nations Emergency Force makes more cheerful reading. For persons interested in United Nations forces of the future, the 120 pages of General Burns' book devoted to UNEF give some sense of the actual operating problems faced by the command. For example, when UNEF entered the Gaza Strip, it had responsibilities for civil administration thrust upon it without any clear guidance from the United Nations, without civil affairs personnel or the appropriate staff section, without even the British and American civil affairs manuals which had been requested (pp. 255-257). Things worked themselves out in time, but only through pulling and hauling with the local population and the Egyptian authorities.

All in all, this is a frank and level-headed book, which should help internationalists to distinguish what is real and important from what is irrelevant, trivial, unworkable, or merely of theoretical interest.

R. R. BAXTER

Comparative Federalism: States' Rights and National Power. By Edward McWhinney. (Toronto: University of Toronto Press, 1962. pp. xii, 103. Index. \$5.00.) This compact and lucidly written volume draws together eight essays based upon lectures given lately by the author at several European centers of learning, responsive to the current lively interest there in federalism as a way to economic and political integration. Their design is to show, through a review of the law in action as exemplified by recent court decisions in the three "classical" Federal Governments of the United States, Canada and West Germany, how major policy dilemmas have been variously resolved within the federal framework. In so doing, Professor McWhinney has in effect marshaled a brief in

¹ Regulations annexed to Convention No. IV of The Hague respecting the Laws and Customs of War on Land, signed Oct. 18, 1907, Art. 40, 36 Stat. 2277, 2305; Treaty Series, No. 539; 2 A.J.I.L. Supp. 90 (1908).

support of judicial review as an efficacious instrumentality for harmonizing conflicting interests and competing values. At least, in the case of the governments concerned, the judicial umpire has been part and parcel of a living denial of Dicey's charge that federalism inherently spells weakness, conservatism and legalism; and if any lesson is to be drawn by constitution-makers elsewhere from their experience, in the author's view, it is the value of this instrumentality, operating in an atmosphere of restraint and live-and-let live.

The cases discussed involve mainly civil liberties, minority rights and security. But one chapter focuses on "Federalism and the Foreign Affairs Power," concluding with the remark that "none of the dire consequences, in terms of the practical conduct of foreign policy, that were predicted by the court's critics as the inevitable aftermath of the holding [the German *Reichskonkordat* decision, and the Canadian Labour Conventions case] seem to have ensued up to date" (p. 49).

HERMAN WALKER

The United States and the First Hague Peace Conference. By Calvin DeArmond Davis. (Ithaca, N. Y.: Cornell University Press, for the American Historical Association, 1962. pp. xiv, 236. Index. \$5.00.) Professor Davis examines American foreign policy of the late nineteenth century as reflected in the First Hague Peace Conference. Out of an impressive knowledge of the sources, he describes the subject in narrative form as if he had been a participant. Although the United States was an aggressive and imperialistic Power, Davis points out, she was interested in pacific settlement of international disputes. While making no reference to nineteenth-century world opinion for arbitration, he suggests that the duality of American foreign policy was influenced by many organized peace movements in America. Historian Davis comes to the conclusion, already widely held, that the Conference was a ceremonious show which failed to achieve its threefold objectives: to limit armaments, to civilize war, and to institute limited compulsory arbitration. In fact, the objectives seemed rather Utopian to the nations participating in the Peace Conference; not only were most of them highly pessimistic of the outcome, but the great Powers went to The Hague precisely to prevent the success of the Conference. Had the American Delegation not been isolationist, the author speculates, the Permanent Court of Arbitration might have been something more than a panel of publicists. On the other hand, he stresses that the Americans did aid in the establishment of the tribunal.

This book is well documented and is a useful account of the diplomatic processes of the Conference.

SUNGJOOK JUNN

Die Deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts in den Jahren 1956 und 1957. Edited by Franz Gamillscheg. (Berlin: Walter de Gruyter & Co.; Tübingen: J. C. B. Mohr (Paul Siebeck), 1962. pp. xvi, 779. Index. DM. 103.) Like its predecessor, a collection of German conflicts cases decided in 1954 and 1955, this volume, which covers the years 1956 and 1957 and includes many decisions hitherto unpublished, is an essential tool for comparative research in private international law.¹ The American reader, who has often felt frustrated by the largely academic use of case law in German commentaries and treatises,

¹ For a French counterpart, see Francescakis, *Jurisprudence de droit international privé* (1961), reviewed in 56 A.J.I.L. 256 (1962).

will find here the much needed access to primary sources. Indeed, he may do so with some envy, since this access is offered to him by an outstanding scholar,² in a manner unknown in this country, within the framework of a systematic analysis and with the help of a superb index.

There are many cases dealing with American municipal and conflicts law. Close study of those cases lends considerable support to the basic rôle of the law of the forum,³ particularly in the fields of divorce and adoption, where that law is often reached by the misuse of *renvoi*.⁴ Moreover, those cases substantiate the suspicion prevalent among conflicts scholars everywhere that the foreign law ascertained by "proof" and judicial notice is more often than not a mere "domestic *jus gentium*."⁵ In the case of American conflicts law as seen from abroad, the fictitious character of "finding" that law is aggravated by the foreign courts' prominent reliance on the *Restatement* (see, e.g., pp. 365, 368, 453, 471), now largely abandoned even by its author, the American Law Institute. Continuing confusion could and should be forestalled by a formal disclaimer by the Institute of the applicability of its *Restatements* (including the forthcoming *Restatement Second*) to international conflicts.

ALBERT A. EHRENZWEIG

Deutsches Internationales Kartellrecht. By Ivo E. Schwartz. (Cologne, Berlin, Bonn and Munich: Carl Heymanns Verlag KG, 1962. pp. xx, 325. DM. 42.80.) This book on German international antitrust law signals the emergence of foreign competition in a field dominated by American writers and judges. It first discusses provisions of the German law against restraints on competition as they affect international arrangements, including export cartels, vertical restraints, license agreements and international cartels. In the second part, German authorities on the extra-territorial scope of their antitrust law are explored in relation to general German conflicts rules and in comparison with American decisions. The third asks whether international law limits assertions of antitrust authority.

Perhaps the most interesting contrast between German and American rules, both of which base jurisdiction on the place where a restraint has economic impact, is that German law does not reach export arrangements not affecting sales in internal German markets. Here the rule diverges from American cases which saw harm to our economy in arrangements which curtailed American production for export. German law, *per contra*, is in theory more extensive in that it will be applied to those who violate its substantive rules, whether or not they do business or are "found" in Germany.

Dr. Schwartz' book is scholarly and carefully organized and has clearly benefited from his extensive study in this country. Because of the language barrier and the book's emphasis on jurisdictional theory, American antitrust lawyers may prefer to resort to the author's own English language summary elsewhere.¹ It should, however, furnish international perspective to a body of theory long treated only from our national point

² See, e.g., Gamillscheg, *Internationales Arbeitsrecht* (1959).

³ See Ehrenzweig, *Treatise on the Conflict of Laws* §§ 102-120 (1962).

⁴ Namely, the assumption of a reference to the *lex fori* by the American law of domicile.

⁵ Brogгинi, "Die Maxime 'jura novit curia' und das ausländische Recht," 155 *Arch. Civ. Pr.* 469, 473 (1956).

¹ 2 *Cartel and Monopoly in Modern Law* 701 (1961).

of view. The prospect, as thus seen, is not comforting to international businessmen, since it reveals that we will not be the only ones who, on the basis of repercussions within the national territory, will assert jurisdiction over transactions taking place outside it.

DETLEV F. VAGTS

Algemeen Deel van het Nederlandse Internationaal Privaatrecht. 2nd ed. By J. Kusters and C. W. Dubbink. (Haarlem: De Erven F. Bohn N.V., 1962. pp. xx, 936. Index. Fl. 65.50.) This is a revised edition of *Het Internationaal Burgerlijk Recht in Nederland*, published in 1917 by Kusters. Notes indicate when his views are not shared by the present reviser. The material is excellently presented and gives a thorough survey of the "general part" of international private law as applied in The Netherlands. Besides the Dutch statutory law, judicial decisions, and doctrine of publicists, there is given with respect to most subjects treated a similar review of the law in other countries, particularly France (whose codes were the basis of Dutch legislation), as well as Germany, Switzerland, England, and other nations affording material in point with regard to the particular topic under discussion. On debated issues, the various views are set forth clearly, and the author's position with respect to the preferable solution made plain. The effect that would follow on particular problems, if the uniform law drawn up in the Benelux Treaty of May 11, 1951, went into force, is also explored.

Introductory chapters deal with the nature and history of private international law as a subject of legal thought; the sources of Dutch international private law in statute, unwritten rules, and treaties. Then the familiar topics of characterization (*qualification*), *renvoi*, vested rights, public order, *fraude à la loi*, reciprocity and retaliation are dealt with. This is followed by discussion of form (*locus regit actum*), modes of proof, nationality, rights of foreigners, personal status, domicile and related concepts, merchants (the French practice of a special commercial law was abolished in The Netherlands on July 2, 1934), jurisdiction of courts, procedural rules, *cassation* (the Dutch highest court, the *Hooge Raad*, is a court of cassation which can only quash the decision of a lower court for misapplication of a *statute*, but cannot control the development of rules of unwritten law), arbitration, bankruptcy, diplomatic and consular activities.

This is a very useful and valuable volume for students and practitioners of private international law.

EDWARD DUMBAULD

Deutsches Atomgesetz und Strahlenschutzrecht—Kommentar. By Hans Fischerhof and Associates. (Baden-Baden and Bonn: Verlag August Lutzeyer, 1962. pp. 864. Index. DM. 68.) This extensive commentary on the German atomic energy act is useful for students of comparative law. It explains the provisions of the German statute with reference to problems of liability for damages due to atomic experiments, among others. Of special interest to international lawyers are the sections on international atomic energy agreements, in particular the Euratom Treaty (pp. 398-404), and national legislation, including the Anderson-Price Act and the British Nuclear Installations (Licensing and Insurance) Act (pp. 354-385). The comparison between liability provisions of the laws of different countries shows, among other things, that the United States leaves to the courts the problem of determining standards based on strict lia-

bility, while Great Britain has established special criteria in law. The authors doubt that the U. S. courts will be able to achieve satisfactory results.

It is clear from this discussion that countries must assume liability for damages to other states due to atomic experiments taking place in their territory. The problem of liability of private companies is less clear in this regard. It would appear that compulsory insurance combined with international responsibility of states might best serve the interests of all parties concerned. In this connection, similar standards for damages due to activities of private enterprise may be applicable in the related field of outer space.

The work contains bibliographies at the end of each section, several appendices, and an index.

ROBERT K. WOETZEL

Post-War International Civil Aviation Policy and the Law of the Air. 2nd rev. ed. By H. A. Wassenbergh. (The Hague: Martinus Nijhoff, 1962. pp. xii, 197. Index. Gld. 15.) This is a revised edition of the book which was reviewed in this JOURNAL in 1958 (52 A.J.I.L. 153). The Dutch author has not changed any of his views or methods of presentation. He still argues, in consonance with the interests of his nation, for a very large measure of freedom of international air commerce. Many of the references are brought up to date, and a new concluding chapter surveys the developments in the intervening years. The author notes with regret signs of growing protectionism in United States policy, and briefly discusses the European and other regional efforts at co-operation in the field of air transport.

Sovetskaya Literatura po Mezhdunarodnomu Pravu. Bibliografia 1917-1957. Edited by V. N. Durdenevskii. (Moscow: Gosudarstvennoye Izdatel'stvo Yuridicheskoi Literatury, 1959. pp. 304. Index.) This first comprehensive bibliography of Soviet publications on public and private international law is the work of seven compilers and bears the imprint of the Soviet Association of International Law. It is essentially a classified list of books, pamphlets, articles, collections of documents, dissertation abstracts and other materials on international law written or compiled by Soviet authors and published in Russian in the Soviet Union. Not included are publications in languages other than Russian (unless accompanied by summaries in Russian), Russian translations of foreign works (although some Soviet introductions to such translations are listed), and articles in the daily press. Within these limits, coverage appears to be complete. Works on the border line between international law and international politics are included. Authors proscribed in the late Stalin era, such as Pashukanis, are fully represented. Book entries are accompanied by lists of reviews printed in Soviet periodicals. Despite the dates given in the subtitle, a supplement (pp. 259-280) lists many publications issued in 1958. For non-Soviet scholars, the usefulness of the bibliography is somewhat impaired by an unfamiliar classificatory scheme which is said to correspond to the organization of international law courses in the Soviet Union. The book is one of the Soviet bibliographies of various branches of law which have recently appeared. For the historian of international law, it is usefully supplemented by a less formal but more circumstantial guide to pre-revolutionary Russian literature of international law compiled by V. E. Grabar' (*Materialy k Istorii Literatury Mezhdunarodnogo Prava v Rossii (1647-1917)*), Moscow: Izdatel'stvo Akademii Nauk SSSR, 1958).

O. J. LISSITZYN

Problemele Privind Arbitrajul Pentru Comerțul Exterior în Țările Socialiste Europene [*Problems of Foreign Trade Arbitration in the Socialist Countries of Europe*]. By Ion Nestor. (Bucharest: Publishing House of the Academy of the Rumanian People's Republic, Institute of Legal Research, 1962. pp. 309. With an Abstract in English, pp. 21.) The increase of East-West trade of European countries makes the settlement of commercial disputes with Communist trade organizations an important feature of state trading transactions. Though the Soviet Union recently agreed to commercial arbitration outside its own territory (see this JOURNAL, Vol. 53, p. 798), other Communist countries rely nearly exclusively on their own Foreign Trade Arbitration Commissions, which are attached to the central national chambers of commerce. A description of that system is presented in the Rumanian book, which deals first with the organization and functioning of commercial arbitration in Rumania and then in other European Communist countries (U.S.S.R., Bulgaria, Hungary, Czechoslovakia, Poland, and the German Democratic Republic). Of special interest are problems of private international law and the treatment of conflict of laws in arbitral awards, mostly based on the *lex fori* to be found in the provisions of the respective Codes of Civil Procedure. The proof of foreign law and its application by the Arbitral Commissions, under the principle of *jura novit curia*, and the problem of commercial usage are dealt with on a comparative basis. International arbitral conventions to which Communist countries of Eastern Europe adhere are also considered: the Geneva Agreements of 1923 and 1927, the 1958 U. N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the European Convention on International Commercial Arbitration of April 21, 1961. Numerous references will facilitate the study of some interesting legal aspects of East-West trade relations.

MARTIN DOMKE

Doctrinas de la Cancillería Venezolana. Digesto. Vol. V. By Francisco J. Parra, comp. (New York: Las Americas Publishing Co., 1961. pp. xii, 306. Index. \$5.00.) This is part of a non-official guide to Venezuelan Foreign Office practice. This volume covers the period 1925 to 1935. Volume six, covering the period 1936 to 1941, was scheduled to appear in the fall of 1963. One of the purposes of the work is to allow the student to formulate the legal principles which Venezuela has followed in the international arena. The book is useful as a research tool. Arranged alphabetically are all the matters acted upon during the period by the Venezuelan Government which have anything at all to do with foreign affairs, with a brief description of each item, the extent of Venezuelan participation (if an international conference, treaty or conflict), and the documentary reference. Included are many extremely insignificant entries. On the other hand, the international disputes in South America involving Venezuela directly or only indirectly and certain topics of special interest to Venezuela are given substantial space. The series is basically only a guide, however, and one must have access to documentation, especially the official "Yellow Book" annuals, in order to perform work in the fields cited.

ROBERT D. HAYTON

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ELEANOR H. FINCH

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UNITED NATIONS REPORT OF THE INTERNATIONAL LAW COMMISSION

COVERING THE WORK OF ITS FIFTEENTH SESSION, MAY 6-JULY 12, 1963*

CHAPTER I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly Resolution 174 (II) of 21 November 1947, and in accordance with its Statute annexed thereto, as subsequently amended, held its Fifteenth Session at the European Office of the United Nations, Geneva, from 6 May to 12 July 1963. The work of the Commission during the session is described in this Report. Chapter II of the Report contains twenty-five articles on the invalidity and termination of treaties. Chapter III concerns the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations. Chapter IV relates to progress of work on other subjects under study by the Commission. Chapter V deals with a number of administrative and other questions.

A. MEMBERSHIP AND ATTENDANCE

2. The Commission consists of the following members:

Mr. Roberto AGO (Italy)
Mr. Gilberto AMADO (Brazil)
Mr. Milan BARTOŠ (Yugoslavia)
Mr. Herbert W. BRIGGS (United States of America)
Mr. Marcel CADIEUX (Canada)
Mr. Erik CASTRÉN (Finland)
Mr. Abdullah EL-ERIAN (United Arab Republic)
Mr. Taslim O. ELIAS (Nigeria)
Mr. André GROS (France)
Mr. Eduardo JIMÉNEZ DE ARÉCHAGA (Uruguay)
Mr. Victor KANGA (Cameroon)
Mr. Manfred LACHS (Poland)
Mr. LIU Chieh (China)
Mr. Antonio DE LUNA (Spain)
Mr. Luis PADILLA NERVO (Mexico)

* U.N. General Assembly, 18th Sess., Official Records, Supp. No. 9 (A/5509). For reports of the International Law Commission covering its previous sessions, see Supplements to this JOURNAL, Vols. 44, 45, 47-49, and Official Documents in Vols. 50-57, inclusive.

Mr. Radhabinod PAL (India)
Mr. Angel M. PAREDES (Ecuador)
Mr. OBED PESSOU (Dahomey)
Mr. Shabtai ROSENNE (Israel)
Mr. Abdul Hakim TABIBI (Afghanistan)
Mr. Senjin TSURUOKA (Japan)
Mr. Grigory I. TUNKIN (Union of Soviet Socialist Republics)
Mr. Alfred VERDROSS (Austria)
Sir Humphrey WALDOCK (United Kingdom of Great Britain and Northern Ireland)
Mr. Mustafa Kamil YASSEEN (Iraq)

3. All the members, with the exception of Mr. Victor Kanga, attended the session of the Commission.

B. OFFICERS

4. At its 673rd meeting, held on 6 May 1963, the Commission elected the following officers:

Chairman: Mr. Eduardo Jiménez de Aréchaga

First Vice-Chairman: Mr. Milan Bartoš

Second Vice-Chairman: Mr. Senjin Tsuruoka

Rapporteur: Sir Humphrey Waldock

5. At its 677th meeting, held on 10 May 1963, the Commission appointed a drafting Committee under the chairmanship of the first Vice-Chairman of the Commission. The composition of the Committee was as follows: Mr. Milan Bartoš, Chairman, Mr. Roberto Ago, Mr. Herbert W. Briggs, Mr. Abdullah El-Erian, Mr. André Gros, Mr. Luis Padilla Nervo, Mr. Shabtai Rosenne, Mr. Grigory Tunkin, Sir Humphrey Waldock. The drafting Committee held twelve meetings during the session.

6. The Legal Counsel, Mr. Constantin Stavropoulos, was present at the 710th meeting, held on 28 June 1963. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

C. AGENDA

7. The Commission adopted an agenda for the Fifteenth Session consisting of the following items:

1. Law of treaties.
2. Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly Resolution 1766 (XVII)).
3. State responsibility: report of the Sub-Committee.
4. Succession of States and Governments: report of the Sub-Committee.
5. Special missions.
6. Relations between States and inter-governmental organizations.
7. Co-operation with other bodies.

. 8. Date and place of the sixteenth session.

9. Other business.

8. In the course of the session, the Commission held forty-nine meetings. It considered all the items of its agenda.

CHAPTER II

LAW OF TREATIES

A. INTRODUCTION

SUMMARY OF THE COMMISSION'S PROCEEDINGS

9. At its Fourteenth Session the Commission provisionally adopted Part I of its draft articles on the law of treaties, consisting of twenty-nine articles on the conclusion, entry into force and registration of treaties. At the same time the Commission decided, in accordance with Articles 16 and 21 of its Statute, to transmit this draft, through the Secretary-General, to governments for their observations. The Commission further decided to continue its study of the law of treaties at its next session, to give the topic priority and to take up at that session the questions of the validity and duration of treaties.

10. Both the "validity" and the "duration" of treaties have been the subject of reports by previous Special Rapporteurs. "Validity" was dealt with by Sir Hersch Lauterpacht in Articles 10-16 of his first report on the law of treaties¹ and in his revision of Article 16 in his second report,² and by Sir Gerald Fitzmaurice in his third report.³ "Duration" was not covered by Sir Hersch Lauterpacht in either of his two reports, but was dealt with at length in Sir Gerald Fitzmaurice's second report.⁴ Owing to the pressure of other work, none of these reports had been examined by the Commission; but the Commission has naturally given them full consideration.

11. At the present session of the Commission, the Special Rapporteur submitted a report (A/CN.4/156 and Add.1-3) on the essential validity, duration and termination of treaties. The Commission also had before it a memorandum prepared by the Secretariat containing the provisions of the resolutions of the General Assembly concerning the law of treaties (A/CN.4/154). It considered the report of the Special Rapporteur at its 673rd-685th, 687th-711th, 714th, 716th-718th and 720th meetings and adopted a provisional draft of articles upon the topics mentioned, which is reproduced in the present chapter together with commentaries upon the articles. In studying these topics the Commission came to the conclusion that it was more convenient to formulate the articles upon the "essential validity" of treaties in terms of the various grounds upon which treaties may be affected with invalidity and the articles on "duration and termination" in terms of the various grounds upon which the termination of a

¹ Yearbook of the International Law Commission, 1953, Vol. II, pp. 137-159.

² *Ibid.*, 1954, Vol. II, pp. 133-139.

³ *Ibid.*, 1958, Vol. II, pp. 20-46.

⁴ *Ibid.*, 1957, Vol. II, pp. 16-70.

treaty may be brought about. Accordingly, the Commission decided to change the title of this part of its work on the law of treaties to the "Invalidity and Termination of Treaties"; this is, therefore, the title given to the draft articles reproduced in the present chapter.

12. As stated in paragraph 18 of its Report for 1962,⁵ the Commission's plan is to prepare a draft of a further group of articles at its session in 1964 covering the application and effects of treaties. After all its three drafts on the law of treaties have been completed, the Commission will consider whether they should be amalgamated to form a single draft convention or whether the codification of the law of treaties should take the form of a series of related conventions. In accordance with its decision at its previous session, the Commission has provisionally prepared the present draft in the form of a second self-contained group of articles closely related to the articles in Part I which have already been transmitted to governments for their observations. The present draft has therefore been designated "The Law of Treaties—Part II." At the same time the Commission decided, without thereby prejudging in any way its decision concerning the form in which its work on the law of treaties should ultimately be presented, that it would be more convenient not to number the present group of articles in a new series, but to number them consecutively after the last article of the previous draft. Accordingly, the first article of the present group is numbered 30.

13. In accordance with Articles 16 and 21 of its Statute, the Commission decided to transmit its draft concerning the invalidity and termination of treaties, through the Secretary-General, to governments for their observations.

THE SCOPE OF THE PRESENT GROUP OF DRAFT ARTICLES

14. The present group of draft articles covers the broad topics of the invalidity and termination of treaties, while the topic of the suspension of the operation of treaties has been dealt with in close association with that of termination. The draft articles do not, however, contain any provisions concerning the effect of the outbreak of hostilities upon treaties, although this topic raises problems both of the termination of treaties and of the suspension of their operation. The Commission considered that the study of this topic would inevitably involve a consideration of the effect of the provisions of the Charter concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question; and it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties. Another question not dealt with in these draft articles is the effect of the extinction of the international personality of a state upon the termination of treaties. The Commission, as further explained in paragraph 3 of its commentary to Article 43, did not think that any useful provisions could be formulated on this question without taking into account the problem of the succession of states to treaty rights and obligations. Having regard to its decision

⁵ Official Records of the General Assembly, 17th Sess., Supp. No. 9 (A/5209 and Corr.1).

to undertake a separate study of the topic of succession of states and governments and to deal with succession in the matter of treaties in connexion with that topic, the Commission excluded for the time being the question of the extinction of the international personality of a state altogether from the draft articles regarding the termination of treaties. It decided to review this question at a later session when its work on the succession of states was further advanced.

15. In discussing the invalidity of treaties, the Commission considered the case of a treaty the provisions of which conflict with those of a prior treaty; and in discussing the termination of treaties it considered the analogous case of the implied termination of a treaty by reason of entering into another treaty the provisions of which are incompatible with those of the earlier treaty. Some members of the Commission considered that in both instances these cases raised questions of the interpretation and of the priority of the application of treaties, rather than of validity or termination. Other members expressed doubts as to whether these cases could be considered as exclusively questions of interpretation and application. The Commission decided to leave both these cases aside for examination at its next session when it would have before it a further report from its Special Rapporteur dealing with the application of treaties, and to determine their ultimate place in the draft articles on the law of treaties in the light of that examination.

16. The draft articles have provisionally been arranged in six sections covering: (i) a general provision, (ii) invalidity of treaties, (iii) termination of treaties, (iv) particular rules relating to the application of sections (ii) and (iii), (v) procedure, and (vi) legal consequences of the nullity, termination or suspension of the operation of a treaty. The definitions contained in Article 1 of Part I are applicable also to Part II and it was not found necessary to add any further definitions for the purposes of this part. The articles formulated by the Commission in this part, as in Part I, contain elements of progressive development as well as of codification of the law.

17. The text of draft Articles 30-54 and the commentaries as adopted by the Commission on the proposal of the Special Rapporteur are reproduced below:

B. DRAFT ARTICLES ON THE LAW OF TREATIES

PART II

INVALIDITY AND TERMINATION OF TREATIES

SECTION I: GENERAL PROVISION

ARTICLE 30

Presumption as to the validity, continuance in force and operation of a treaty

Every treaty concluded and brought into force in accordance with the provisions of Part I shall be considered as being in force and in operation

with regard to any state that has become a party to the treaty, unless the nullity, termination or suspension of the operation of the treaty or the withdrawal of the particular party from the treaty results from the application of the present articles.

Commentary

The substantive provisions of the present part of the draft articles on the law of treaties relate exclusively to cases where for one reason or another the treaty is to be considered vitiated by nullity or terminated or its operation suspended. The Commission accordingly thought it desirable to underline in a general provision at the beginning of this part that any treaty concluded and brought into force in accordance with the provisions of the previous part is to be considered as being in force and in operation, unless its nullity or termination or the suspension of its operation results from the provisions of the present part.

SECTION II: INVALIDITY OF TREATIES

ARTICLE 31

Provisions of internal law regarding competence to enter into treaties

When the consent of a state to be bound by a treaty has been expressed by a representative considered under the provisions of Article 4 to be furnished with the necessary authority, the fact that a provision of the internal law of the state regarding competence to enter into treaties has not been complied with shall not invalidate the consent expressed by its representative, unless the violation of its internal law was manifest. Except in the latter case, a state may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree.

Commentary

(1) Constitutional limitations affecting the exercise of the treaty-making power take various forms.⁶ Some constitutions seek to preclude the executive from entering into treaties, or particular kinds of treaties, except with the previous consent of a legislative organ; some provide that treaties shall not be effective as law within the state unless "approved" or confirmed in some manner by a legislative organ; others contain fundamental laws which are not susceptible of alteration except by a special procedure of constitutional amendment and which in that way indirectly impose restrictions upon the power of the executive to conclude treaties. Legally, a distinction can be drawn under internal law between those types of provision which place constitutional limits upon the power of a government to enter into treaties and those which merely limit the power of a government to enforce a treaty within the state's internal law without some form of

⁶ See United Nations Legislative Series, Laws and Practices concerning the Conclusion of Treaties (ST/LEG/SER.B/3).

endorsement of the treaty by the legislature. The former can be said to affect the actual power of the executive to conclude a treaty, the latter merely the power to implement a treaty when concluded. The question which arises under this article is how far any of these constitutional limitations may affect the validity under international law of a consent to a treaty given by a state agent ostensibly authorized to declare that consent; and on this question opinion has been divided.

(2) One group of writers⁷ maintains that international law leaves it to the internal law of each state to determine the organs and procedures by which the will of a state to be bound by a treaty shall be formed and expressed; and that constitutional laws governing the formation and expression of a state's consent to a treaty have always to be taken into account in considering whether an international act of signature, ratification, acceptance, approval or accession is effective to bind the state. On this view, internal laws limiting the power of state organs to enter into treaties are to be considered part of international law so as to avoid, or at least render voidable, any consent to a treaty given on the international plane in disregard of a constitutional limitation; the agent purporting to bind the state in breach of the constitution is totally incompetent in international as well as national law to express its consent to the treaty. If this view were to be accepted, it would follow that other states would not be entitled to rely on the authority to commit the state ostensibly possessed by a head of state, prime minister, foreign minister, etc., under Article 4; they would have to satisfy themselves in each case that the provisions of the state's constitution are not infringed or take the risk of subsequently finding the treaty void. The weakening of the security of treaties which this doctrine entails is claimed by those who advocate it to be outweighed by the need to give the support of international law to democratic principles in treaty-making.

(3) In 1951 the Commission itself adopted an article based upon this view.⁸ Some members, however, were strongly critical of the thesis that constitutional limitations are incorporated into international law, while the Assistant Secretary-General for Legal Affairs expressed misgivings as to the difficulties with which it might confront depositaries. During the discussion at that session it was said that the Commission's decision had been based more on a belief that states would not accept any other rule than on legal principles.

(4) A second group of writers,⁹ while basing themselves on the in-

⁷ *E.g.*, P. Chailley, *La nature juridique des traités internationaux selon le droit contemporain*, pp. 175 and 215; S. B. Crandall, *Treaties, Their Making and Enforcement*, pp. 13-14; C. De Visscher, *Bibliotheca Visseriana*, Vol. 3 (1924), p. 98.

⁸ Article 2: "A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose." (Yearbook of the International Law Commission, 1951, Vol. II, p. 73.)

⁹ *E.g.*, McNair, *Law of Treaties* (1961), Ch. III; Paul De Visscher, *De la conclusion des traités internationaux* (1943), p. 275; P. Guggenheim, *Recueil des cours de l'Académie de droit international*, Vol. 74 (1949), p. 236; Sir Hersch Lauterpacht, *First Report on the Law of Treaties*, Yearbook of the International Law Commission, 1953, Vol. II, pp. 141-146.

corporation of constitutional limitations into international law, recognize that some qualification of that doctrine is essential if it is not to undermine the security of treaties. According to this group, good faith requires that only notorious constitutional limitations with which other states can reasonably be expected to acquaint themselves should be taken into account. On this view, a state contesting the validity of a treaty on constitutional grounds can only invoke those provisions of the constitution which are notorious or could easily have been ascertained by inquiry. Some writers in this group further maintain that a state which invokes the provisions of its constitution to annul its signature, ratification, etc., of a treaty, is liable to compensate the other party which "relied in good faith and without any fault of its own on the ostensible authority of the regular constitutional organs of the State."¹⁰

(5) A compromise solution based upon the initial hypothesis of the invalidity in international law of an unconstitutional signature, ratification, etc., of a treaty presents certain difficulties. If a limitation laid down in the internal law of a state is to be regarded as effective in international law to curtail the authority of a head of state or other state agent to declare the state's consent to a treaty, it is not clear upon what principle a "notorious" limitation is effective for that purpose but "non-notorious" one is not. Under the state's internal law both kinds of limitation are legally effective to curtail the agent's authority to enter into the treaty. Similarly, if the internal limitation is effective in international law to deprive the state agent of any authority to commit the state, it does not seem that the state can be held internationally responsible in damages in respect of its agent's unauthorized signature, ratification, etc., of the treaty. If the initial signature, ratification, etc., of the treaty is not imputable to the state by reason of the lack of authority, all subsequent acts of the state agents with respect to the same treaty would also logically seem not to be imputable to the state.

(6) The practical difficulties are even more formidable, because in many cases it is quite impossible to make a clear-cut distinction between notorious and non-notorious limitations. Admittedly, there now exist collections of the texts of state constitutions and the United Nations has issued a volume of "Laws and Practices concerning the Conclusion of Treaties" based on information supplied by a considerable number of states. Unfortunately, however, neither the texts of constitutions nor the information made available by the United Nations are by any means sufficient to enable foreign states to appreciate with any degree of certainty whether or not a particular treaty falls within a constitutional provision. Some provisions are capable of subjective interpretation, such as a requirement that "political" treaties or treaties of "special importance" should be submitted to the legislature; some laws do not make it clear on their face whether the limitation refers to the power to conclude the treaty or to its

¹⁰ Sir Hersch Lauterpacht, *Yearbook of the International Law Commission*, 1958, Vol. II, p. 148; see also Lord McNair, *op. cit.*, p. 77; *Research in International Law*, Harvard Law School, Part III, Law of Treaties, Art. 21.

effectiveness within domestic law. But even when the provisions are apparently uncomplicated and precise, the superficial clarity and notoriety of the limitations may be quite deceptive. In the majority of cases where the constitution itself contains apparently strict and precise limitations, it has nevertheless been found necessary to admit a wide freedom for the executive to conclude treaties in simplified form without following the strict procedures prescribed in internal law; and this use of the treaty-making power is reconciled with the letter of the law either by a process of interpretation or by the development of political understandings. Furthermore, the constitutional practice in regard to treaties in simplified form tends to be somewhat flexible, and the question whether or not to deal with a particular treaty under the procedures laid down in the constitution then becomes to some extent a matter of the political judgment of the executive, whose decision may afterwards be challenged in the legislature or in the courts. Accordingly, while it is certainly true that in a number of cases it will be possible to say that a particular provision is notorious and that a given treaty falls within it, in many cases neither a foreign state nor the national government itself will be able to judge in advance with any certainty whether, if contested, a given treaty would be held under national law to fall within an internal limitation, or whether an international tribunal would hold the internal provision to be one that is "notorious" and "clear" for the purposes of international law.

(7) A third group of writers¹¹ considers that international law leaves to each state the determination of the organs and procedures by which its will to conclude treaties is formed, and is itself concerned exclusively with the external manifestations of this will on the international plane. According to this view, international law determines the procedures and conditions under which states express their consent to treaties on the international plane; and it also regulates the conditions under which the various categories of state organs and agents will be recognized as competent to carry out such procedures on behalf of their state. In consequence, if an agent, competent under international law to commit the state, expresses the consent of the state to a treaty through one of the established procedures, the state is held bound by the treaty in international law. Under this view, failure to comply with internal requirements may entail the invalidity of the treaty as domestic law, and may also render the agent liable to legal consequences under domestic law; but it does not affect the validity of the treaty in international law so long as the agent acted within the scope of his authority under international law. Some of these writers¹² modify the stringency of the rule in cases where

¹¹ *E.g.*, Anzilotti, *Cours de droit international* (translation Gidel), Vol. 1 (1929), pp. 366-367; Sir Gerald Fitzmaurice, *British Yearbook of International Law*, Vol. 15 (1934), pp. 129-137; Blix, *Treaty-Making Power* (1960), Ch. 24; and see UNESCO, *Survey of the Ways in which States Interpret their International Obligations* (P. Guggenheim), pp. 7-8.

¹² J. Basdevant, for example, while holding that states must in general be able to rely on the ostensible authority of a state agent and to disregard constitutional limitations upon his authority, considered that this should not be so in the case of a

the other state is actually aware of the failure to comply with internal law or where the lack of constitutional authority is so manifest that the other state must be deemed to have been aware of it. This compromise solution, which takes as its starting point the supremacy of the international rules concerning the conclusion of treaties, does not present the same logical difficulties as the compromise put forward by the other group. As the basic principle, according to the third group, is that a state is entitled to assume the regularity of what is done within the authority possessed by an agent under international law, it is logical enough that the state should not be able to do so when it knows, or must in law be assumed to know, that in the particular case the authority does not exist.

(8) The decisions of international tribunals and state practice, if they are not conclusive, appear to support a solution based upon the position taken by the third group. The international jurisprudence is admittedly not very extensive. The *Cleveland* award¹³ (1888) and the *George Pinson* case¹⁴ (1928), although not involving actual decisions on the point, contain observations favouring the relevance of constitutional provisions to the international validity of treaties. On the other hand, the *Franco-Swiss Custom* case¹⁵ (1912), and the *Rio Martin* case¹⁶ (1924) contain definite decisions by arbitrators declining to take account of alleged breaches of constitutional limitations when upholding the validity respectively of a protocol and an exchange of notes, while the *Metzger* case¹⁷ contains an observation in the same sense. Furthermore, pronouncements in the *Eastern Greenland*¹⁸ and *Free Zones*¹⁹ cases, while not directly in point, seem to indicate that the International Court will not readily go behind the ostensible authority under international law of a state agent—a foreign minister and an agent in international proceedings in the cases mentioned—to commit his state.

(9) As to state practice, a substantial number of diplomatic incidents has been closely examined in a recent work.²⁰ These incidents certainly contain examples of claims that treaties were invalid on constitutional grounds, but in none of them was that claim admitted by the other party to the dispute. Moreover, in three instances—the admission of Luxembourg to the League, the Politis incident and the membership of Argentina—the League of Nations seems to have acted upon the principle that a consent given on the international plane by an ostensibly competent state agent is not invalidated by the subsequent disclosure that the agent lacked constitutional authority to commit his state. Again, in one case a de-

“Violation manifeste de la constitution d'un Etat”; *Recueil des cours de l'Académie de droit international*, Vol. XV (1926), p. 581; see also UNESCO, *Survey of the Ways in which States Interpret their International Obligations*, p. 8.

¹³ Moore, *International Arbitrations*, Vol. 2, p. 1946.

¹⁴ United Nations Reports of International Arbitral Awards, Vol. V, p. 327.

¹⁵ *Ibid.*, Vol. XI, p. 411.

¹⁶ *Ibid.*, Vol. II, p. 724.

¹⁷ Foreign Relations of the United States (1901), p. 262.

¹⁸ P.C.I.J., Series A/B, No. 53, pp. 56-71 and p. 91.

¹⁹ P.C.I.J., Series A/B, No. 46, p. 170.

²⁰ H. Blix, *op. cit.*, Ch. 20.

positary, the United States Government, seems to have assumed that an ostensibly regular notice of adherence to an agreement could not be withdrawn on a plea of lack of constitutional authority except with the consent of the other parties.²¹ Nor is it the practice of state agents, when concluding treaties, to cross-examine each other as to their constitutional authority to affix their signatures to a treaty or to deposit an instrument of ratification, acceptance, etc. It is true that in the *Eastern Greenland* case Denmark conceded the relevance in principle of Norway's constitutional provisions in appreciating the effect of the Ihlen declaration, while contesting their relevance in the particular circumstances of the case. It is also true that at the Seventeenth Session of the General Assembly one delegate in the Sixth Committee expressed concern that certain passages in the Commission's report seemed to imply a view unfavourable to the relevance of constitutional provisions in determining the question of a state's consent in international law. But the weight of state practice seems to be very much the other way.

(10) The view that a failure to comply with constitutional provisions should not normally be regarded as vitiating a consent given in due form by an organ or agent ostensibly competent to give it appears to derive support from two further considerations. The first is that international law has devised a number of treaty-making procedures—ratification, acceptance and approval—specifically for the purpose of enabling governments to reflect fully upon the treaty before deciding whether or not the state should become a party to it, and also of enabling them to take account of any domestic constitutional requirements. When a treaty has been made subject to ratification, acceptance or approval, the negotiating states would seem to have done all that can reasonably be demanded of them in the way of giving effect to democratic principles of treaty-making. It would scarcely be reasonable to expect each government subsequently to follow the internal handling of the treaty by each of the other governments, while any questioning on constitutional grounds of the internal handling of the treaty by another government would certainly be regarded as an inadmissible interference in its affairs. The same considerations apply in cases of accession where the government has the fullest opportunity to study the treaty and give effect to constitutional requirements before taking any action on the international plane to declare the state's accession to the treaty. Again, in the case of a treaty binding upon signature it is the government which authorizes the use of this procedure; the government is aware of the object of the treaty before the negotiations begin and, with modern methods of communication, it normally has knowledge of the exact contents of the treaty before its representative proceeds to the act of signature; moreover, if necessary, its representative can be instructed to sign "*ad referendum*." Admittedly, in the case of treaties binding upon signature, and more especially those in simplified form, there may be a slightly greater risk of a constitutional provision being overlooked; but even in these cases the government had the necessary means of

²¹ H. Blix, *op. cit.*, p. 267.

controlling the acts of its representative and of giving effect to any constitutional requirements. In other words, in every case any failure to comply with constitutional provisions in entering into a treaty will be the clear responsibility of the government of the state concerned.

(11) The second consideration is that the majority of the diplomatic incidents in which states have invoked their constitutional requirements as a ground of invalidity have been cases in which for quite other reasons they have desired to escape from their obligations under the treaty. Furthermore, in most of these cases the other party to the dispute has contested the view that non-compliance with constitutional provisions could afterwards be made a ground for invalidating a treaty which had been concluded by representatives ostensibly possessing the authority of the state to conclude it. Where a government has genuinely found itself in constitutional difficulties after concluding a treaty and has raised the matter promptly, it appears normally to be able to get the constitutional obstacle removed by internal action and to obtain any necessary indulgence in the meanwhile from the other parties. In such cases the difficulty seems often to show itself not from the matter being raised in the legislative body whose consent was by-passed, but rather in the courts when the validity of the treaty as internal law is challenged on constitutional grounds.²² Confronted with a decision in the courts impugning the constitutional validity of a treaty, a government will normally seek to regularize its position under the treaty by taking appropriate action in the domestic or international sphere.

(12) Some members of the Commission were of the opinion that international law had to take account of internal law to the extent of recognizing that internal law determines the organ or organs competent in the state to exercise the treaty-making power. On this view, any treaty concluded by an organ or representative not competent to do so under internal law by reason of any failure to comply with its provisions would be invalidated by reason of the defective character of the consent resulting from the application of the internal law. The majority of the Commission, however, considered that under such a rule the complexity and uncertain application of provisions of internal law regarding the conclusion of treaties would create too large a risk to the security of treaties. In the light of this consideration and of the jurisprudence of international tribunals and the evidence of state practice, they considered that the basic principle of the present article had to be that non-observance of a provision of internal law regarding competence to enter into treaties does not affect the validity of a consent given in due form by a state organ or agent

²² *E.g.*, Prosecution for Misdemeanours (Germany) case (International Law Reports, 1955, pp. 560-561); Belgian State v. Leroy (*ibid.*, pp. 614-616). National courts have sometimes appeared to assume that a treaty, constitutionally invalid as domestic law, will also be automatically invalid on the international plane. More often, however, they have either treated the international aspects of the matter as outside their province or have recognized that to hold the treaty constitutionally invalid may leave the state in default in its international obligations.

competent under international law to give that consent. Some members, indeed, took the view that it was undesirable to weaken this basic principle in any way by admitting any exceptions to it and would have preferred to see the state held bound by the consent of its organ or representative in every case where it appeared to have been given in due form. Other members forming part of the majority, while endorsing whole-heartedly the view that non-observance of internal law regarding competence to enter into treaties does not, in principle, affect a consent regularly given under the rules of international law, considered that it would be admissible to allow an exception in cases where the violation of the internal law regarding competence to enter into treaties was absolutely manifest. They had in mind cases, such as have occurred in the past, where a head of state enters into a treaty on his own responsibility in contravention of an unequivocal provision of the constitution. They did not feel that to allow this exception would compromise the basic principle, since the other state could not legitimately claim to have relied upon a consent given in such circumstances. This view is incorporated in Article 31.

(13) The article therefore provides that, when the consent of a state to be bound has been expressed by an organ or representative furnished with the necessary authority to do so under international law, the efficacy of that consent to bind the state cannot normally be impeached merely on the ground of a non-observance of internal law. Only in the case of a violation of the law which is "manifest" may the invalidity of the consent be claimed. Article 4, to which reference is made in the text of the paragraph, is an article which sets out the conditions under which certain state organs or agents are not required to furnish any evidence of their authority to negotiate or conclude treaties and the conditions under which they are required to do so. From this article it follows that an organ or agent is to be considered as possessing authority under international law either when no evidence of authority is required under Article 4 or when specific evidence of authority has been produced.

(14) The second sentence of the article merely draws the logical consequence from the rule laid down in the first sentence. This is that, except in the case of a manifest violation, a consent regularly given under the provisions of international law but in breach of a provision of internal law may only be withdrawn with the agreement of the other party or parties.

ARTICLE 32

Lack of authority to bind the state

1. If the representative of a state, who cannot be considered under the provisions of Article 4 as being furnished with the necessary authority to express the consent of his state to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative shall be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his state.

2. In cases where the power conferred upon a representative to express the consent of his state to be bound by a treaty has been made subject to particular restrictions, his omission to observe those restrictions shall not invalidate the consent to the treaty expressed by him in the name of his state, unless the restrictions upon his authority had been brought to the notice of the other contracting states.

Commentary

(1) Article 32 covers cases where a representative may purport by his act to bind the state but in fact lacks authority to do so. This may happen in two ways. First, a representative who cannot be considered as possessing authority under international law to bind the state in accordance with the provisions of Article 4 and lacks any specific authority from his government may, through error or excess of zeal, purport to enter into a treaty on its behalf. Secondly, while possessing the necessary authority under international law, a representative may be subject to express instructions from his government which limit his authority in the particular instance. Neither type of case is common but both types have occasionally occurred in practice.²³

(2) Where a treaty is not to become binding without subsequent ratification, acceptance or approval, any excess of authority committed by a representative in establishing the text of the treaty will automatically be dealt with at the subsequent stage of ratification, acceptance or approval. The state in question will then have the clear choice either of repudiating the text established by its representative or of ratifying, accepting or approving the treaty; and if it does the latter, it will necessarily be held to have endorsed the unauthorized act of its representative and, by doing so, to have cured the original defect of authority. Accordingly, the present article is confined to cases in which the defect of authority relates to the execution of an act by which a representative purports finally to establish his state's consent to be bound. In other words, it is confined to cases where there is an unauthorized signing of a treaty which is to become binding upon signature, or where a representative, authorized to exchange or deposit a binding instrument under certain conditions or subject to certain reservations, exceeds his authority by failing to comply with the conditions or to specify the reservations, when exchanging or depositing the instrument.

(3) Paragraph 1 of the article deals with cases where the representative lacks any authority to enter into the treaty. In 1908, for example, the United States Minister to Romania signed two conventions without having any authority to do so.²⁴ With regard to one of these conventions, his

²³ See generally H. Blix, *op. cit.*, pp. 5-12 and 76-82.

²⁴ Hackworth's Digest of International Law, Vol. IV, p. 467. Cf. also the well-known historical incident of the British Government's disavowal of an agreement between a British political agent in the Persian Gulf and a Persian minister which the British Government afterwards said had been concluded without any authority whatever; *Adamiyat, Bahrein Islands*, p. 106.

government had given him no authority at all, while he had obtained full powers for the other by leading his government to understand that he was to sign a quite different treaty. Again, in 1951 a convention concerning the naming of cheeses concluded at Stresa was signed by a delegate on behalf both of Norway and Sweden, whereas it appears that he had authority to do so only from the former country. In both these instances the treaty was, in fact, subject to ratification, but they serve to illustrate the kind of cases that may arise. A further case, in which the same question may arise, and one more likely to occur in practice, is where an agent has authority to enter into a particular treaty, but goes beyond his full powers by accepting unauthorized extensions or modifications of it. An instance of such a case was Persia's attempt, in discussions in the Council of the League, to disavow the Treaty of Erzerum of 1847 on the ground that the Persian representative had gone beyond his authority in accepting a certain explanatory note when exchanging ratifications.²⁵

(4) Where there is no authority to enter into a treaty, it seems clear, on principle, that the state must be entitled to disavow the act of its representative, and paragraph 1 so provides. On the other hand, it seems equally clear that, notwithstanding the representative's original lack of authority, the state may afterwards endorse his act and thereby establish its consent to be bound by the treaty. It will also be held to have done so by implication if it invokes the provisions of the treaty or otherwise acts in such a way as to appear to treat the act of its representative as effective.

(5) Paragraph 2 of the article deals with the other type of case where the representative has authority to enter into the treaty but his authority is curtailed by specific instructions. The Commission considers that in order to safeguard the security of international transactions, the rule must be that specific instructions given by a state to its representative are only effective to limit his authority vis-à-vis other states, if they are made known to the other states in some appropriate manner before the state in question enters into the treaty. That this is the rule acted on by states is suggested by the rarity of cases in which a state has sought to disavow the act of its representative by reference to secret limitations upon his authority. Thus in the incident in 1923 of the Hungarian representative's signature of a resolution of the Council of the League, the Hungarian Government sought to disavow his act by interpreting the scope of his full powers, rather than by contending that he had specific instructions limiting their exercise. Furthermore, the Council of the League seems clearly to have held the view that a state may not disavow the act of an agent done within the scope of the authority apparently conferred upon him by his full powers. Paragraph 2 accordingly provides that specific instructions are not to affect a consent to a treaty signified by a representative unless they had been brought to the notice of the other contracting state or states.

²⁵ For further cases, see H. Blix, *op. cit.*, pp. 77-81.

ARTICLE 33

Fraud

1. If a state has been induced to enter into a treaty by the fraudulent conduct of another contracting state, it may invoke the fraud as invalidating its consent to be bound by the treaty.

2. Under the conditions specified in Article 46, the state in question may invoke the fraud as invalidating its consent only with respect to the particular clauses of the treaty to which the fraud relates.

Commentary

(1) There does not appear to be any recorded instance of a state claiming to annul or denounce a treaty on the ground that it had been induced to enter into the treaty by the fraud of the other party. The only instance mentioned by writers as one where the matter was discussed at all is the Webster-Ashburton Treaty of 1842 relating to the northeastern boundary between the United States and Canada.²⁸ That, however, was a case of non-disclosure of a material map by the United States in circumstances in which it was difficult to say that there was any legal duty to disclose it, and Great Britain did not assert that the non-disclosure amounted to fraud.

(2) Clearly, cases in which governments resort to deliberate fraud in order to procure the conclusion of a treaty are likely to be rare, while any fraudulent misrepresentation of a material fact inducing an essential error would in any event fall under the provisions of the next article dealing with error. Some members of the Commission therefore felt that it was not really necessary to have a separate article dealing specifically with fraud and they would have preferred to amalgamate fraud and error in a single article. On balance, however, the Commission considered that it was advisable to keep fraud and error distinct in separate articles. Fraud, when it occurs, strikes at the root of an agreement in a somewhat different way from innocent misrepresentation and error. It does not merely nullify the consent of the other party to the terms of the agreement; it destroys the whole basis of mutual confidence between the parties.

(3) The Commission encountered some difficulty in formulating the article. Fraud is a concept found in most systems of law, but the scope of the concept is not the same in all systems. Thus, it is doubtful whether the French term "dol" corresponds exactly with the English term "fraud"; and in any event it is not always appropriate to transplant private law concepts into international law without certain modifications. Moreover, the absence of any precedents means that there is no guidance to be found either in state practice or in the jurisprudence of international tribunals as to the scope to be given to the concept of fraud in international law. In these circumstances, some members of the Commission thought it desirable that an attempt should be made to define with precision the conditions necessary to establish fraud in the law of treaties. The view which

²⁸ See Moore, *Digest of International Law*, Vol. 5, p. 719.

prevailed, however, was that it would be better to formulate the general concept of fraud applicable in the law of treaties in as clear terms as possible and to leave its precise scope to be worked out in practice and in the decisions of international tribunals.

(4) The article, as drafted, uses the English word "fraud" and the French word "dol" as the nearest terms available in those languages for identifying the principle with which the article is concerned; and the same applies to the word "dolo" in the Spanish text of the article. In using these terms the Commission does not intend to convey that all the detailed connotations given to these terms in internal law are necessarily applicable in international law. It is the broad principle comprised in each of these terms, rather than the detailed applications of the principle in internal law, that is covered by the present article. The term used in each of the three texts is accordingly intended to have the same meaning and scope in international law. Accordingly, in indicating the matters which will operate to nullify consent under this article, the Commission has sought to find a non-technical expression of as nearly equivalent meaning as possible: fraudulent conduct, *conduite frauduleuse* and *conducta fraudulenta*. This expression is designed to include any false statements, misrepresentations or other deceitful proceedings by which a state is induced to give a consent to a treaty which it would not otherwise have given.

(5) The effect of fraud, it seems to be generally agreed, is not to render the treaty *ipso facto* void but to entitle the injured party, if it wishes, to invoke the fraud as invalidating its consent; the article accordingly so provides.

(6) Paragraph 2 makes applicable to cases of fraud the principle of the separability of treaty provisions, the general scope of which principle is defined in Article 46. The Commission considered that where the fraud related to particular clauses only of the treaty, it should be at the option of the injured party to invoke the fraud as invalidating its consent to the whole treaty or to the particular clauses to which the fraud related. On the other hand, even in cases of fraud the severance of the treaty could only be admitted under the conditions specified in Article 46, because it would be undesirable to set up continuing treaty relations on the basis of a truncated treaty the provisions of which might apply in a very uneven manner as between the parties.

ARTICLE 34

Error

1. A state may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that state to exist at the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 above shall not apply if the state in question contributed by its own conduct to the error or could have avoided it, or if the

circumstances were such as to put that state on notice of a possible error.

3. Under the conditions specified in Article 46, an error which relates only to particular clauses of a treaty may be invoked as a ground for invalidating the consent of the state in question with respect to those clauses alone.

4. When there is no mistake as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and Articles 26 and 27 then apply.

Commentary

(1) In municipal law, error occupies a comparatively large place as a factor which may nullify the reality of consent to a contract. Some types of error found in municipal law, however, can hardly be imagined as operating in the field of treaties, *e.g.*, error *in persona*. Similarly, some types of treaty, more especially law-making treaties, appear to afford little scope for error *in substantia* to affect the formation of consent, even if that may not be altogether impossible. Moreover, treaty-making processes are such as to reduce to a minimum the risk of errors on material points of substance. In consequence, the instances in which errors of substance have been invoked as affecting the essential validity of a treaty have not been frequent.

(2) Almost all the recorded instances concern geographical errors, and most of them concern errors in maps.²⁷ In some instances, the difficulty was disposed of by a further treaty; in others the error was treated more as affecting the application of the treaty than its validity and the point was settled by arbitration. These instances confirm the possible relevance of errors either in regard to the validity of treaties or their application, but they do not provide clear guidance as to the principles governing the effect of error on the essential validity of treaties.

(3) The effect of error was, however, discussed in the *Eastern Greenland* case before the Permanent Court of International Justice, and again in the *Temple* case before the present Court. In the former case²⁸ Norway contended that, when asked by the Danish Ambassador to say that Norway would not object to the Danish Government extending its political and economic interests over the whole of Greenland, Norway's Foreign Minister had not realized that this covered the extension of the Danish monopoly régime to the whole of Greenland, and that accordingly his acquiescence in the Danish request had been vitiated by error. The Court contented itself with saying that the Foreign Minister's reply had been definitive and unconditional and appears not to have considered that there was any relevant error in the case. Judge Anzilotti, while also considering that there was no error, went on to say: "But even accepting, for a moment, the supposition that M. Ihlen was mistaken as to the results which might

²⁷ See Harvard Law School: Research in International Law, III, Law of Treaties, pp. 1127-1128; Hyde, A.J.I.L. (1938), p. 311; and Kiss, Répertoire français de droit international public, Vol. I, pp. 55-56.

²⁸ P.C.I.J., Series A/B, No. 53, pp. 71 and 91.

ensue from an extension of Danish sovereignty, it must be admitted that this mistake was not such as to entail the nullity of the agreement. If a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a Government could be ignorant of the legitimate consequences following upon an extension of sovereignty. . . .”²⁹

(4) In the first stage of the *Temple* case³⁰ the Court was confronted with a plea that, when making a declaration under the optional clause in 1950, Thailand had had a mistaken view of the status of its earlier declaration of 1940 and had for that reason used language which had been shown in the *Israel v. Bulgaria* case to be inadequate to affect her acceptance of the optional clause in 1950. As to this plea the Court said: “Any error of this kind would evidently have been an error of law, but in any event the Court does not consider that the issue in the present case is really one of error. Furthermore, the principal juridical relevance of error, where it exists, is that it may affect the reality of the consent supposed to have been given. The Court cannot, however, see in the present case any factor which could, as it were *ex post* and retroactively, impair the reality of the consent Thailand admits and affirms she fully intended to give.” A plea of error was also raised in the second stage of the case on the merits; and the error, which was geographical, arose in somewhat special circumstances. There was no error in the conclusion of the original treaty, in which the parties were agreed that the boundary in a particular area should be the line of a certain watershed; the error concerned what the Court held to be a subsequent, implied, agreement to vary the terms of the treaty. Thailand had accepted a map prepared *bona fide* for the purpose of delimiting the boundary in the area in question, but showing a line which did not follow the watershed. Rejecting Thailand’s plea that her acceptance of the map was vitiated by error, the Court said: “It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error.”³¹

(5) The *Eastern Greenland* and *Temple* cases throw light on the conditions under which error will *not* nullify the reality of the consent rather than on those under which it will do so. The only further guidance which can perhaps be obtained from the Courts’ decisions is in the *Mavromatis Concessions* case³² which, however, concerned a concession, not a treaty. There the Court held that an error in regard to a matter not constituting a *condition* of the agreement would not suffice to invalidate the consent, and it seems to be generally agreed that, to vitiate consent to a treaty, an error must relate to a matter considered by the parties to form an essential basis of their consent to the treaty.

(6) The Commission recognized that some systems of law distinguish between mutual and unilateral error; but it did not consider that it would

²⁹ *Ibid.*, p. 92.

³⁰ I.C.J. Reports, 1961, p. 80.

³¹ *Ibid.*, p. 26; see also the individual opinion of Sir Gerald Fitzmaurice (*ibid.*, p. 57).

³² P.O.L.J., Series A, No. 11.

be appropriate to make this distinction in international law. Accordingly, the present article applies no less to an error made by only one party than to a mutual error made by both or all the parties.

(7) Paragraph 1 formulates the general rule that an error respecting the substance of a treaty may be invoked as vitiating consent where the error related to a fact or state of facts assumed to exist at the time that the treaty was entered into and forming an essential basis of the consent to the treaty. The Commission did not intend the requirement that the error must have related to a "fact or state of facts" to exclude any possibility that an error of law should in some circumstances serve to nullify consent. Quite apart from the fact that errors as to rights may be mixed questions of law and fact, the line between law and fact is not always an easy one to draw and cases are conceivable in which an error of law might be held to affect consent. For example, it may be doubtful how far an error made as to a regional or local custom is to be considered as one of law or of fact for the purposes of the present article, having regard to the pronouncements of the Court as to the proof of a regional or local custom.³³ Again, it would seem clear on principle that an error as to internal law would for the purposes of international law be considered one of fact.

(8) Under paragraph 1, error only affects consent if it was a fundamental error in the sense of an error as to a matter which formed an essential basis of the consent given to the treaty. Furthermore, even such an error does not make the treaty automatically void, but gives a right to the party whose consent to the treaty was induced by the error to invoke the error as invalidating its consent. On the other hand, if the party concerned does invoke the error as invalidating its consent, the effect will be to make the treaty void *ab initio*.

(9) Paragraph 2 excepts from the rule cases where the mistaken party in some degree brought the error upon itself. The terms in which the exception is formulated are those used by the Court in the sentence from its judgment on the merits in the *Temple* case which has already been quoted in paragraph 4 above.

(10) Paragraph 3 applies to cases of error the principle of the separability of treaty provisions. The Commission considered that it was undesirable that the whole treaty should be brought to the ground in cases where the error related to particular clauses only and where these clauses were separable from the rest of the treaty under the conditions specified in Article 46. If acceptance of the clauses in question had not been an essential condition of the consent of the parties to the treaty as a whole, it appeared to be legitimate and desirable to allow severance of the treaty with respect to those clauses.

(11) Paragraph 4, in order to prevent any misunderstanding, takes up a point which was the subject of Articles 26 and 27, namely, errors not as to the substance of a treaty but as to the wording of its text. The present paragraph merely underlines that such an error does not affect the validity

³³ *E.g.*, in the *Asylum, Right of Passage and U.S. Nationals in Morocco* cases.

of the consent and that it falls under the provisions of Articles 26 and 27 relating to the correction of errors in the texts of treaties.

ARTICLE 35

Personal coercion of representatives of states

1. If individual representatives of a state are coerced, by acts or threats directed against them in their personal capacities, into expressing the consent of the state to be bound by a treaty, such expression of consent shall be without any legal effect.

2. Under the conditions specified in Article 46, the state whose representative has been coerced may invoke the coercion as invalidating its consent only with respect to the particular clauses of the treaty to which the coercion relates.

Commentary

(1) There appears to be general agreement that acts of coercion or threats applied to individuals with respect to their own persons or in their personal capacity in order to procure the signature, ratification, acceptance or approval of a treaty will necessarily justify the state in invoking the nullity of the treaty.³⁴ History provides a number of instances of the alleged employment of coercion against not only negotiators but members of legislatures in order to procure the signature or ratification of a treaty. Amongst those instances the Harvard Research Draft lists:³⁵ the surrounding of the Diet of Poland in 1773 to coerce its members into accepting the treaty of partition; the coercion of the Emperor of Korea and his ministers in 1905 to obtain their acceptance of a treaty of protection; the surrounding of the national assembly of Haiti by United States forces in 1915 to coerce its members into ratifying a convention. It is true that in some instances it may not be possible to distinguish completely between coercion of a head of state or minister as a means of coercing the state itself and coercion of them in their personal capacities. For example something like third-degree methods of pressure were employed in 1939 for the purpose of extracting the signatures of President Hacha and the Foreign Minister of Czechoslovakia to a treaty creating a German protectorate over Bohemia and Moravia, as well as the gravest threats against their state. Nevertheless, the two forms of coercion, although they may sometimes be combined, are, from a legal point of view, somewhat different; the Commission has accordingly placed them in separate articles.

(2) The present article deals with the coercion of the individual representatives "in their personal capacities." This phrase is intended to cover any form of constraint of or threat against a representative affecting him as an individual and not as an organ of his state. It would therefore include not only a threat to his person, but a threat to ruin his career by

³⁴ McNair, *op. cit.*, pp. 207-209.

³⁵ *Ibid.*, pp. 1155-1159.

exposing a private indiscretion, as would also a threat to injure a member of the representative's family with a view to coercing the representative.

(3) The Commission gave consideration to the question whether coercion of a representative, as distinct from coercion of the state, should render the treaty *ipso facto* void or whether it should merely entitle it to invoke the coercion of its representative as invalidating its consent to the treaty. It concluded that the use of coercion against the representative of a state for the purpose of procuring the conclusion of a treaty would be a matter of such gravity that the article should provide for the absolute nullity of a consent to a treaty so obtained.

(4) On the other hand, if the coercion has been employed against a representative for the purpose of extracting his assent to particular clauses only of a treaty and these clauses are separable from the rest of the treaty under the conditions specified in Article 46, it seems logical that the injured party should have the right, if it wishes, to treat the coercion as invalidating its consent to those clauses alone. Otherwise, the injured party might be obliged to waive the coercion of its representative with respect to part of the treaty in order not to lose the benefit of the remainder of the treaty.

ARTICLE 36

Coercion of a state by the threat or use of force

Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void.

Commentary

(1) The traditional doctrine prior to the Covenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of force for the settlement of international disputes. With the Covenant and the Pact of Paris there began to develop a strong body of opinion which advocated that the validity of such treaties ought no longer to be recognized. The endorsement of the criminality of aggressive war in the Charters of the Allied military tribunals for the trial of the Axis war criminals, the clear-cut prohibition of the threat or use of force in Article 2, paragraph 4, of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this opinion. The Commission considers that these developments justify the conclusion that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today.

(2) Some authorities, it is true, while not disputing the moral value of the principle, have hesitated to accept it as a legal rule. The arguments are that to recognize the principle as a legal rule may open the door to the

evasion of treaties by encouraging unfounded assertions of coercion and that the rule will be ineffective because the same threat or compulsion that procured the conclusion of the treaty will also procure its execution, whether the law regards it as valid or invalid. Important though it may be not to overlook the existence of these difficulties, they do not appear to the Commission to be of such a kind as to call for the omission from the present articles of a principle of invalidity springing from the most fundamental provisions of the Charter, the relevance of which in the law of treaties as in other branches of international law cannot today be regarded as open to question.

(3) If the notion of coercion is confined, as the Commission thinks it must be, to a threat or use of force in violation of the principles of the Charter, the possibilities of a plausible abuse of this ground of invalidity do not appear to be any greater than in cases of fraud or error or than in cases of a claim to terminate a treaty on the ground of an alleged breach or of a fundamental change in the circumstances. Some members of the Commission expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion. The Commission, however, decided to define coercion in terms of a "threat or use of force in violation of the principles of the Charter," and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter.

(4) Again, even if sometimes a state should initially be successful in achieving its objects by a threat or use of force, it cannot be assumed in the circumstances of today that a rule nullifying a treaty procured by such unlawful means would not prove meaningful and effective. The existence, universal character and effective functioning of the United Nations in themselves provide the necessary framework for the operation of the rule formulated in the present article.

(5) The Commission considered that the rule should be stated in as simple and categorical terms as possible. The article therefore provides that: "Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void." The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, rules of general international law which are today of universal application. It was therefore considered to be both legitimate and appropriate to frame the article in terms of the principles of the Charter. At the same time, the phrase "violation of the principles of the Charter" was chosen rather than "violation of the Charter," in order that the article should not appear to be confined in its application to Members of the United Nations.

(6) The Commission further considered that a treaty procured by a threat or use of force in violation of the principles of the Charter must be characterized as void, rather than as voidable. The prohibitions on the threat or use of force contained in the Charter are rules of international

law the observance of which is legally a matter of concern to every state. Even if it were conceivable that after being liberated from the influence of a threat or of a use of force a state might wish to allow a treaty procured from it by such means, the Commission considered it essential that the treaty should be regarded as a law void *ab initio*. This would enable the state concerned to take its decision in regard to the maintenance of the treaty in a position of full legal equality with the other state. If, therefore the treaty were maintained in force, it would in effect be by the conclusion of a new treaty and not by the recognition of the validity of a treaty procured by means contrary to the most fundamental principles of the Charter of the United Nations.

ARTICLE 37

Treaties conflicting with a peremptory norm of general international law (jus cogens)

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Commentary

(1) The opinion of writers has been divided upon the question whether international law recognizes the existence within its legal order of rules having the character of *jus cogens*, that is, rules from which the law does not permit any derogation. Some writers, considering that the operation even of the most general rules of international law still falls short of being universal, deny that any rule can properly be regarded as a *jus cogens* from which individual states are not competent to derogate by agreement between themselves.³⁶ But whatever imperfections international law may still have, the view that in the last analysis there is no rule from which states cannot at their own free will contract out has become increasingly difficult to sustain. The law of the Charter concerning the prohibition of the use of force in reality presupposes the existence in international law of rules having the character of *jus cogens*.³⁷ This being so, the Commission concluded that in codifying the law of treaties it must take the position that today there are certain rules and principles from which states are not competent to derogate by a treaty arrangement.

(2) The formulation of the rule, however, is not free from difficulty, since there is not as yet any generally recognized criterion by which to identify a general rule of international law as having the character of *jus cogens*. Moreover, it is undeniable that the majority of the general rules of international law do not have that character and that states may contract out of them by treaty. The general law of diplomatic inter-

³⁶ See for example G. Schwarzenberger, *International Law* (3rd edition), Vol. I, pp. 426-427.

³⁷ See McNair, *op. cit.*, pp. 213-214.

course, for example, requires that certain treatment be accorded to diplomatic representatives and forbids the doing of certain acts with respect to diplomats; but these rules of general international law do not preclude individual states from agreeing between themselves to modify the treatment to be accorded reciprocally to each other's representatives. It would therefore be going much too far to state that a treaty is void if its provisions conflict with a rule of general international law.

(3) The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in state practice and in the jurisprudence of international tribunals. Some members of the Commission felt that there might be advantage in specifying, by way of illustration, some of the most obvious and best settled rules of *jus cogens* in order to indicate by these examples the general nature and scope of the rule contained in the article. Examples suggested included: (a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter; (b) a treaty contemplating the performance of any other act criminal under international law; and (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every state is called upon to co-operate. Other members expressed the view that, if examples were given, it would be undesirable to appear to limit the scope of the article to cases involving acts which constitute crimes under international law; treaties violating human rights or the principle of self-determination were mentioned as other possible examples. The Commission, however, decided against including any examples of rules of *jus cogens* in the article for two reasons. First, the mention of some cases of treaties void for conflict with a rule of *jus cogens* might, even with the most careful drafting, lead to misunderstanding as to the position concerning other cases not mentioned in the article. Secondly, if the Commission were to attempt to draw up, even on a selective basis, a list of the rules of international law which are to be regarded as having the character of *jus cogens*, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles.

(4) Accordingly, the article, simply provides that a treaty is void "if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." This provision makes it plain that nullity attaches to a treaty under the article only if the rule with which it conflicts is a peremptory norm of general international law from which no derogation is permitted, even by agreement between particular states. On the other hand, it would clearly be wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments. As any modification of a rule of *jus cogens* would today most probably be ef-

affected by the conclusion of a general multilateral treaty, the Commission thought it desirable to make it plain by the wording of the article that a general multilateral treaty establishing a new rule of *jus cogens* would fall outside the scope of the article. In order to safeguard this point, the article defines rules of *jus cogens* as peremptory norms of general international law from which no derogation is permitted "and which can be modified only by a subsequent norm of general international law having the same character."

(5) The Commission considered the question whether the nullity resulting from the application of the article should in all cases attach to the whole treaty or whether severance of the offending provisions from the rest of the treaty might be admissible under the conditions laid down in Article 46. Some members were of the opinion that it was undesirable to prescribe that the whole treaty should be brought to the ground in cases where only one part—and that a small part—of the treaty was in conflict with a rule of *jus cogens*. Other members, however, took the view that rules of *jus cogens* are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of *jus cogens*, the treaty must be considered totally invalid. In such a case it was open to the parties themselves to revise the treaty so as to bring it into conformity with the law; and if they did not do so, the law must attach the sanction of nullity to the whole transaction. This was the view which prevailed in the Commission and the article does not, therefore, admit any severance of the offending clauses from the rest of the treaty in cases falling under its provisions.

SECTION III: TERMINATION OF TREATIES

ARTICLE 38

Termination of treaties through the operation of their own provisions

1. A treaty terminates through the operation of one of its provisions:

(a) On such date or on the expiry of such period as may be fixed in the treaty;

(b) On the taking effect of a resolutive condition laid down in the treaty;

(c) On the occurrence of any other event specified in the treaty as bringing it to an end.

2. When a party has denounced a bilateral treaty in conformity with the terms of the treaty, the treaty terminates on the date when the denunciation takes effect.

3. (a) When a party has denounced or withdrawn from a multilateral treaty in conformity with the terms of the treaty, the treaty ceases to apply to that party as from the date upon which the denunciation or withdrawal takes effect.

(b) A multilateral treaty terminates if the number of the parties is reduced below a minimum number laid down in the treaty as necessary

for its continuance in force. It does not, however, terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.

Commentary

(1) The majority of modern treaties contain clauses fixing their duration or the date of their termination or a condition or event which is to bring about their termination, or providing for a right to denounce or withdraw from the treaty. In these cases the termination of the treaty is brought about by the provisions of the treaty itself and how and when this is to happen is essentially a question of interpreting and applying the treaty. The present article sets out the basic rules governing the termination of a treaty through the application of its own provisions.

(2) The treaty clauses are very varied.⁸⁸ Many treaties provide that they are to remain in force for a specified period of years or until a particular date or event; others provide for the termination of the treaty through the operation of a resolutive condition. Specific periods fixed by individual treaties may be of very different lengths, periods between one and twelve years being usual but longer periods up to twenty, fifty and even ninety-nine years being sometimes found. More common in modern practice are treaties which fix a comparatively short initial period for their duration, such as five or ten years, but at the same time provide for their continuance in force after the expiry of the period subject to a right of denunciation or withdrawal. These provisions normally take the form either of an indefinite continuance in force of the treaty subject to a right of denunciation on six or twelve months' notice or of a renewal of the treaty for successive periods of years, subject to a right of denunciation or withdrawal on giving notice to that effect six months before the expiry of each period. Some treaties fix no period for their duration and simply provide for a right to denounce or withdraw from the treaty, either with or without a period of notice. Occasionally, a treaty which fixes a single specific period, such as five or ten years, for its duration allows a right of denunciation or withdrawal even during the currency of the period.

(3) Paragraph 1 sets out the rules governing the time at which a treaty comes to an end by the operation of the various types of terminating provision found in treaties. Some members felt that these rules were self-evident and did not really need to be stated; but the Commission considered that, although they follow directly from the application of the provisions in question, the rules are the governing rules and therefore should have a place in a codifying convention. Some members suggested that the "occurrence of any other event," in sub-paragraph (c), was already covered by the "resolutive condition." As, however, a clause providing for a terminating "event" is not always expressed in the form of a term or of a condition, it was thought preferable to include sub-paragraph (c) so as to ensure that no case could be said not to have been covered.

⁸⁸ See Handbook of Final Clauses (ST/LEG.6), pp. 54-73.

(4) Paragraphs 2 and 3 deal with cases where the treaty comes to an end through the operation of a clause providing for a right to denounce or withdraw from it. If this is only a particular example of termination through the operation of a resolutive condition, it has a special importance for two reasons. First, it is a condition which brings the treaty to an end at the will of the individual party; secondly, it is extremely common in multilateral treaties. Clearly, denunciation of a bilateral treaty brings the treaty itself to an end and paragraph 2 so provides. The denunciation of a multilateral treaty, on the other hand, by a single party or the withdrawal of a single party from the treaty does not normally put an end to the treaty; the effect is merely that the treaty ceases to apply to the party in question. Paragraph 3 (a) states this general rule.

(5) In some cases, a multilateral treaty which is subject to denunciation or withdrawal does provide for the termination of the treaty itself, if denunciations or withdrawals should reduce the number of parties below a certain figure. For example, the Convention on the Political Rights of Women³⁹ provides that it "shall cease to be in force as from the date when the denunciation which reduces the number of parties to less than six becomes effective." In some cases the minimum number of surviving parties required by the treaty to keep it alive is even smaller, *e.g.*, five in the case of the Customs Convention on the Temporary Importation of Commercial Road Vehicles⁴⁰ and three in the case of the Convention Regarding the Measurement and Registration of Vessels Employed in Inland Navigation.⁴¹ In other, perhaps less frequent, cases a larger number is required to maintain the treaty in force. Clearly, provisions of this kind establish what is really a resolutive condition and, as paragraph 3 (b) states, the treaty terminates when the number of parties falls below the specified minimum.

(6) A further point arises as to whether a multilateral treaty, the entry into force of which was made dependent upon its ratification, acceptance, etc., by a given minimum number of states, automatically ceases to be in force, should the parties afterwards fall below that number as a result of denunciations or withdrawals. The better opinion,⁴² it is believed, is that this is not a necessary effect of a drop in the number of the parties below that fixed for the treaty's entry into force. The treaty provisions in question relate exclusively to the conditions for the entry into force of the treaty and, if the negotiating states had intended the minimum number of parties fixed for that purpose to be a continuing condition of the validity of the treaty, it would have been both easy and natural for them so to provide. In some cases, it is true, a treaty which fixes a low minimum number of parties for entry into force prescribes the same number for the cessation of the treaty. But there is no general practice to that

³⁹ United Nations Treaty Series, Vol. 193, p. 135, Art. 8.

⁴⁰ Handbook of Final Clauses (ST/LEG.6), p. 58.

⁴¹ *Ibid.*, pp. 72-73.

⁴² Cf. E. Giraud, "Modification et terminaison des traités collectifs," *Annuaire de l'Institut de droit international*, Vol. 49, Tome I, 1961, p. 62.

effect, and the fact that this has not been a regular practice in cases where a larger minimum number, such as ten or twenty, has been fixed for entry into force seems significant. At any rate, when the number for entry into force is of that order of magnitude, it does not seem desirable that the application of the treaty should be dependent on the number of parties not falling below that number. The remaining parties, if unwilling to continue to operate the treaty with the reduced number, may themselves either join together to terminate it or separately exercise their own right of denunciation or withdrawal. Paragraph 3 (b) therefore also provides that a treaty is not terminated "by reason only of the fact" that the number of its parties falls below that prescribed for its original entry into force.

ARTICLE 39

Treaties containing no provisions regarding their termination

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal. In the latter case, a party may denounce or withdraw from the treaty upon giving to the other parties or to the depositary not less than twelve months' notice to that effect.

Commentary

(1) Article 39 covers the termination of treaties which neither contain any provision regarding their duration or termination nor mention any right for the parties to denounce or withdraw from it. Such treaties are not uncommon, recent examples being the Charter of the United Nations, the four Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations. The question is whether they are to be regarded as terminable only by common agreement or whether individual parties are under any conditions to be considered as having an implied right to withdraw from the treaty upon giving reasonable notice to that effect.

(2) In principle, the answer to the question must depend on the intention of the parties in each case, and the very character of some treaties excludes the possibility that the contracting states could have intended them to be open to unilateral denunciation or withdrawal at the will of an individual party. Treaties of peace and treaties fixing a territorial boundary are examples of such treaties. Many treaties, however, are not of a kind with regard to which it can be said that to allow a unilateral right of denunciation or withdrawal would be inconsistent with the character of the treaty; for the normal practice today in the case of most categories of treaties is either to fix a comparatively short period for their duration or to provide for the possibility of termination or withdrawal,

No doubt, one possible point of view would be that, since the parties in many cases do provide expressly for a unilateral right of denunciation or withdrawal, their silence on the point in other cases must be interpreted as excluding such a right. Some authorities,⁴³ basing themselves on the Declaration of London of 1871 and certain state practice, take the position that an individual party may denounce or withdraw from a treaty only when such denunciation or withdrawal is provided for in the treaty or consented to by all the other parties. The Declaration of London and the state practice in question, however, relate to peace treaties or other treaties designed to establish enduring territorial settlements, in other words, to treaties where an intention to admit a right of unilateral denunciation or withdrawal is excluded by the character of the treaty. In many other types of treaty the widespread character of the practice making the treaty subject to denunciation or withdrawal suggests that it would be unsafe to draw the conclusion from the mere silence of the parties on the point that they necessarily intended to exclude any possibility of denunciation or withdrawal. For this reason a number of other authorities⁴⁴ take the position that a right of denunciation or withdrawal may properly be implied under certain conditions in some types of treaties, and more especially in commercial treaties and in treaties of alliance.

(3) The difficulty of the problem is well illustrated by the discussions which took place at the Geneva Conference on the Law of the Sea concerning the insertion of denunciation clauses in the four conventions drawn up at that Conference.⁴⁵ None of the conventions contains a denunciation clause. They provide only that after five years from the date of their entry into force any party may at any time request the revision of the Convention, and that it will be for the General Assembly to decide upon the steps, if any, to be taken in respect of the request. The Drafting Committee, in putting forward this revision clause, observed that its inclusion "made unnecessary any clause on denunciation." Proposals had previously been made for the inclusion of a denunciation clause and these were renewed in the plenary meeting, notwithstanding the view of the Drafting Committee. Some delegates thought it wholly inconsistent with the nature of the codifying conventions to allow denunciation; some thought that a right of denunciation existed anyhow under customary law; others considered it desirable to provide expressly for denunciation in order to take account of possible changes of circumstances. The proposal to include the clause in the "codifying" conventions was rejected by 32 votes to 12, with 23 abstentions. A similar proposal was also made with reference to the Fishing and Conservation Convention, which formu-

⁴³ See Article 34 of the Harvard Research Draft, pp. 1173-1183; C. Rousseau, *Principes généraux du droit international public*, pp. 526-548.

⁴⁴ See Hall, *International Law*, 8th Edition, p. 405; Oppenheim, *International Law*, 8th Edition, Vol. 1, p. 938; McNair, *Law of Treaties*, 1961, pp. 501-505; Sir Gerald Fitzmaurice, *Second Report on the Law of Treaties*, Yearbook of the International Law Commission, 1957, Vol. II, p. 22.

⁴⁵ United Nations Conference on the Law of the Sea, *Official Records*, Vol. II, pp. 19, 56 and 58.

lated entirely new law. Here, opponents of the clause argued that a right of denunciation would be out of place in a convention which created new law and was the result of negotiation. Advocates of the clause, on the other hand, regarded the very fact that the convention created new law as justifying and indeed requiring the inclusion of a right of denunciation. Again, the proposal was rejected, by 25 votes to 6, with no less than 35 abstentions. As already mentioned, no clause of denunciation or withdrawal was inserted in these conventions and at the subsequent Vienna Conferences on Diplomatic and Consular Intercourse the omission of the clause from the conventions on those subjects was accepted without discussion. However, any temptation to generalize from these Conferences as to the intentions of the parties in regard to the denunciation of "law-making" treaties is discouraged by the fact that other conventions, such as the Genocide Convention and the Geneva Conventions of 1949 on prisoners of war, sick and wounded, etc. expressly provide for a right of denunciation.

(4) The contention was put forward in the Commission that, in order to safeguard the security of treaties, the absence of any provision in the treaty should be interpreted in every case as excluding any right of unilateral denunciation or withdrawal without the agreement of the other party. Some members, on the other hand, considered that in certain types of treaty, such as treaties of alliance, the presumption as to the intentions of the parties was the other way round, with the result that a right of denunciation or withdrawal after reasonable notice should be implied in the treaty unless there were indications of a contrary intention. Certain other members took the view that, while the omission of any provision for it in the treaty did not exclude the possibility of implying a right of denunciation or withdrawal, the existence of such a right was not to be implied from the character of the treaty alone. According to these members, the intention of the parties was essentially a question of fact to be determined not merely by reference to the character of the treaty but by reference to all the circumstances of the case. This view prevailed in the Commission and is embodied in Article 39.

(5) The article states that a treaty not making any provision for its termination or for denunciation or withdrawal is not subject to denunciation or withdrawal unless "it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of denunciation or withdrawal." Under this rule, the character of the treaty is only one of the elements to be taken into account and a right of denunciation or withdrawal will not be implied unless it appears from the general circumstances of the case, including the statements of the parties, that the parties intended to allow the possibility of unilateral denunciation or withdrawal. The statement of one party would not, of course, be sufficient to establish that intention, unless it appeared to meet with the express or tacit assent of the other parties. The term "statements of the parties," it should be added, was not meant by the Commission to refer only to statements

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forming part of the *travaux préparatoires* of the treaty, but was meant also to cover subsequent statements showing the understanding of the parties as to the possibility of denouncing or withdrawing from the treaty; in other words, it was meant to cover interpretation of the treaty by reference to "subsequent conduct" as well as by reference to the *travaux préparatoires*.

(6) The period of notice is twelve months. An alternative would be simply to say "reasonable" notice; but as the purpose of the article is to clarify the position where the parties have failed to deal with the question of the termination of the treaty, the Commission preferred to propose a specific period of notice. A period of six months' notice is sometimes found in termination clauses, but this is usually where the treaty is of the renewable type and is open to denunciation by a notice given before or at the time of renewal. Where the treaty is to continue indefinitely subject to a right of denunciation, the period of notice is more usually twelve months, though admittedly in some cases no period of notice is required. In formulating a general rule, the Commission considered it to be desirable to lay down a longer rather than a shorter period in order to give adequate protection to the interests of the other parties to the treaty.

ARTICLE 40

Termination or suspension of the operation of treaties by agreement

1. A treaty may be terminated at any time by agreement of all the parties. Such agreement may be embodied:

(a) In an instrument drawn up in whatever form the parties shall decide;

(b) In communications made by the parties to the depositary or to each other.

2. The termination of a multilateral treaty, unless the treaty itself otherwise prescribes, shall require, in addition to the agreement of all the parties, the consent of not less than two thirds of all the states which drew up the treaty; however, after the expiry of . . . years the agreement only of the states parties to the treaty shall be necessary.

3. The foregoing paragraphs also apply to the suspension of the operation of treaties.

Commentary

(1) The termination of a treaty or the suspension of its operation by agreement is necessarily a process which involves the conclusion of a new "treaty" in some form or another. From the point of view of international law, as stated in Article 1 of the Commission's draft articles, the agreement may be any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. It is true that the view has sometimes been put forward that an agreement terminating a prior treaty must be cast in the same form as the treaty which is to be termi-

nated or at least be a treaty form of "equal weight." However, it reflects the constitutional practice of particular states,⁴⁶ not a general rule of international law. It is always for the states concerned themselves to select the appropriate instrument or procedure for bringing a treaty to an end, and, in doing so, they will no doubt take into account their own constitutional requirements. So far as international law is concerned, all that is required is that the parties to the prior treaty should have entered into an agreement to terminate it, whether they conclude that agreement by a formal instrument or instruments or by a "treaty in simplified form."

(2) Paragraph 1 of Article 40 therefore provides that a treaty may be terminated at any time by agreement of all the parties, and that the agreement may be embodied in an instrument drawn up in whatever form the parties shall decide. The paragraph further underlines that the agreement may be embodied in communications made by the parties to the depositary or to each other. In some cases, no doubt, the parties will think it desirable to use a formal instrument. In other cases, they may think it sufficient to express their consents through the diplomatic channel or, in the case of multilateral treaties, by communications made through the depositary. As to the latter procedure, in modern practice communications through the depositary are a normal means of obtaining the consents of the interested states in matters touching the operation of the "final clauses" of the treaty; it would seem to be a convenient procedure to use for effecting the termination of a treaty by an agreement in simplified form.

(3) Paragraph 1, as already noted, provides that the consent of all the parties to a treaty is necessary for its termination by agreement. Each party to a treaty has a vested right in the treaty itself of which it cannot be deprived by a subsequent treaty to which it is not a party or to which it has not given its assent. The application of this rule to multilateral treaties tends to result in somewhat complicated situations, because it is very possible that some parties to the earlier treaty may fail to become parties to the terminating agreement. In that event, the problem may arise whether the earlier treaty is to be regarded as terminated *inter se* the parties to the later treaty but still in force in other respects. Further reference to this matter is made in the commentary to the next article. Here it suffices to say that, whatever the complications, it is a strongly entrenched rule of international law that the consent of every party is, in principle, necessary to the termination of any treaty bilateral or multilateral; it is this rule which is safeguarded in the opening sentence of paragraph 1 of the present article.

(4) Paragraph 2 deals with the question whether in the case of a multilateral treaty the consent of all the parties is necessarily sufficient for its termination or whether account might also be taken of the interests of the other states still entitled to become parties under the terms of the treaty.

⁴⁶ See an observation of the United States representative at the 49th meeting of the Social Committee of the Economic and Social Council (E/AC.7/SR.49, p. 8), to which Sir Gerald Fitzmaurice drew attention.

Some members of the Commission were inclined to the opinion that, if a state had not shown enough interest in a treaty to take the necessary steps to become a party before the time arrived when its termination was under discussion, there was no case for making the termination of the treaty conditional upon its consent. However, it was pointed out that quite a number of multilateral conventions, especially those of a technical character, require only two or a very small number of ratifications or acceptances to bring them into force; and that it did not seem right that the first two or three states to deposit instruments of ratification or acceptance should have it in their power to terminate the treaty without regard to the wishes of the other states which drew up the treaty. It was also recalled that in drafting Article 9 concerning the opening of a treaty to additional states the Commission had thought it necessary that all the states which had drawn up the treaty should have a voice in the matter for a certain period of time. The Commission decided that it ought to follow the same approach in the present article; paragraph 2 accordingly provides that until the expiry of . . . years the consent of the states which drew up the treaty should be required in addition to that of the actual parties. As in the case of Article 9, the Commission preferred to await the comments of governments on the question before suggesting the length of the period during which this provision should apply.

(5) Paragraph 3 provides that the rules laid down in the article apply equally to the suspension of the operation of a treaty.

ARTICLE 41

Termination implied from entering into a subsequent treaty

1. A treaty shall be considered as having been impliedly terminated in whole or in part if all the parties to it, either with or without the addition of other states, enter into a further treaty relating to the same subject-matter and either:

(a) The parties in question have indicated their intention that the matter should thereafter be governed by the later treaty; or

(b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. However, the earlier treaty shall not be considered as having been terminated where it appears from the circumstances that the later treaty was intended only to suspend the operation of the earlier treaty.

Commentary

(1) The previous article concerns cases where the parties to a treaty enter into a later agreement for the express purpose of terminating the treaty. The present article deals with cases where the parties, without expressly terminating or modifying the first treaty, enter into another treaty which is so far incompatible with the earlier one that they must be

considered to have intended to abrogate it. Where the parties to the two treaties are identical, there can be no doubt that, in concluding the second treaty, they are competent to abrogate the earlier one; for that is the very core of the rule contained in the previous article. Even where the parties to the two treaties are not identical, the position is clearly the same if the parties to the later treaty include all the parties to the earlier one; for what the parties to the earlier treaty are competent to do together, they are competent to do in conjunction with other states. The sole question therefore is whether and under what conditions the conclusion of the further incompatible treaty must be held by implication to have terminated the earlier one.

(2) This question is essentially one of the construction of the two treaties in order to determine the extent of their incompatibility and the intentions of the parties with respect to the maintenance in force of the earlier one. Some members of the Commission felt that for this reason the question ought not to be dealt with in the present report as one of termination, but should be left over for consideration at the next session at which the Special Rapporteur would be submitting draft articles on the application of treaties. However, it was pointed out that, even if it were true that a preliminary question of interpretation was involved in these cases, there was still a need to determine the conditions under which the interpretation should be held to lead to the conclusion that the treaty had been terminated. The Commission decided provisionally, and subject to reconsideration at its next session, to retain Article 41 in its present place among the articles dealing with "termination" of treaties.

(3) Paragraph 1 therefore seeks to formulate the conditions under which the parties to a treaty are to be understood as having intended to terminate it by concluding a later treaty conflicting with it. The wording of the two clauses in paragraph 1 is based upon the language used by Judge Anzilotti in his separate opinion in the *Electricity Company of Sofia* case,⁴⁷ where he said:

"There was no express abrogation. But it is generally agreed that, beside express abrogation, there is also tacit abrogation resulting from the fact that the new provisions are incompatible with the previous provisions, or that the whole matter which formed the subject of these latter is henceforward governed by the new provisions."

That case, it is true, concerned a possible conflict between unilateral declarations under the optional clause and a treaty, and the Court itself did not accept Judge Anzilotti's view that there was any incompatibility between the two instruments. Nevertheless, the two tests put forward by Judge Anzilotti for determining whether a tacit abrogation had taken place appeared to the Commission to contain the essence of the matter.

(4) Paragraph 2 merely provides that the earlier treaty shall not be considered to have been terminated where it appears from the circumstances that a later treaty was intended only to suspend the operation of

⁴⁷ P.C.I.J., Series A/B, No. 77, p. 92.

the earlier one. Judge Anzilotti, it is true, in the above-mentioned opinion considered that the declarations under the optional clause, although in his view incompatible with the earlier treaty, had not abrogated it because of the fact that the treaty was of indefinite duration, whereas the declarations were for limited terms. But it could not be said to be a general principle that a later treaty for a fixed term does not abrogate an earlier treaty expressed to have a longer or indefinite duration. It would depend entirely upon the intention of the states in concluding the second treaty, and it is probable that in most cases their intention would have been to cancel rather than suspend the earlier treaty.

(5) The Commission considered whether it should add a further paragraph dealing with the question of the termination of a treaty as between certain of its parties only in cases where those parties alone enter into a later treaty which conflicts with their obligations under the earlier one. In such cases, parties to the earlier treaty, as stressed in paragraph 3 of the commentary to the previous article, cannot be deprived of their rights under it without their agreement, so that in law the later treaty, even if concluded between a majority of the parties to the earlier treaty, cannot be said to have terminated the earlier one altogether. There is, however, a question whether the earlier treaty terminates *inter se* the parties who enter into the later treaty. This question is so closely connected with the problem of the application of treaties that, for the reasons given in the Introduction to the present articles, the Commission decided to defer the examination of this question until its next session when it will take up the problem of the application of treaties.

ARTICLE 42

Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) Any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state;

(b) The other parties by common agreement either:

(i) To apply to the defaulting state the suspension provided for in sub-paragraph (a) above; or

(ii) To terminate the treaty or to suspend its operation in whole or in part.

3. For the purposes of the present article, a material breach of a treaty by one of the parties consists in:

(a) The unfounded repudiation of the treaty; or

(b) The violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

4. The right to invoke a material breach as a ground for terminating or suspending the operation of part only of a treaty, which is provided for in paragraphs 1 and 2 above, is subject to the conditions specified in Article 46.

5. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach.

Commentary

(1) The great majority of writers⁴⁸ recognize that the violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty or to suspend the performance of its own obligations under the treaty. A violation of a treaty obligation, as of any other obligation, may give rise to a right in the other party to take non-forcible reprisals and these reprisals may properly relate to the defaulting party's rights under the treaty. Opinion differs, however, as to the extent of the right to abrogate the treaty and the conditions under which it may be exercised. Some writers,⁴⁹ in the absence of effective international machinery for securing the observance of treaties, are more impressed with the innocent party's need to have this right as a sanction for the violation of the treaty. These writers tend to formulate the right in unqualified terms, giving the innocent party a general right to abrogate the treaty in the event of a breach.⁵⁰ Other writers are more impressed with the risk that a state may allege a trivial or even fictitious breach simply to furnish a pretext for denouncing a treaty which it now finds embarrassing.⁵¹ These writers tend to restrict the right of denunciation to "material" or "fundamental" breaches and also to subject the exercise of the right to procedural conditions.⁵²

(2) State practice, although not lacking,⁵³ does not give great assistance in determining the true extent of this right or the proper conditions for its exercise. In many cases, the denouncing state has decided

⁴⁸ See Harvard Law School, *Research in International Law*, III, *Law of Treaties*, pp. 1081-1083; McNair, *op. cit.*, p. 558. C. Rousseau seems to have doubted whether customary law recognizes a right to denounce a treaty on the ground of other party's non-performance, because claims to do so have usually been objected to; but for the reasons given in paragraph 2 this can hardly be regarded as sufficient evidence of the non-existence of any such customary rights.

⁴⁹ *E.g.*, Hall, *op. cit.*, p. 408; S. B. Crandall, *Treaties, Their Making and Enforcement*, p. 456; A. Cavaglieri "Règles générales du droit de la paix," *Recueil des cours de l'Académie de droit international* (1929-I), Vol. 26, p. 535.

⁵⁰ See Oppenheim, *op. cit.*, p. 947.

⁵¹ *E.g.*, McNair, *op. cit.*, p. 571; C. C. Hyde, *International Law*, Vol. 2, p. 1543; E. Giraud, *op. cit.*, p. 28.

⁵² See Harvard Law School, *Research in International Law*, III, *Law of Treaties* (Article 27), pp. 1077 and 1091-1092.

⁵³ Hackworth, *Digest of International Law*, Vol. 5, pp. 342-348; Harvard Law School, *Research in International Law*, III, *Law of Treaties*, pp. 1088-1090; McNair, *op. cit.*, pp. 553-569; A. C. Kiss, *Répertoire français de droit international*, Vol. 5, pp. 102-121; *Fontes Juris Gentium*, Series B, Sectio 1, Tomus I, part I (2), pp. 791-2.

for quite other reasons to put an end to the treaty and, having alleged the violation primarily to provide a pretext for its action, has not been prepared to enter into a serious discussion of the legal principles involved. The other party has usually contested the denunciation primarily on the basis of the facts; and, if it has sometimes used language appearing to deny that unilateral denunciation is ever justified, this has usually appeared rather to be a protest against the one-sided and arbitrary pronouncements of the denouncing state than a rejection of the right to denounce when serious violations are established. Thus, states which have on one occasion seemed to assert that denunciation of a treaty is always illegitimate in the absence of agreement have, on other occasions, themselves claimed the right to denounce a treaty on the basis of alleged breaches by the other party.

(3) Municipal courts have not infrequently made pronouncements recognizing the principle that the violation of a treaty may entitle the innocent party to denounce it. But they have nearly always done so in cases where their government had not in point of fact elected to denounce the treaty and they have not found it necessary to examine the conditions for the application of the principle at all closely.⁵⁴

(4) International jurisprudence has contributed comparatively little on this subject. In the case of the *Diversion of Water from the River Meuse*,⁵⁵ Belgium contended that, by constructing certain works contrary to the terms of the Treaty of 1863, Holland had forfeited the right to invoke the treaty against it. Belgium did not claim to denounce the treaty, but it did assert a right, as a defence to Holland's claim, to suspend the operation of one of the provisions of the treaty on the basis of Holland's alleged breach of that provision, although it pleaded its claim rather as an application of the principle *inadimplenti non est adimplendum*. The Court, having found that Holland had not violated the treaty, did not pronounce upon the Belgian contention. In a dissenting opinion, however, Judge Anzilotti expressed the view⁵⁶ that the principle underlying the Belgian contention is "so just, so equitable, so universally recognized that it must be applied in international relations also." The only other case that seems to be of much significance is the *Tacna Arica Arbitration*.⁵⁷ There Peru contended that by preventing the performance of Article 3 of the Treaty of Ancon, which provided for the holding of a plebiscite under certain conditions in the disputed area, Chile had discharged Peru from her obligations under that article. The Arbitrator,⁵⁸ after examining the evidence, rejected the Peruvian contention, saying:

⁵⁴ *E.g.*, *Ware v. Hylton* (1796), 3 Dallas 261; *Charlton v. Kelly*, 229 U.S. 447; *Lepeschkin v. Gosweiler et Cie.*, *Journal du droit international* (1924), Vol. 51, p. 1136; *In re Tatarko*, *Annual Digest and Reports of Public International Law Cases*, 1949, No. 110, p. 314.

⁵⁵ P.C.I.J., Series A/B, No. 70.

⁵⁶ *Ibid.*, p. 50; *of.* Judge Hudson, pp. 76-77.

⁵⁷ *Reports of International Arbitral Awards*, Vol. II, pp. 929 and 943-944.

⁵⁸ President Coolidge.

“It is manifest that if abuses of administration could have the effect of terminating such an agreement, *it would be necessary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement*, and, in the opinion of the Arbitrator, a situation of such gravity has not been shown.”

This pronouncement seems to assume that only a “fundamental” breach of Article 3 by Chile could have justified Peru in claiming to be released from its provisions.

(5) The Commission was agreed that a breach of a treaty, however serious, did not *ipso facto* put an end to a treaty, and also that it was not open to a state simply to allege a violation of the treaty and pronounce the treaty at an end. On the other hand, it considered that within certain limits and subject to certain safeguards the right of a party to invoke the breach of a treaty as a ground for terminating it or suspending its operation should be recognized. Some members considered that, in view of the risk of abuse, it would be dangerous for the Commission to endorse such a right, unless its exercise were to be made subject to control by compulsory reference to the International Court of Justice. Other members, while agreeing on the importance of providing proper safeguards against arbitrary denunciation of a treaty on the ground of an alleged breach, pointed out that the question of providing safeguards against arbitrary action was a general one which affected several articles and was taken up in Article 51; at the same time, they drew attention to the difficulties standing in the way of any proposal to include a clause of compulsory jurisdiction in a general convention. The Commission decided to formulate in the present article the substantive conditions under which a treaty may be terminated or its operation suspended in consequence of a breach, and to deal with the question of the procedural safeguards in Article 51. Some members, in agreeing to this decision, stressed that in their opinion the present article would only be acceptable, if the necessary procedural safeguards were provided in Article 51.

(6) Paragraph 1 therefore provides that a “material” breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. The formula “invoke as a ground” is intended to underline that the right arising under the article is not a right arbitrarily to pronounce the treaty terminated. If the other party contests the breach or its character as a “material” breach there will be a “difference” between the parties with regard to which the normal obligations incumbent upon the parties under the Charter and under general international law to seek a solution of the question by pacific means will apply. The Commission considered that the action open to the other party in the case of a material breach is either the termination or the suspension of the operation of the treaty in whole or in part. The right to take this action arises under the law of treaties independently of any right of reprisal, the principle being that a party cannot be called upon to fulfil obligations which the other

party fails to fulfil. This right would, of course, be without prejudice to the injured party's right to present an international claim on the basis of the other party's responsibility with respect to the breach.

(7) Paragraph 2 covers the case of a material breach of a multilateral treaty and here the Commission considered that it was necessary to visualize two possible situations: (a) an individual party affected by the breach might react alone; or (b) the other parties to the treaty might join together in reacting to the breach. When an individual party reacts, the Commission considered that its position was similar to that in the case of a bilateral treaty, but that its right should be limited to suspending the operation of the treaty in whole or in part as between itself and the defaulting state. In the case of a multilateral treaty the interests of the other parties had to be considered, while a right of suspension provided adequate protection to the state directly affected by the breach. Moreover, the limitation of the right of the individual party to a right of suspension seemed particularly necessary having regard to the nature of the obligations contained in general multilateral treaties of a law-making character. Indeed, the question was raised as to whether even suspension would be admissible in the case of law-making treaties. It was pointed out, however, that it might be inequitable to allow a defaulting state to continue to enforce the treaty against the injured party, whilst itself violating its obligations towards that state under the treaty. Moreover, it had to be borne in mind that even such treaties as the Genocide Convention and the Geneva Conventions on the treatment of prisoners of war, sick, and wounded allowed an express right of denunciation. When the other parties to a multilateral treaty react jointly to a breach by one party, they obviously have the right to do jointly what each one may do severally, and may therefore jointly suspend the operation of the treaty with regard to the defaulting state. Equally, if a breach by one state frustrates or undermines the operation of the treaty as between all the parties, the others are entitled jointly to terminate or suspend the operation of the treaty in whole or in part.

(8) Paragraph 3 defines the kind of breach which may give rise to a right to terminate or suspend the treaty. Some authorities have in the past seemed to assume that any breach of any provision would suffice to justify the denunciation of the treaty. The Commission, however, was agreed that the right to terminate or suspend must be limited to cases where the breach was of a serious character. It preferred the term "material" to "fundamental" to express the kind of breach which is required. The word "fundamental" might be understood as meaning that only the violation of a provision directly touching the central purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even although these provisions may be of an ancillary character. Sub-paragraph (a) of the definition simply records that the repudiation of a treaty, which does not of itself terminate a treaty, is an

act which the other party is entitled to regard as a "material" breach. The main definition is in sub-paragraph (b) under which a breach is "material" if the provision violated is one "essential to the effective execution of any of the objects or purposes of the treaty."

(9) Paragraph 4 subjects the provisions in the article concerning the partial termination of a treaty or partial suspension of its operation to the conditions governing the separability of treaty provisions specified in Article 46. The Commission considered that this was necessary because even in the case of breach it would be wrong to hold the defaulting state afterwards to a truncated treaty the operation of which was grossly inequitable between the parties.

(10) Paragraph 5 merely reserves the rights of the parties under specific provisions of the treaty or of a related instrument which are applicable in the event of a breach.

ARTICLE 43

Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating the treaty when such impossibility results from the total and permanent disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty.

2. If it is not clear that the impossibility of performance will be permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty.

3. Under the conditions specified in Article 46, if the impossibility relates to particular clauses of the treaty, it may be invoked as a ground for terminating or suspending the operation of those clauses only.

Commentary

(1) The present article concerns the termination of a treaty or the suspension of its operation in consequence of the fact that the total disappearance or destruction of its subject-matter has rendered its performance permanently or temporarily impossible. The next article concerns the termination of a treaty in consequence of a fundamental change in the circumstances existing at the time when it was entered into. Cases of supervening impossibility of performance are *ex hypothesi* cases where there has been a fundamental change in the circumstances existing at the time when the treaty was entered into. Some members of the Commission felt that it was not easy to draw a clear distinction between the types of cases dealt with in the two articles and were in favour of amalgamating them. The Commission, however, considered that juridically "impossibility of performance" and a "fundamental change of circumstances" are distinct grounds for regarding a treaty as having been terminated, and should be kept separate. Although it was true that there might be borderline cases in which the two articles tended to overlap, the criteria to be employed in applying the articles were not the same, and to combine them

might lead to misunderstanding. "Impossibility of performance" was therefore kept distinct in the present article as a specific and separate ground for invoking the termination of a treaty.

(2) Paragraph 1 provides that the total and permanent disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty may be invoked as putting an end to the treaty. This may happen either through the disappearance or destruction of the physical subject-matter of the treaty or of a legal situation which was the *raison d'être* of the rights and obligations contained in the treaty. Practice furnishes few examples of impossibility relating to the physical subject-matter of the treaty; but the type of case envisaged by the article is the submergence of an island, the drying up of a river, the destruction of a railway, hydro-electric installation, etc. by an earthquake or other disaster. As to impossibility resulting from the disappearance of the legal subject-matter of the treaty rights and obligations, an example is treaty provisions connected with the operation of capitulations which necessarily fall to the ground with the disappearance of the capitulations themselves. The dissolution of a customs union might similarly render further performance of treaties relating to its operation impossible.

(3) Most authorities cite the total extinction of the international personality of one of the parties to a bilateral treaty as an instance of impossibility of performance. After discussion, however, the Commission decided against including the point in the present article, at any rate at the present stage of its work. It considered that it would be very misleading to formulate a provision concerning the extinction of the international personality of a party without at the same time dealing with, or at least reserving, the question of the succession of states to treaty rights and obligations. But the question of succession is a complex one which is already under separate study in the Commission and it was thought to be inadvisable to prejudge in any way the outcome of that study by attempting to formulate in the present article the conditions under which the extinction of the personality of one of the parties would bring about the termination of a treaty. If, on the other hand, the question of state succession were merely to be reserved by some such phrase as "subject to the rules governing state succession in the matter of treaties," a provision stating that the "extinction of a party could be invoked as terminating the treaty" would serve little purpose. For the time being, therefore, extinction of the international personality of a party was omitted from the article, and it was noted that the point should be reconsidered when the Commission's work on state succession was further advanced.

(4) Impossibility of performance, as a ground for the termination of the treaty under this article, is something which comes about through events which occur outside the treaty; and the treaty is sometimes referred to as terminating by operation of law independently of any action of the parties. The Commission recognized that in cases under this article, unlike cases of breach, the ground of termination, when established, might be considered to have automatic effects on the validity of the treaty. But in

drawing up the article it felt bound to cast the rule in the form not of a provision automatically terminating the treaty but of one entitling the parties to invoke the impossibility of performance as a ground for terminating the treaty. The difficulty is that disputes may arise as to whether a total disappearance or destruction of the subject-matter of the treaty has in fact occurred, and in the absence of compulsory jurisdiction it would be inadvisable to adopt, without any qualification, a rule bringing about the automatic abrogation of the treaty by operation of law. Otherwise, there would be a risk of arbitrary assertions of a supposed impossibility of performance as a mere pretext for repudiating a treaty. For this reason, the Commission considered it necessary to formulate the article in terms of a right to invoke the impossibility of performance as a ground for terminating the treaty and to make this right subject to the procedural requirements of Article 51.

(5) Paragraph 2 provides that if it is not clear that the impossibility is to be permanent, it may be invoked only as a ground for suspending the operation of the treaty. These cases might simply be treated as cases where *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance. But where there is a continuing impossibility of performance of continuing obligations it seems better to recognize that the treaty may be suspended.

(6) Paragraph 3 applies the principle of the separability of treaty provisions to cases of impossibility of performance. Where the impossibility is only partial, the Commission considered that the separation of those parts of the treaty which had been rendered impossible of performance from the remainder of the treaty would be entirely appropriate and desirable, if the conditions for the separability of treaty provisions set out in Article 46 existed in the case.

ARTICLE 44

Fundamental change of circumstances

1. A change in the circumstances existing at the time when the treaty was entered into may only be invoked as ground for terminating or withdrawing from a treaty under the conditions set out in the present article.

2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

(a) The existence of that fact or situation constituted an essential basis of the consent of the parties to the treaty; and

(b) The effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty.

3. Paragraph 2 above does not apply:

(a) To a treaty fixing a boundary; or

(b) To changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself.

4. Under the conditions specified in Article 46, if the change of circumstances referred to in paragraph 2 above relates to particular clauses of the treaty, it may be invoked as a ground for terminating those clauses only.

Commentary

(1) Almost all modern writers,⁵⁹ however reluctantly, admit the existence in international law of the principle with which this article is concerned and which is commonly spoken of as the doctrine of *rebus sic stantibus*. Just as many systems of municipal law recognize that, quite apart from any actual *impossibility* of performance, contracts may become inapplicable through a fundamental change of circumstances, so also, it is held, international law recognizes that treaties may cease to be binding upon the parties for the same reason. Most writers, however, at the same time enter a strong *caveat* as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked; for the risks to the security of treaties which this doctrine presents in the absence of any general system of compulsory jurisdiction are perhaps more serious than in the case of any other ground either of invalidity or of termination. The circumstances of international life are always changing and it is all too easy to find some basis for alleging that the changes have rendered the treaty inapplicable.

(2) The evidence of the recognition of the principle as a rule of customary law is considerable, even if it be true that the Court has not yet committed itself on the point. In the *Free Zones* case,⁶⁰ having held that the facts did not in any event justify the application of the doctrine, the Permanent Court expressly reserved its position. It observed that it became unnecessary for it to consider "any of the questions of principle which arise in connexion with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the methods by which effect can be given to the theory, if recognized, and the question whether it would apply to treaties establishing rights such as that which Switzerland derived from the treaties of 1815 and 1816." On the other hand, it can equally be said that the Court has never on any occasion⁶¹ rejected the principle and that in the passage just quoted it

⁵⁹ *E.g.*, Oppenheim, *op. cit.*, Vol. I, pp. 938-944; McNair, *op. cit.*, pp. 681-691; F. I. Kozhevnikov, *International Law* (Academy of Sciences of the USSR), p. 281; O. Rousseau, *Principes généraux du droit international public*, Tome I, pp. 580-615; Harvard Law School, *Research in International Law*, III, *Law of Treaties*, pp. 1096-1126; Chesney Hill, *The Doctrine of Rebus Sic Stantibus*, University of Missouri Studies (1934).

⁶⁰ P.C.I.J., Series A/B, No. 46, pp. 156-158.

⁶¹ *E.g.*, in the *Nationality Decrees* Opinion (P.C.I.J., Series B, No. 4, p. 29), where it merely observed that it would be impossible to pronounce upon the point raised by France regarding the "principle known as the *clausula rebus sic stantibus*" without recourse to the principles of international law concerning the duration of treaties.

even seems to have assumed that the doctrine is to some extent admitted in international law.

(3) Municipal courts, on the other hand, have not infrequently recognized the relevance of the principle in international law, though for one reason or another they have always ended by rejecting the application of it in the particular circumstances of the case before them.⁶² These cases contain the propositions that the principle is limited to changes in circumstances the continuance of which, having regard to the evident intention of the parties at the time, was regarded as a tacit condition of the agreement,⁶³ that the treaty is not dissolved automatically by law upon the occurrence of the change but only if the doctrine is invoked by one of the parties;⁶⁴ and that the doctrine must be invoked within a reasonable time after the change in the circumstances was first perceived.⁶⁵ Moreover, in *Bremen v. Prussia*⁶⁶ the German Reichsgericht, while not disputing the general relevance of the doctrine, considered it altogether inapplicable to a case where one party was seeking to release itself not from the whole treaty but only from certain restrictive clauses which had formed an essential part of an agreement for an exchange of territory.

(4) The principle of *rebus sic stantibus* has not infrequently been invoked in state practice either *eo nomine* or in the form of a reference to a general principle claimed to justify the termination or modification of treaty obligations by reason of changed circumstances. Detailed examination of this state practice is not possible in the present Report.⁶⁷ Broadly speaking, it shows a wide acceptance of the view that a fundamental change of circumstances may justify a demand for the termination or revision of a treaty, but also shows a strong disposition to question the right of a party to denounce a treaty unilaterally on this ground. The most significant indications as to the attitude of states regarding the principle are perhaps to be found in statements submitted to the Court in the cases where the doctrine has been invoked. In the *Nationality Decrees* case the French Government contended that "perpetual" treaties are always subject to termination in virtue of the *rebus sic stantibus* clause and claimed that the establishment of the French protectorate over

⁶² *E.g.*, *Hooper v. United States*, Hudson, Cases on International Law, Second Edition, p. 930; *Lucerne v. Aargau* (1888), Arrêts du Tribunal fédéral suisse, Vol. 8, p. 57; *In re Lepeschkin*, Annual Digest of Public International Law Cases, 1923-1924, Case No. 189; *Bremen v. Prussia*, *ibid.*, 1925-1926, Case No. 266; *Rothschild and Sons v. Egyptian Government*, *ibid.*, 1925-1926, Case No. 14; *Canton of Thurgau v. Canton of St. Gallen*, *ibid.*, 1927-1928, Case No. 289; *Bertaco v. Bancel*, *ibid.*, 1935-1937, Case No. 201; *Stransky v. Zivnostenska Bank*, International Law Reports, 1955, pp. 424-427.

⁶³ *Lucerne v. Aargau*; *Canton of Thurgau v. Canton of St. Gallen*; *Hooper v. United States*.

⁶⁴ *In re Lepeschkin*; *Stransky v. Zivnostenska Bank*.

⁶⁵ *Canton of Thurgau v. Canton of St. Gallen*.

⁶⁶ Annual Digest of Public International Law Cases, 1925-1926, Case No. 266.

⁶⁷ See the accounts of the state practice in Chesney Hill, *op. cit.*, pp. 27-74; O. Kiss, *op. cit.*, pp. 381-393; C. Rousseau, *op. cit.*, pp. 594-615; Harvard Law School, Research in International Law, III, Law of Treaties, pp. 1113-1124; H. W. Briggs, A.J.I.L. 1942, pp. 89-96, and 1949, pp. 762-769.

Morocco had for that reason had the effect of extinguishing certain Anglo-French treaties.⁶⁸ The British Government, while contesting the French Government's view of the facts, observed that the most forceful argument advanced by France was that of *rebus sic stantibus*.⁶⁹ In the case concerning *The Denunciation of the Sino-Belgian Treaty of 1865*, China invoked, in general terms, changes of circumstances as a justification of her denunciation of a sixty-year-old treaty, and supported her contention with a reference to Article 19 of the Covenant of the League of Nations.⁷⁰ This article, however, provided that the Assembly of the League should "from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable," and the Belgian Government replied that neither Article 19 nor the doctrine of *rebus sic stantibus* contemplated the unilateral denunciation of treaties. It further maintained that there could be no question of China's denouncing the treaty because of a change of circumstances unless she had at least tried to obtain its revision through Article 19; that where both parties were subject to the Court's jurisdiction, the natural course for China, in case of dispute, was to obtain a ruling from the Court; and that if she did not, she could not denounce the treaty without Belgium's consent.⁷¹ In the *Free Zones* case⁷² the French Government, the government invoking the *rebus sic stantibus* principle, itself emphasized that it does not allow unilateral denunciation of a treaty claimed to be out of date. It argued that the doctrine would cause a treaty to lapse only "*lorsque le changement de circonstances aura été reconnu par un acte faisant droit entre les deux Etats intéressés*"; and it further said: "*cet acte faisant droit entre les deux Etats intéressés peut être soit un accord, lequel accord sera une reconnaissance du changement des circonstances et de son effet sur le traité, soit une sentence du juge international compétent s'il y en a un.*"⁷³ Switzerland, emphasizing the differences of opinion amongst writers in regard to the principle, disputed the existence in international law of any such right to the termination of a treaty because of changed circumstances enforceable through the decision of a competent tribunal. But she rested her case primarily on three contentions: (a) the circumstances alleged to have changed were not circumstances on the basis of whose continuance the parties could be said to have entered into the treaty; (b) in any event, the doctrine does not apply to treaties creating territorial rights; and (c) France had delayed unreasonably long after the alleged changes of circumstances had manifested themselves.⁷⁴ France does not appear to have disputed that the doctrine is inapplicable to territorial rights; instead, she drew a distinction between territorial rights and "personal" rights created on the occasion of a territorial settlement.⁷⁵ The Court upheld

⁶⁸ P.O.I.J., Series C, No. 2, pp. 187-188.

⁶⁹ *Ibid.*, pp. 208-209.

⁷⁰ *Ibid.*, No. 16, I, p. 52.

⁷¹ *Ibid.*, pp. 22-23; the case was ultimately settled by the conclusion of a new treaty.

⁷² *Ibid.*, Series A/B, No. 46.

⁷³ *Ibid.*, Series C, No. 58, pp. 578-579, 109-146, and 405-415; see also Series C, No. 17, I, pp. 89, 250, 256, and 283-284.

⁷⁴ *Ibid.*, Series C, No. 58, pp. 463-476.

⁷⁵ *Ibid.*, pp. 136-148.

the Swiss Government's contentions on points (a) and (c), but did not pronounce on the application of the *rebus sic stantibus* principle to treaties creating territorial rights.

(5) The principle has also sometimes been invoked in debates in political organs of the United Nations, either expressly or by implication. In 1947, for example, when Egypt referred the question of the continued validity of the Anglo-Egyptian Treaty to the Security Council, the United Kingdom delegates interpreted the Egyptian case as being one based on the *rebus sic stantibus* principle. The existence of the principle was not disputed, though emphasis was placed on the conditions restricting its application. The Secretary-General also, in a study of the validity of the minorities treaties concluded during the League of Nations era, while fully accepting the existence of the principle in international law, emphasized the exceptional and limited character of its application.⁷⁶

(6) Some members of the Commission expressed doubts as to how far the principle could be regarded as an already accepted rule of international law; and many members emphasized the dangers which the principle involved for the security of treaties unless the conditions for its application were closely defined and adequate safeguards were provided against its arbitrary application. (The Commission, however, concluded that the principle, if its application were carefully delimited and regulated, should find a place in the modern law of treaties. A treaty might remain in force for a long time and its stipulations come to place an undue burden on one of the parties. Then, if the other party were obdurate in opposing any change, the fact that international law recognized no legal means of terminating or modifying the treaty otherwise than through a further agreement between the same parties might impose a serious strain on the relations between the states concerned; and the dissatisfied state might ultimately be driven to take action outside the law. The number of such cases was likely to be comparatively small. As pointed out in the commentary to Article 38, the majority of modern treaties were expressed to be of short duration, or were entered into for recurrent terms of years with a right to break the treaty at the end of each term, or were expressly or implicitly terminable upon notice. In all these cases either the treaty expired automatically or each party, having the power to terminate the treaty, had the power also to apply pressure upon the other party to revise its provisions. Nevertheless, there remained a residue of cases in which, failing any agreement, one party might be left powerless under the treaty to obtain any legal relief from outmoded and burdensome provisions. It was in these cases that the *rebus sic stantibus* doctrine could serve a purpose as a lever to induce a spirit of compromise in the other party. Moreover, despite the strong reservations often expressed with regard to it, the evidence of the acceptance of the doctrine in international law was so considerable that it seemed to indicate a recognition of a need for this safety-valve in the law of treaties.)

(7) In the past the principle has almost always been presented in the

⁷⁶ E/CN.4/367, p. 37.

guise of a tacit condition implied in every "perpetual" treaty that would dissolve it in the event of a fundamental change of circumstances. The Commission noted, however, that the tendency today was to regard the implied term as only a fiction by which it was attempted to reconcile the principle of the dissolution of treaties in consequence of a fundamental change of circumstances with the rule *pacta sunt servanda*.⁷⁷ In most cases the parties gave no thought to the possibility of a change of circumstances and, if they had done so, would probably have provided for it in a different manner. Furthermore, the Commission considered the fiction to be an undesirable one since it increased the risk of subjective interpretations and abuse. For this reason, the Commission was agreed that the theory of an implied term must be rejected and the doctrine formulated as an objective rule of law by which, on grounds of equity and justice, a fundamental change of circumstances may, under certain conditions, be invoked by a party as a ground for terminating the treaty. It further decided that, in order to emphasize the objective character of the rule, it would be better not to use the term "*rebus sic stantibus*" either in the text of the article or even in the title, and so avoid the doctrinal implication of that term.

(8) The Commission also recognized that many authorities have in the past limited the application of the principle to so-called perpetual treaties, that is, to treaties not making any provision for their termination. The reasoning by which this limitation of the principle was supported by these authorities did not, however, appear to the Commission to be convincing. When a treaty had been given a duration of ten, twenty, fifty or ninety-nine years, it could not be excluded that a fundamental change of circumstances might occur which radically affected the basis of the treaty. The cataclysmic events of the present century showed how fundamentally circumstances may change within a period of only ten or twenty years. If the doctrine were regarded as an objective rule of law founded upon the equity and justice of the matter, there did not seem to be any reason to draw a distinction between "perpetual" and "long term" treaties. Moreover, practice does not altogether support the view that the principle was confined to "perpetual" treaties.⁷⁸ Some treaties of limited duration actually contained what were equivalent to *rebus sic stantibus* provisions.⁷⁹ The principle had also been invoked sometimes in regard to limited treaties as, for instance, in the resolution of the French Chamber of Deputies of

⁷⁷ C. Rousseau, *op. cit.*, p. 584; Sir John Fischer Williams, A.J.I.L., 1928, pp. 93-94; C. De Visscher, *Théories et réalités en droit international public*, p. 391; J. Basedvant, "Règles générales du droit de la paix," *Recueil des Cours* 1936, Vol. IV, pp. 653-654; Sir Gerald Fitzmaurice, Second report, Yearbook of the International Law Commission, 1957, Vol. II, par. 149.

⁷⁸ C. Rousseau, *op. cit.*, p. 586.

⁷⁹ *E.g.*, Art. 21 of the Treaty on Limitation of Naval Armament, signed at Washington, 6 February 1922 (Hudson, *International Legislation*, Vol. II, p. 820); Art. 26 of the Treaty for the Limitation of Naval Armament, signed at London, 25 March 1936 (*ibid.*, Vol. VII, p. 280); and Convention regarding the Régime of the Straits, signed at Montreux, 20 July 1936 (L.N.T.S., Vol. 173, p. 229).

14 December 1932 expressly invoking the principle of *rebus sic stantibus* with reference to the Franco-American war debts agreement of 1926.⁸⁰ The Commission accordingly decided that the rule should be framed in the present article as one of general application, though for obvious reasons it would seldom or never have relevance for treaties of limited duration or which are terminable upon notice.

(9) Paragraph 1 has as its object to emphasize that it is not any change in the circumstances existing when the treaty was entered into that may be invoked as a ground for terminating a treaty, but only one which fulfils the conditions laid down in paragraph 2. Many members of the Commission regarded the rule contained in this article, even when strictly defined, as representing a danger to the security of treaties. These members considered it essential to underline the exceptional character of the application of the rule, and some of them were in favour of using an even stronger formula. Certain other members, while recognizing the need to define the conditions for the application of the article with precision, regarded it rather as expressing a principle of general application which has an important rôle to play in bringing about a modification of out-of-date treaty situations in a rapidly changing world.

(10) Paragraph 2 defines the changes of circumstances which may be invoked as a ground for the termination of a treaty or for withdrawing from a multilateral treaty. The change must relate to a fact or situation which existed at the time when the treaty was entered into and must be a "fundamental" one in the sense that: (a) "the existence of the fact or situation constituted an essential basis of the consent of the parties to the treaty," and (b) "the effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty." The Commission gave the closest consideration to the formulation of these conditions. It attached great importance in expressing them in objective ✓ terms, while at the same time making it clear that the change must be one affecting the essential basis of the consent of the parties to the treaty. Certain members felt that general changes of circumstances quite outside the treaty might bring the article into operation. But the Commission decided that such general changes could only be invoked as a ground for terminating the treaty if their effect was to alter a fact or situation constituting an essential basis of the parties' consent to the treaty.

(11) Certain members of the Commission favoured the insertion of a provision making it clear that a subjective change in the attitude or policy of a government could never be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty. They represented that, if this were not the case, the security of treaties might be gravely prejudiced by recognition of the principle in the present article. Other members, while not dissenting from the view that mere changes of policy on the part of a government cannot normally be invoked as bringing the principle into operation, felt that it would be going too far to state that

⁸⁰ For the text of the resolution, see C. Kiss, *op. cit.*, pp. 384-385.

a change of policy could never in any circumstances be invoked as a ground for terminating a treaty. They instanced a treaty of alliance as a possible case where a radical change of political alignment by the government of a country might make it unacceptable, from the point of view of both parties, to continue with the treaty. The Commission, considering that the definition of a "fundamental change of circumstances" in paragraph 2 should suffice to exclude abusive attempts to terminate a treaty on the basis merely of a change of policy, decided that it was unnecessary to go further into the matter in formulating the article.

(12) Paragraph 3 excepts from the operation of the article two cases which gave rise to some discussion. The first concerns treaties fixing a boundary, which both states concerned in the *Free Zones* case appear to have recognized as being outside the rule, as do most writers. Some members of the Commission suggested that the total exclusion of these treaties from the rule might go too far, and might be inconsistent with the principle of self-determination recognized in the Charter. The Commission, however, concluded that treaties fixing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. It also took the view that "self-determination," as envisaged in the Charter, was an independent principle and that it might lead to confusion if, in the context of the law of treaties, it were presented as an application of the rule contained in the present article. By excepting treaties fixing a boundary from its scope the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed.

(13) The second exception—in sub-paragraph 3(b)—is cases where the parties have foreseen the change of circumstances and have made provision for it in the treaty itself. In the discussion of this article some members of the Commission expressed the view that the principle contained in this article is one which, under general international law, the parties may not exclude altogether by a provision in the treaty. According to these members, the parties may make express provision for a change which they contemplate may happen, but are not entitled simply to negative the application of the present article to the treaty. Other members doubted whether the freedom of states to make their own agreement on this point could or should be limited in this way. The Commission, without taking any position on this question, excepted from the article "changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself."

(14) Paragraph 4 makes the principle of the separability of treaty provisions applicable to this article. Where the change of circumstances relates to particular clauses only of the treaty, it seemed to the Commission appropriate, for the same reasons as in the case of supervening impossibility of performance, to allow the severance of those clauses from the rest of the treaty under the conditions laid down in Article 46.

- (15) In the discussion of this article, as in the discussion of Article 42, many members of the Commission stressed the importance which they attach to the provision of adequate procedural safeguards against arbitrary action as an essential basis for the acceptance of the article.

ARTICLE 45

Emergence of a new peremptory norm of general international law

1. A treaty becomes void and terminates when a new peremptory norm of general international law of the kind referred to in Article 37 is established and the treaty conflicts with that norm.

2. Under the conditions specified in Article 46, if only certain clauses of the treaty are in conflict with the new norm, those clauses alone shall become void.

Commentary

(1) The rule formulated in this article is the logical corollary of the rule in Article 37 under which a treaty is void if it conflicts with a "peremptory norm of general international law from which no derogation is permitted." Article 37, as explained in the commentary to it, is based upon the hypothesis that in international law today there are a certain number of fundamental rules of international public order from which no state may derogate even by agreement with another state. Manifestly, if a new rule of that character—a new rule of *jus cogens*—is established either by general multilateral treaty or by the development of a new customary rule, its effect must be to render void not only future but existing treaties. This follows from the fact that it is an overriding rule of public order depriving any act or situation which is in conflict with it of legality. An example would be former treaties regulating the slave trade, the performance of which later ceased to be compatible with international law owing to the general recognition of the total illegality of all forms of slavery.

(2) The Commission discussed whether to include this rule in Article 37, but decided that it should be placed among the articles concerning the termination of treaties. Although the rule operates to deprive the treaty of validity, its effect is not to render it void *ab initio*, but only from the date when the new rule of *jus cogens* is established; in other words it does not nullify the treaty, it forbids its further performance. It is for this reason that paragraph 1 provides that the treaty "becomes void when a new peremptory norm. . . ."

(3) Paragraph 2 provides that, subject to the conditions for the separability of treaty provisions laid down in Article 46, if only certain clauses of the treaty are in conflict with the new rule of *jus cogens*, they alone are to become void. Although the Commission did not think that the principle of separability was appropriate when a treaty was rendered void *ab initio* under Article 37 by an existing rule of *jus cogens*, it felt that different considerations applied in the case of a treaty which had

been entirely valid when concluded but was now found in some of its provisions to conflict with a newly established rule of *jus cogens*. If those provisions could properly be regarded as severable from the rest of the treaty, the Commission thought that the rest of the treaty ought to be regarded as still valid.

SECTION IV: PARTICULAR RULES RELATING TO THE
APPLICATION OF SECTIONS II AND III

ARTICLE 46

Separability of treaty provisions for the purposes of the operation of the present articles

1. Except as provided in the treaty itself or in Articles 33 to 35 and 42 to 45, the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty shall relate to the treaty as a whole.

2. The provisions of Articles 33 to 35 and 42 to 45 regarding the partial nullity, termination or suspension of the operation of a treaty or withdrawal from particular clauses of a treaty shall apply only if:

(a) The clauses in question are clearly severable from the remainder of the treaty with regard to their application; and

(b) It does not appear either from the treaty or from statements made during the negotiations that acceptance of the clauses in question was an essential condition of the consent of the parties to the treaty as a whole.

Commentary

(1) A number of the articles in Sections II and III provide explicitly for the possibility of limiting a claim to invoke the nullity of a treaty or a ground of termination to particular clauses only of the treaty. In each case reference is made to the conditions for the separability of treaty provisions specified in the present article. As the proposals of the Commission concerning the right to claim the partial nullity or termination of a treaty are to some extent *de lege ferenda*, the Commission considers it desirable to make certain general observations on the question before commenting upon the article.

(2) The separability of treaty provisions was until comparatively recently considered almost exclusively in connexion with the right to terminate a treaty on the ground of a breach of the other party. Certain modern authorities,⁸¹ however, have advocated recognition of the principle of separability in cases of invalidity and in determining the effect of war upon treaties. They have urged that in some cases one provision of a treaty may be struck out or suspended without necessarily disturbing the balance of the rights and obligations established by the other provisions of the treaty and without destroying one of the considerations which in-

⁸¹ See Harvard Law School, Research in International Law, III, Law of Treaties, Art. 30, pp. 1134-1139; McNair, Law of Treaties (1961), Ch. 28.

duced the parties to accept the treaty as a whole. These authorities cite in support of their contentions certain pronouncements of the Permanent Court of International Justice in regard to the interpretation of self-contained parts of treaties.⁸²

(3) The question of the separability of treaty provisions for the purposes of interpretation raises quite different issues from the application of the principle of separability to the nullity or termination of treaties. However, if the jurisprudence of the two Courts does not throw much light on these latter questions, it is clear that certain judges in separate opinions in the *Norwegian Loans* and *Interhandel* cases accepted the applicability of the principle of separating treaty provisions in the case of the alleged nullity of a unilateral Declaration under the Optional Clause, by reason of a reservation the validity of which was contested.

(4) The authorities being by no means conclusive, the Commission decided that it should examine *de novo* the appropriateness and utility of recognizing the principle of separability of treaty provisions in the context of the nullity and termination of treaties. The Commission further decided that in order to determine the appropriateness of applying the principle in these contexts it was essential to examine each article in turn, since different considerations might well apply in the various articles. The Commission concluded that, for reasons which have already been given in the commentary to each article, the application of the principle would be appropriate and serve a useful purpose in regard to Articles 33 (fraud), 34 (error), 35 (personal coercion), 42 (breach), 43 (impossibility of performance), 44 (change of circumstances) and 45 (supervening rule of *jus cogens*). But it also concluded that this would only be acceptable if the conditions under which the principle might legitimately be invoked in any given case were defined with some strictness. The sole purpose of the present article is to define those conditions.

(5) Paragraph 1 of the article makes it clear that the general rule is that the nullity or termination of a treaty or the suspension of its operation relates to the treaty as a whole. This rule is subject, first, to any provisions in the treaty allowing the separation of its provisions and, secondly, to the special provisions contained in the above-mentioned articles. Treaties, more especially multilateral treaties, which admit the acceptance of part only of the treaty or which allow partial withdrawal from the treaty or suspension of the operation of only one part are not uncommon; and their provisions, so far as they are applicable, necessarily prevail.

(6) Paragraph 2 sets out the basic conditions to which the application of the principle of separability is subject in each of the articles where it is allowed, and they are two-fold. First, the clauses to be dealt with separately must be clearly severable from the rest of the treaty with regard to their operation. In other words, the severance of the treaty must not

⁸² *E.g.*, the *Free Zones Case*, Series A/B, No. 46, p. 140; the *Wimbledon Case*, Series A, No. 1, p. 24.

interfere with the operation of the remaining provisions. Secondly, it must not appear from the treaty or from the statements during the negotiations that acceptance of the severed clauses was an essential condition of the consent of the parties to the treaty as a whole. In other words, acceptance of the severed clauses must not have been so linked to acceptance of the other parts that, if the severed parts disappear, the basis of the consent of the parties to the treaty as a whole also disappears.

ARTICLE 47

Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty

A right to allege the nullity of a treaty or a ground for terminating or withdrawing from it in cases falling under Articles 32 to 35 and 42 and 44 shall no longer be exercisable if, after becoming aware of the facts giving rise to such right, the state concerned shall have:

(a) Waived the right; or

(b) So conducted itself as to be debarred from denying that it has elected in the case of Articles 32 to 35 to consider itself bound by the treaty, or in the case of Articles 42 and 44 to consider the treaty as unaffected by the material breach, or by the fundamental change of circumstances, which has occurred.

Commentary

(1) The foundation of the principle that a party is not permitted to benefit from its own inconsistencies is essentially good faith and fair dealing (*allegans contraria non audiendus est*). The relevance of this principle in international law is generally admitted and has been expressly recognized by the International Court of Justice itself in two recent cases.⁸³

(2) The principle is one of general application which is not confined to the law of treaties.⁸⁴ Nevertheless, it does have a particular importance in this branch of international law. As already mentioned in previous commentaries, the grounds upon which treaties may be invalidated under Section II or terminated under Section III involve certain risks of abusive claims to allege the nullity or termination of treaties. Another risk is that a state, after becoming aware of an essential error in the conclusion of the treaty, an excess of authority committed by its representative or a breach by the other party etc., may continue with the treaty as if nothing had happened and only raise the matter at a much later date when it desires for quite other reasons to put an end to its obligations under the treaty. Indeed, it may seek in this way to resuscitate an alleged ground of invalidity

⁸³ The Arbitral Award made by the King of Spain, I.C.J. Reports, 1960, pp. 213-214; The Temple of Preah Vihear, I.C.J. Reports, 1962, pp. 23-32.

⁸⁴ See generally D. W. Bowett, British Yearbook of International Law, 1957, pp. 176-202; Bin Cheng, General Principles of Law, pp. 141-149; Judges Alfaro and Fitzmaurice in The Temple of Preah Vihear, I.C.J. Reports, 1962, pp. 39-51, 62-65.

or of termination long after the event upon the basis of arbitrary or controversial assertions of fact. The principle now under consideration does place a limit upon the cases in which such claims can be asserted with any appearance of legitimacy. Such indeed was the rôle played by the principle in the *Temple* case and in the case of the *Arbitral Award of the King of Spain*. Accordingly, while recognizing the general character of the principle, the Commission considered that its particular importance in the sphere of the invalidity and termination of treaties called for its mention in this part of the law of treaties.

(3) "Waiver," although not identical with the general principle of law discussed in the preceding paragraphs of this commentary, is connected with it; indeed some cases of the application of that general principle can equally be viewed as cases of implied waiver. The Commission, therefore, considered it appropriate to include "waiver" in the present article together with the general principle of law.

(4) The article accordingly provides that the right to invoke the nullity of a treaty or a ground for terminating or withdrawing from it in cases falling under certain articles shall no longer be exercisable if the state concerned shall have either: (a) waived its right or (b) shall have so conducted itself that it is debarred from asserting the right by reason of the principle that it may not take up a legal position which is in contradiction with its own previous representations or conduct. The essence of the matter is that the state in question so conducts itself as to appear to have elected, in cases of nullity under Articles 32-35, to consider itself bound by the treaty, or in cases of termination under Articles 42 and 44, to consider the treaty unaffected by the breach or change of circumstances.

(5) The Commission noted that the application of the principle in any given case would necessarily turn upon the facts and that the governing consideration would be that of good faith. This being so, the principle would not operate if the state in question had not been aware of the facts giving rise to the right or had not been in a position freely to exercise its right to invoke the nullity of the treaty as the ground of termination. The Commission further noted that in municipal systems of law this general principle has its own particular manifestations reflecting technical features of the particular system. It felt that these technical features of the principle in municipal law might not necessarily be appropriate for application of the principle in international law. For this reason, it preferred to avoid the use of such municipal law terms as "*préclusion*" or "*estoppel*" and to speak simply of the state being "debarred" from denying that it has elected to consider itself as bound by the treaty or to consider the treaty in force.

(6) The Commission did not think it appropriate that the principle should be admitted in cases of "coercion" or "*jus cogens*" or in cases of "impossibility of performance" or of "supervening *jus cogens*"; and, clearly, it would not be applicable to termination under a right conferred by the treaty or to termination by agreement. Consequently, the operation of the principle was confined to Articles 32-35 and 42 and 44.

ARTICLE 48

Treaties which are constituent instruments of international organizations or which have been drawn up within international organizations

Where a treaty is a constituent instrument of an international organization, or has been drawn up within an international organization, the application of the provisions of Part II, Section III, shall be subject to the established rules of the organization concerned.

Commentary

(1) The application of the law of treaties to the constituent instruments of international organizations and to treaties drawn up within an organization inevitably has to take account also of the law governing each organization. Thus, in formulating the rules governing the conclusion of treaties in Part I, the Commission found it necessary in certain contexts to draw a distinction between these and other kinds of multilateral treaties and also in a few instances to distinguish treaties drawn up under the auspices of an international organization and treaties drawn up at a conference convened by the states concerned. In the present part the Commission did not think it necessary to make any particular provision for these special categories of treaties with regard to the articles contained in Section II which deal with the grounds of the invalidity of treaties. The principles embodied in that section appeared by their very nature not to require modification for the purposes of being applied to the constituent treaties of organizations or to treaties drawn up within or under the auspices of international organizations.

(2) On the other hand, it appeared to the Commission that certain of the articles in Section III concerning the termination or suspension of the operation of treaties and withdrawal from multilateral treaties might encroach upon the internal law of international organizations to a certain extent, more especially in relation to withdrawal from the organization, and termination and suspension of membership. Accordingly, the present article provides that the application of the provisions of Section III to constituent instruments and to treaties drawn up "within" an organization shall be subject to the "established rules" of the organization concerned. The term "established rules of the organization" is intended here, as in Article 18, paragraph 1 (a), to embrace not only the provisions of the constituent instrument or instruments of the organization but the customary rules developed in its practice.

(3) The phrase treaty "drawn up within an international organization," which also appears in certain articles of Part I, covers treaties, such as the international labour conventions, the texts of which are drawn up and adopted by an organ of the organization concerned, but not treaties drawn up "under the auspices" of an organization in a diplomatic conference convened by the organization. The latter category of treaties, in the opinion of the Commission, is as fully subject to all the provisions of the present part as are general multilateral treaties drawn up in conferences

convened by the states concerned. Admittedly, there are a few treaties, like the Genocide Convention and the Convention on the Political Rights of Women, which were drawn up "within" an organization but the application of which is not particularly affected by the law of the organization. As, however, the present article does not exclude these treaties from the application of the provisions of Section III, but only makes the application of those provisions subject to the law of the organization concerned, it was not considered necessary to qualify the phrase "drawn up within an organization" for the purposes of the present article.

SECTION V: PROCEDURE

ARTICLE 49

Authority to denounce, terminate or withdraw from a treaty or suspend its operation

The rules contained in Article 4 relating to evidence of authority to conclude a treaty also apply, *mutatis mutandis*, to evidence of authority to denounce, terminate or withdraw from the treaty or to suspend its operation.

Commentary

Article 4 sets out the rules governing the cases in which organs or representatives of states may be required to furnish evidence of their authority to conclude a treaty. Competence under international law to invoke or establish the nullity of a treaty or to invoke a ground terminating, withdrawing from or suspending the operation of a treaty or to effect these acts is of the same nature as competence to conclude treaties, and it is normally exercised by corresponding state organs or representatives. Similarly, when an organ or representative of a state purports to exercise that competence, the other parties to the treaty are concerned to know that it or he possesses the necessary authority to do so. Accordingly, it seems both logical and necessary that the rules concerning the furnishing of evidence of authority contained in Article 4 should also apply, *mutatis mutandis*, to organs or representatives purporting to perform acts on behalf of their states with regard to the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty; and the present article so provides.

ARTICLE 50

Procedure under a right provided for in the treaty

1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty must be communicated, through the diplomatic or other official channel, to every other party to the treaty either directly or through the depositary.

2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect.

Commentary

(1) This article concerns the procedure for exercising a power of termination, withdrawal or suspension conferred which is expressed or implied in the treaty. The procedural act required is a notification and this is usually given in writing. If difficulties are to be avoided, it is essential that the notice should not only emanate from an authority competent for the purpose under the previous article, but should also be the subject of an official communication to the other interested states. It goes without saying that the notification should conform to any conditions laid down in the treaty itself; *e.g.*, the condition frequently found in treaties for recurrent periods of years that notice must be given not less than six months before the end of one of the periods.

(2) Paragraph 1 accordingly provides that a notice of termination etc. should be formally communicated to all the other parties either directly or through the depositary. It sometimes happens that in moments of tension the termination of a treaty or a threat of its termination may be made the subject of a public utterance not addressed to the state concerned. But it is clearly essential that such statements, at whatever level they are made, should not be regarded as a substitute for the formal act which diplomatic propriety and legal regularity require.

(3) Paragraph 2 deals with a small point of substance in that it provides that a notice of termination etc. may be revoked at any time before the date on which it takes effect. Thus, if a treaty is subject to termination by giving six months' notice, a notice given under the treaty may be revoked at any time before the expiry of the six months' period makes it effective. A query was raised in the Commission as to a possible need to protect the interests of the other parties to the treaty, should they have changed their position by taking preparatory measures in anticipation of the state's ceasing to be a party. The Commission, however, considered that the right to revoke the notice was really implicit in the provision that it was not to become effective until after the expiry of a certain period. The other parties would be aware that the notice was not to become effective until after the expiry of the period specified and would, no doubt, take that fact into account in any preparations which they might make.

ARTICLE 51

Procedures in other cases

1. A party alleging the nullity of a treaty, or a ground for terminating, withdrawing from or suspending the operation of a treaty otherwise than under a provision of the treaty, shall be bound to notify the other party or parties of its claim. The notification must:

(a) Indicate the measure proposed to be taken with respect to the treaty and the grounds upon which the claim is based;

(b) Specify a reasonable period for the reply of the other party or parties, which period shall not be less than three months except in cases of special urgency.

2. If no party makes any objection, or if no reply is received before the expiry of the period specified, the party making the notification may take the measure proposed. In that event it shall so inform the other party or parties.

3. If, however, objection has been raised by any other party, the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Subject to Article 47, the fact that a state may not have made any previous notification to the other party or parties shall not prevent it from invoking the nullity of or a ground for terminating a treaty in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty.

Commentary

(1) As already mentioned in previous commentaries, many members of the Commission regarded the present article as in some ways a key article for the application of the provisions of Part II, Sections II and III, of the law of treaties. They thought that some of the grounds upon which treaties may be considered invalid or terminated under those sections, if allowed to be arbitrarily asserted in face of objection from the other party, would involve real danger for the security of treaties. These dangers were, they felt, particularly serious in regard to claims to denounce or withdraw from a treaty by reason of an alleged breach by the other party or by reason of a fundamental change of circumstances. In order to minimize these dangers the Commission has sought to define as precisely and as objectively as possible the conditions under which the various grounds may be invoked. But whenever a party to a treaty invokes one of these grounds, the question whether or not its claim is justified will nearly always turn upon facts the determination or appreciation of which may be controversial. Accordingly, the Commission considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity or termination of a treaty may be arbitrarily asserted on the basis of the provisions of Sections II and III as a mere pretext for getting rid of an inconvenient obligation.

(2) States in the course of disputes have not infrequently used language in which they appeared to maintain that the nullity or termination of a treaty could not be established except by consent of both parties. This presentation of the matter, however, subordinates the application of the principles governing the invalidity and termination of treaties to the will of the objecting State no less than the arbitrary assertion of the nullity or termination of a treaty subordinates their application to the will of the claimant state. The problem is, of course, the familiar one of the settlement of differences between states. In the case of treaties there is the special consideration that the parties by negotiating and concluding the

treaty have brought themselves into a relationship in which there are particular obligations of good faith. Some members of the Commission were strongly in favour of recommending that the application of the present articles should be made subject to compulsory judicial settlement by the International Court of Justice, if the parties did not agree upon another means of settlement. Other members, however, pointed out that the Geneva Conventions on the Law of the Sea and the two Vienna Conventions respectively on Diplomatic and on Consular Relations did not provide for compulsory jurisdiction. While not disputing the value of recourse to the International Court of Justice as a means of settling disputes arising under the present articles, these members expressed the view that in the present state of international practice it would not be realistic for the Commission to put forward this solution of the procedural problem.

(3) After giving prolonged consideration to the question, the Commission concluded that its appropriate course was, first, to provide a procedure requiring a party which invoked the nullity of a treaty or a ground for terminating it to notify the other parties and give them a proper opportunity to state their views, and then, in the event of an objection being raised by the other party, to provide that the solution of the question should be sought through the means indicated in Article 33 of the Charter. In other words, the Commission considered that in dealing with this problem it should take as its basis the general obligation of states under international law to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" which is enshrined in Article 2, paragraph 3 of the Charter and the means for the fulfilment of which are indicated in Article 33 of the Charter.

(4) Paragraph 1 accordingly provides that a party "alleging" the nullity of the treaty or a ground for terminating it or suspending its operation shall put in motion a regular procedure under which it must first notify the other parties of its claim. In doing so it must indicate the measure which it proposes to take with respect to the treaty and the grounds upon which the claim is based, and must give the other parties a reasonable period within which to reply. Except in cases of special urgency, the period must not be less than three months. The second stage of the procedure depends on whether or not objection is raised by any party. If there is none or there is no reply before the expiry of the period, the party may take the measure proposed. If, on the other hand, objection is raised, the parties are required to seek a solution of the question through the means indicated in Article 33 of the Charter. The Commission did not find it possible to carry the procedural provisions beyond this point without becoming involved in some measure and in one form or another in compulsory solution of the question at issue between the parties. If after recourse to the means indicated in Article 33 the parties should reach a deadlock, it would be for each government to appreciate the situation and to act as good faith demands. There would also remain the right of every state, whether or not a Member of the United Nations,

under certain conditions, to refer the dispute to the competent organ of the United Nations.

(5) Even if, for the reasons previously mentioned in this commentary, the Commission felt obliged not to go beyond Article 33 of the Charter in providing for procedural checks upon arbitrary action, it considered that the establishment of the procedural provisions of the present article as an integral part of the law relating to the invalidity and termination of treaties would be a valuable step forward. The express subordination of the substantive rights arising under the provisions of Sections II and III to the procedure prescribed in the present article and the checks on unilateral action which the procedure contains would, it was thought, give a substantial measure of protection against purely arbitrary assertions of the nullity or termination of a treaty.

(6) Paragraph 4 merely provides that nothing in the article is to affect the position of the parties under any other provisions for the settlement of disputes in force between the parties, whether contained in the treaty itself or in any other instrument.

(7) Paragraph 5 reserves the right of any party to invoke the nullity or termination of a treaty by way of answer to a demand for its performance or to a complaint in regard to its violation, even though it may not previously have initiated the procedure laid down in the article for invoking the nullity or termination of the treaty. In cases of error, impossibility of performance or change of circumstances, for example, a state might well not have invoked the ground in question before being confronted with a complaint—perhaps even before a tribunal. Subject to the provisions of Article 47 concerning the effect of inaction in debarring a state from invoking a ground of nullity or termination, it would seem right that a mere failure to have made a prior notification should not prevent a party from raising the question of the nullity or termination of a treaty in answer to a demand for performance.

SECTION VI: LEGAL CONSEQUENCES OF THE NULLITY, TERMINATION OR
SUSPENSION OF THE OPERATION OF A TREATY

ARTICLE 52

Legal consequences of the nullity of a treaty

1. (a) The nullity of a treaty shall not as such affect the legality of acts performed in good faith by a party in reliance on the void instrument before the nullity of that instrument was invoked.

(b) The parties to that instrument may be required to establish as far as possible the position that would have existed if the acts had not been performed.

2. If the nullity results from fraud or coercion imputable to one party, that party may not invoke the provisions of paragraph 1 above.

3. The same principles shall apply with regard to the legal consequences of the nullity of a state's consent to a multilateral treaty.

Commentary

(1) This article deals only with the legal effects of the nullity of a treaty. It does not deal with any questions of responsibility or of redress arising from acts which are the cause of the nullity of a treaty. Fraud or coercion, for example, clearly raise questions of responsibility and redress as well as of nullity. But those questions fall outside the scope of the present part, which is concerned only with the nullity of the treaty.

(2) The Commission found that this article posed a problem of some delicacy. The nullity of the treaty in cases falling under Section II is a nullity *ab initio*, and yet, for reasons which are entirely justifiable in law, it may not have been invoked until after the treaty has been applied for some time. The problem is to determine the legal position of the parties on the basis that the treaty is a nullity but the parties have acted upon it as if it were not. The Commission considered that in cases where neither party was to be regarded as a wrong-doer with respect to the cause of nullity their legal positions should be determined on the basis of the principle of good faith, taking account of the nullity of the treaty.

(3) Paragraph 1 accordingly provides that the nullity of the treaty is not, as such, to affect the legality of acts performed by either party in good faith in reliance on the void instrument before its nullity is invoked. This means that the nullity of the treaty does not, as such, convert acts done in reliance on a right conferred by the treaty into wrongful acts for which the party in question has international responsibility. It does not mean that the acts are to be regarded as validated for the future and creative of continuing rights. On the contrary, sub-paragraph (b) expressly provides that the parties may be required to "establish as far as possible the position that would have existed if the acts had not been performed." In other words, the nullity of the treaty is for all other purposes to have its full legal consequences.

(4) Paragraph 2 for obvious reasons excepts from the rule in paragraph 1 a party whose fraud or coercion has been the cause of the nullity.

(5) Paragraph 3 merely applies the previous paragraphs also to the nullity of the consent of an individual state to a multilateral treaty.

ARTICLE 53

Legal consequences of the termination of a treaty

1. Subject to paragraph 2 below and unless the treaty otherwise provides, the lawful termination of a treaty:

- (a) Shall release the parties from any further application of the treaty;
- (b) Shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

2. If a treaty terminates on account of its having become void under Article 45, a situation resulting from the application of the treaty shall retain its validity only to the extent that it is not in conflict with the

norm of general international law whose establishment has rendered the treaty void.

3. Unless the treaty otherwise provides, when a particular state lawfully denounces or withdraws from a multilateral treaty:

(a) That state shall be released from any further application of the treaty;

(b) The remaining parties shall be released from any further application of the treaty in their relations with the state which has denounced or withdrawn from it;

(c) The legality of any act done in conformity with the provisions of the treaty prior to the denunciation or withdrawal and the validity of any situation resulting from the application of the treaty shall not be affected.

4. The fact that a state has been released from the further application of a treaty under paragraph 1 or 3 above shall in no way impair its duty to fulfil any obligations embodied in the treaty to which it is also subjected under any other rule of international law.

Commentary

(1) Article 53, like the previous article, does not deal with any question of responsibility or redress that may arise from acts which are the cause of the termination of a treaty, such as breaches of the treaty by one of the parties; it is limited to the legal consequences of a treaty's termination.

(2) Except in the case mentioned in paragraph 2 of the article, the formulation of the legal consequences of termination did not appear to the Commission to pose any particular problem. Paragraph 1 states that the termination releases the parties from any further application of the treaty, but does not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty. It is true that different opinions are sometimes expressed as to the exact legal basis, after a treaty has terminated, of situations resulting from executed provisions of the treaty. However, the Commission did not think it necessary to enter into this theoretical point for the purpose of formulating the provisions of the article, which appeared to it to follow logically from the legal act of the termination of the treaty.

(3) The particular case of a termination resulting from the emergence of a new rule of *jus cogens* which is contemplated in Article 45 did, on the other hand, appear to the Commission to be a little more complicated. The hypothesis is that a treaty or part of it becomes void and terminates by reason of its conflict with a new overriding rule of *jus cogens*, after having been valid and applied during some, perhaps quite long, period of time. Clearly, the invalidity which subsequently attaches to the treaty is not a nullity *ab initio*, but is one that dates from the emergence of the new rule of *jus cogens*. Accordingly, equity requires that, in principle, the rules laid down in paragraph 1 concerning the legal consequences of termi-

nation should apply. However, the rule of *jus cogens* being an overriding rule of international law, it seemed to the Commission that any situation resulting from the previous application of the treaty could only retain its validity after the emergence of the rule of *jus cogens* to the extent that it was not in conflict with that rule. Paragraph 2 accordingly so provides.

(4) Paragraph 3 merely adopts the provisions of paragraph 1 to the case of the withdrawal of an individual state from a multilateral treaty. It also takes account of the fact that some multilateral treaties do contain express provisions regarding the legal consequences of withdrawal from the treaty. Article XIX of the Convention on the Liability of Operators of Nuclear Ships,⁸⁵ for example, expressly provides that even after the termination of the convention, liability for a nuclear incident is to continue for a certain period with respect to ships the operation of which was licensed during the currency of the convention. Again some treaties, for example, the European Convention on Human Rights and Fundamental Freedoms,⁸⁶ expressly provide that the denunciation of the treaty shall not release the state from its obligations with respect to acts done during the currency of the convention.

(5) Paragraph 4 provides—*ex abundanti cautela*—that release from the further application of the provisions of a treaty does not in any way impair the duty of the parties to fulfil obligations embodied in the treaty to which they are also subjected under general international law or under another treaty. The point, although self-evident, was considered worth emphasizing in this article, seeing that a number of major conventions embodying rules of general international law, and even rules of *jus cogens*, contain denunciation clauses. A few conventions, such as the Geneva Conventions of 1949 for the humanising of warfare, expressly lay down that denunciation does not impair the obligations of the parties under general international law. But the majority of treaties provide for their own denunciation without prescribing that the denouncing state will remain bound by its obligations under general international law with respect to the matters dealt with in the treaty.⁸⁷

ARTICLE 54

Legal consequences of the suspension of the operation of a treaty

1. Subject to the provisions of the treaty, the suspension of the operation of a treaty:

(a) Shall relieve the parties from the obligation to apply the treaty during the period of the suspension;

(b) Shall not otherwise affect the legal relations between the parties established by the treaty;

⁸⁵ Signed at Brussels on 25 May 1962.

⁸⁶ Article 65, United Nations Treaty Series, Vol. 213, p. 252.

⁸⁷ *E.g.*, the Genocide Convention, United Nations Treaty Series, Vol. 78, p. 277.

(c) In particular, shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

2. During the period of the suspension, the parties shall refrain from acts calculated to render the resumption of the operation of the treaty impossible.

Commentary

(1) This article, like the two previous articles, does not touch the question of responsibility, but concerns only the direct legal consequences of the suspension of the operation of the treaty.

(2) Paragraph 1 adapts to the case of suspension the rules laid down in Article 53, paragraph 1, for the case of termination. The parties are relieved from the obligation to apply the treaty during the period of the suspension. But the relations established between them by the treaty are not otherwise affected by the suspension, while the legality of acts previously done under the treaty and of situations resulting from the application of the treaty are not affected.

(3) The very purpose of suspending the operation of the treaty rather than terminating it is to keep the treaty relationship in being. The parties are therefore bound in good faith to refrain from acts calculated to frustrate the treaty altogether and to render its resumption impossible.

CHAPTER III

QUESTION OF EXTENDED PARTICIPATION IN GENERAL MULTILATERAL TREATIES CONCLUDED UNDER THE AUSPICES OF THE LEAGUE OF NATIONS

18. On the recommendation of the Sixth Committee, the General Assembly, at its 1171st meeting, held on 20 November 1962, adopted the following resolution:⁸⁸

"The General Assembly,

"Taking note of paragraph 10 of the commentary to articles 8 and 9 of the draft articles on the law of treaties contained in the report of the International Law Commission covering the work of its fourteenth session,

"Desiring to give further consideration to this question,

"1. Requests the International Law Commission to study further the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, giving due consideration to the views expressed during the discussions at the seventeenth session of the General Assembly, and to include the results of the study in the report of the Commission covering the work of its fifteenth session;

"2. Decides to place on the provisional agenda of its eighteenth session an item entitled 'Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations'."

⁸⁸ Resolution 1766 (XVII).

19. In addition to the records of the discussions in the Sixth Committee, the Commission had before it a note by the Secretariat which contained a summary of those discussions (A/CN.4/159 and Add.1) and a report entitled "Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII)," submitted by the Special Rapporteur on the Law of Treaties (A/CN.4/162). The Commission examined the question at its 712th and 713th meetings.

20. As indicated by the terms of the resolution, the further study requested of the Commission relates to a question raised in paragraph 10 of the commentary to Articles 8 and 9 of the Commission's draft articles on the law of treaties. In that paragraph, the Commission drew attention to "the problem of the accession of new states to general multilateral treaties, concluded in the past, whose participation clauses were limited to specific categories of states." It pointed out that certain technical difficulties stand in the way of finding a speedy and satisfactory solution to this problem through the medium of the draft articles on the law of treaties which are now in course of preparation. Suggesting that consideration should therefore be given to having recourse to other more expeditious procedures, it observed:

"It seems to be established that the opening of a treaty to accession by additional states, while it requires the consent of the states entitled to a voice in the matter, does not necessitate the negotiation of a fresh treaty amending or supplementing the earlier one. One possibility would be for administrative action to be taken through the depositaries of the individual treaties to obtain the necessary consents of the states concerned in each treaty; indeed, it is known that action of this kind has been taken in some cases. Another expedient that might be considered is whether action to obtain the necessary consents might be taken in the form of a resolution of the General Assembly by which each Member State agreed that a specified list of multilateral treaties of a universal character should be opened to accession by new states. It is true that there might be a few non-member states whose consent might also be necessary, but it should not be impossible to devise a means of obtaining the assent of these states to the terms of the resolution."⁸⁹

21. During the discussion of the Commission's Report, members of the Sixth Committee had asked for particulars of the treaties in question. The Secretariat had accordingly submitted a working paper⁹⁰ setting out the multilateral agreements concluded under the auspices of the League of Nations in respect of which the Secretary-General acts as depositary and which are not open to new states. Part A of this list gave twenty-six agreements which have entered into force, while Part B gave five agreements which have not yet done so. As over a quarter of a century has now elapsed without the treaties mentioned in Part B receiving the neces-

⁸⁹ Official Records of the General Assembly, 17th Sess., Supp. No. 9 (A/5209 and Corr. 1) [57 A.J.I.L. 190, 215-216 (1963)].

⁹⁰ *Ibid.*, Annexes, Agenda Item 76, Doc. A/C.6/L.498.

sary support to bring them into force, the Commission decided to confine its present study to the treaties mentioned in Part A.

22. The Commission interprets the request addressed to it by the General Assembly as relating only to the technical aspects of the question of extended participation in League of Nations treaties. In the present study, therefore, it will examine this question generally with reference to the twenty-six treaties given in Part A of the Secretariat's list, without considering how far any particular treaty may or may not still retain its usefulness. However, in the course of the discussion it was stressed that quite a number of the treaties given in Part A may have been overtaken by modern treaties concluded during the period of the United Nations, while some others may have lost much of their interest for states with the lapse of time. It was also pointed out that no re-examination of the treaties appears to have been undertaken with a view to ascertaining whether, quite apart from their participation clauses, they may require any changes of substance in order to adapt them to contemporary conditions. The Commission accordingly decided to bring this aspect of the matter to the attention of the General Assembly, and to suggest that in due course a process of review should be initiated.

23. Five of the twenty-six treaties have rigid participation clauses, being confined to the states which were represented at or invited to the conference which drew up the treaty.⁹¹ These treaties, in short, appear to have been designed to be closed treaties. The remaining twenty-one treaties were clearly intended to be open-ended, the participation clause being so worded as to allow the participation of any state not represented at the conference to which a copy of the treaty might be communicated for that purpose by the Council of the League. It is only the fact of the dissolution of the League and its Council and the absence of any organ of the United Nations exercising the powers previously exercised by the Council under the treaties which has had the effect of turning them into closed treaties.

24. The arrangements made between the League of Nations and the United Nations for the transfer of certain functions, activities and assets of the League to the United Nations covered, *inter alia*, functions and powers belonging to the League of Nations under international agreements. At its final session the League Assembly passed a resolution whereby it recommended that the Members of the League should facilitate in every way the assumption without interruption by the United Nations of functions and powers entrusted to the League under international agreements of a technical and non-political character, which the United Nations was willing to maintain.⁹² The General Assembly, for its part, in Section I of Resolution 24 (I) of 12 February 1946, reserved "the right

⁹¹ In one case, the Convention Regarding the Measurement of Vessels Employed in Inland Navigation, the treaty was also open to states having a common frontier with one of the states invited to the Conference.

⁹² League of Nations, Official Journal, Special Supplement No. 194, p. 57 (Resolution of 18 April 1946).

to decide, after due examination, not to assume any particular function or power, and to determine which organ of the United Nations or which specialized agency brought into relationship with the United Nations should exercise each particular function or power assumed." However, having placed on record that by this resolution those Members of the United Nations which were parties to the instruments in question were assenting to the action contemplated and would use their good offices to secure the co-operation of the other parties to those instruments so far as was necessary, the General Assembly declared its willingness in principle to assume the exercise of certain functions and powers previously entrusted to the League; in the light of this declaration it adopted three decisions, A, B and C, which are contained in Resolution 24 (I).⁹³

25. Decision A recalled that under certain treaties the League had, for the general convenience of the parties, undertaken to act as a custodian of the original signed texts and to "perform certain functions, pertaining to a secretariat, which do not affect the operation of the instruments and do not relate to the substantive rights and obligations of the parties." Having then set out some of the main functions of a depositary, the General Assembly declared the willingness of the United Nations to "accept the custody of the instruments and to charge the Secretariat of the United Nations with the task of performing for the parties the functions, pertaining to a secretariat, formerly entrusted to the League of Nations."⁹⁴ It may here be remarked that, purely secretarial though the functions of the Secretariat of the League may have been as depositary of the treaties, it was invested with these functions by the parties to each treaty, not by the League of Nations, for the appointment of the League Secretariat as depositary was effected by a provision of the "final clauses" of each treaty. The transfer of the depositary functions from the Secretariat of the League to that of the United Nations was therefore a modification of the final clauses of the treaties in question. The League Assembly, it is true, had directed its Secretary-General to transfer to the Secretariat of the United Nations for safe custody and performance of the functions previously performed by the League Secretariat all the texts of the League treaties. But although the General Assembly, as already mentioned, emphasized the assent given to this transfer by those Members of the United Nations which were also parties to the particular treaties, it did not seek to obtain the agreement of all the parties to the various treaties. It simply assumed the functions of the depositary of these treaties by Resolution 24 (I) and charged the Secretariat with the task of carrying them out. No objection was raised by any party and the Secretary-General has acted as the depositary for all these treaties ever since the passing of the resolution.⁹⁵

⁹³ See "Resolutions of the General Assembly concerning the Law of Treaties" (A/CN.4/154), pp. 15-17.

⁹⁴ See *ibid.* (A/CN.4/154), p. 16.

⁹⁵ See Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7), pp. 65-68.

.26. On the other hand, decision A contained in Resolution 24 (I) underlined the purely secretarial character of the depositary functions transferred to the Secretariat, pointing out that they did not affect "the operation of the instruments" or relate to the "substantive rights and obligations of the parties." Accordingly, in the case of closed treaties, including those where the closure has resulted solely from the disappearance of the Council of the League, the Secretary-General has not considered it within his powers under the terms of the resolution to accept signatures, ratifications or accessions from states not covered by the participation clause.

27. Decision B of the resolution dealt with instruments of a "technical and non-political character" containing provisions "relating to the substance of the instruments" whose due execution was dependent on the continued exercise of functions and powers which those instruments conferred upon organs of the League. The General Assembly expressed its willingness "to take the necessary measures to ensure the continued exercise of these functions and powers" and referred the matter to the Economic and Social Council for examination. Decision C dealt with functions and powers entrusted to the League by instruments having a political character. With regard to these instruments the General Assembly decided that it would either itself examine, or would submit to the appropriate organ of the United Nations, any request from the parties to an instrument that the United Nations should assume the exercise of the functions or powers entrusted to the League.

28. In pursuance of decisions B and C, the General Assembly between 1946 and 1953 approved seven protocols which amended earlier multilateral treaties and transferred the functions or powers formerly exercised by the League to organs of the United Nations. These protocols dealt with various treaties relating to: (1) opium and dangerous drugs (United Nations Treaty Series, Vol. 12, p. 179); (2) economic statistics (United Nations Treaty Series, Vol. 20, p. 229); (3) circulation of obscene publications (United Nations Treaty Series, Vol. 30, p. 3); (4) the white slave traffic (United Nations Treaty Series, Vol. 30, p. 23); (5) circulation of and traffic in obscene publications (United Nations Treaty Series, Vol. 46, p. 169); (6) traffic in women and children (United Nations Treaty Series, Vol. 53, p. 13); and (7) slavery (United Nations Treaty Series, Vol. 182, p. 51). In all of these protocols, in addition to making any necessary amendments of substance, the opportunity was taken of replacing the participation clause of the earlier treaties with a clause opening them to accession by any Member of the United Nations and by any non-Member state to which the Economic and Social Council decides officially to communicate a copy of the amended treaty. It is for this reason that the League of Nations treaties covered by the protocols are not included in Part A of the Secretariat's list of multilateral agreements which are not open to new states.

29. When the problem of extending the right to participate in closed League of Nations treaties was taken up in the Sixth Committee, certain

delegations—Australia, Ghana and Israel⁹⁶—joined together in introducing a draft resolution designed to achieve this objective. This draft resolution in its final form, after recalling the previously quoted passage from the Commission's Report for 1962 and Resolution 24 (I), proposed that the General Assembly should: (1) request the Secretary-General to ask the parties to the conventions listed in an annex to the resolution (*i.e.*, the conventions listed in Part A of the Secretariat's working paper) to state, within a period of twelve months from the date of the inquiry, whether they objected to the opening of those of the conventions to which they were parties for acceptance by any state Member of the United Nations or member of any specialized agency; (2) authorize the Secretary-General, if the majority of the parties to a convention had not within the period referred to in paragraph 1 objected to opening that convention to acceptance, to receive in deposit instruments of acceptance thereto which are submitted by any state Member of the United Nations or member of any specialized agency; (3) recommend that all states parties to the conventions listed in the annex of the resolution should recognize the legal effect of instruments of acceptance deposited in accordance with paragraph 2, and communicate to the Secretary-General as depositary their consent to participation in the conventions of states so depositing instruments of acceptance; (4) request the Secretary-General to inform Members of communications received by him under the resolution.

30. The sponsors of the draft resolution explained that the scheme proposed in their draft contemplated three stages: first, an inquiry to the parties whether they objected to opening a convention; second, an authorization to the Secretary-General to receive new instruments of acceptance; and third, a recommendation that the legal effect of new instruments deposited should be recognized. The first two stages were, they considered, purely administrative in character and did not effect legal relationships. The third stage, that of recognition of the legal effects of newly deposited instruments, would be only a recommendation and each state would be left to determine the method of such recognition in the light of the requirements of its own internal law.

31. During the debate in the Sixth Committee certain reservations were expressed as to the procedure proposed in the joint resolution. Some representatives felt that what was really involved in the first stage was the agreement of the parties to change a rule on participation which had been laid down in the conventions, and that for reasons of international and constitutional law consent to such a change could not be given informally, or tacitly by a mere failure to object. Some representatives stated that the course which was legally preferable in order to avoid uncertainty and constitutional difficulties was to prepare a protocol of amendment of the conventions, as had already been done in other cases by

⁹⁶ Official Records of the General Assembly, 17th Sess., Annexes, Agenda Item 76, Doc. A/C.6/L.504/Rev.2.

the General Assembly.⁹⁷ The sponsors of the three-Power draft and some other delegations, however, expressed the view that a requirement of express consent might mean a delay of some years in the participation of new states, and that such a requirement was unnecessary.

32. Some representatives considered that the fact that some new states might have become bound by the League treaties through succession to parties made it difficult to determine the list of the present-day parties to the treaties, as would need to be done under the draft resolution. Another representative thought that inviting new states to accede to the conventions ignored the possibility that they might have become parties by succession and that such an invitation might prejudice the work of the International Law Commission on state succession. The sponsors, on the other hand, took the view that the question of opening the treaties for new accessions is quite distinct from the succession of states, and could not prejudice the Commission's work on the latter question.

33. A number of representatives also expressed the view that, if participation in the treaties was to be opened to additional states, it should not be restricted to states Members of the United Nations or of a specialized agency, as was at present provided in the draft resolution.

34. Certain other points were made with respect to the draft resolution. One representative observed that its provision for a simple majority as sufficient to open the treaties to additional states appeared to be inconsistent with the requirement of a two-thirds majority in Article 9, paragraph 1 (a), of the draft articles on the law of treaties provisionally adopted by the Commission in 1962. Another representative thought that it should have been made clear that it would not be permissible for acceding states to formulate reservations since he doubted whether the recent practice concerning reservations could be applied to the older treaties.

35. The Commission, as requested, has given due consideration to the views expressed during the discussions of this question at the Seventeenth Session of the General Assembly. It does not, however, understand its task to be to comment in detail upon these views, but to study the technical aspects of the question generally and to report.

36. The first point to be examined is the relation between the present question and that of the succession of states to League of Nations treaties, since it has a definite bearing also on the technical aspects of opening these treaties to participation by additional states. Thus, the joint draft resolution would require the Secretary-General to "ask the parties to the conventions listed in the annex" to state within a period of twelve months whether they objected to the "opening of those conventions to which they are parties" etc.; and his authority to receive instruments of acceptance in deposit from additional states would only arise if a "majority of the parties to a convention" had raised no objection to the opening of the convention. In other words, the identification of the parties to the treaties would be necessary both for the purposes of the inquiry and for determin-

⁹⁷ See protocols mentioned in paragraph 28 above.

ing when the authority of the Secretary-General to receive instruments from additional states came into force. Similarly, if the procedure of an amending protocol were to be used, it would be necessary for a stated number or proportion of the parties to each League treaty to become parties to the amending protocol in order to bring the latter into force. Again, therefore, there would be a need to identify the parties to the League treaties.

37. The present practice of the Secretary-General, as appears from the Secretariat memorandum on the succession of states in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150), is to inquire from each new state whether it recognizes that it is bound by United Nations treaties, and by League treaties amended by United Nations protocols, when any of these treaties had been made applicable to its territory by its predecessor state.⁹⁸ In consequence of these inquiries a number of new states have signified their attitudes towards certain of the League treaties. But that practice has not previously extended to the League treaties now under consideration. According to the information contained in the Secretariat memorandum, the position with regard to these treaties is that Pakistan has of its own accord made communications to the Secretary-General stating that it considers itself a party to three of the treaties, while Laos has done the same with regard to one treaty. These communications have been notified to the governments concerned.

38. The precise legal position of a new state whose territory was formerly under the sovereignty of a state party or signatory to a League treaty is a question which involves an examination of such principles of international law as may govern the succession of states to treaty rights or obligations. Clearly, if a certain view is taken of these principles, participation in the League treaties may be open to a considerable number of the new states without any special action being taken through the United Nations to open the treaties to them. But a number of points of some difficulty may have to be decided before it can be seen how far the problem is capable of being solved through principles of succession. In many of the League treaties, for example, a substantial proportion of the signatories have not proceeded to ratification and the point arises as to what may be the position of a new state whose predecessor in the territory was a signatory but not a party to the treaty. The Commission has only recently begun its study of this branch of international law and nothing in the preceding observations is to be understood as in any way prejudging its views on any aspects of the question of succession to treaties. The Commission is here concerned only to point out that, owing to some of the difficulties, the principles governing the succession of states to treaty rights or obligations can scarcely be expected to provide either a speedy or a complete solution of the problem now under consideration.

⁹⁸ See paragraphs 10-13 of memorandum.

PROTOCOL OF AMENDMENT

39. This procedure, if it has the merit of avoiding any possible constitutional difficulty, also has certain disadvantages. In the first place, the procedure adopted in the seven protocols mentioned in paragraph 28 above is somewhat complicated. A protocol is drawn up under which the parties to the protocol undertake that as between themselves they will apply the amendments to the League treaty which are set out in an annex to the protocol. The protocol is open to signature or acceptance only by the states parties to the League treaty and is expressed to come into force when any two such states have become parties to the protocol. On the other hand, the amendments to the League treaty contained in the annex to the protocol do not come into force until a majority of the parties to the League treaty have become parties to the protocol. Amongst the amendments are provisions making the League treaty, as amended by the protocol, open to accession by any Member of the United Nations and by any non-Member state to which a designated organ of the United Nations shall decide officially to communicate a copy of the amended treaty. Thus, under the procedure of the United Nations protocols there are different dates for the entry into force of the protocol itself and of the amendments to the League treaty. Moreover, the parties to the original treaty become parties to the amended treaty by subscribing to the protocol, whilst other states do so by acceding to the amended treaty.

40. In the second place, the protocol operates only *inter se* the parties to it. This is unavoidable, since under the existing law, unless the treaty expressly so provides, a limited number of the parties, even if they constitute a majority, cannot amend the treaty so as to effect its application to the remaining parties without the latter's consent. But it means that a protocol of amendment provides an incomplete solution to the problem of extending participation in League of Nations treaties to additional states, for accession to the amended treaty will not establish any treaty relations between the acceding states and parties to the original treaty which have failed to subscribe to the protocol. There is also a possibility that there may be some delay before the number of signatures or acceptances necessary to bring the required amending provision into force are obtained. Consequently, even if the use of a simplified form of protocol were to be found possible, this procedure would still have certain drawbacks.

THE THREE-POWER DRAFT RESOLUTION

41. When the Commission suggested that consideration might be given to the possibility of solving the present problem by administrative action taken through the depositary of the treaties, it had in mind that today international agreements are concluded in a great variety of forms, and that in multilateral treaties communications through the depositary are a normal means of obtaining the views of the interested states in matters touching the operation of the final clauses. From the point of view of

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international law, the only essential requirement for the opening of a treaty to participation by additional states is, it is believed, the consent of the parties and, for a certain period of time, of the states which drew up the treaty. Constitutional or political considerations may affect the decision of the interested states as to the particular form in which that consent should be expressed in any given case. But in principle the agreement of the interested states may be expressed in any form which they themselves may determine.

42. The three-Power draft resolution, evidently starting from this standpoint, seeks to obtain the necessary consents by means of inquiries addressed to the parties to the various treaties by the Secretary-General in his capacity as depositary of the treaties. These inquiries would be in a negative form asking the parties to each treaty whether they have any objection to its being opened for acceptance by any state Member of the United Nations or of any specialized agency. In order to obviate delay, the resolution contemplates that the parties should be invited to reply within twelve months and that a failure to reply within that period should be treated as equivalent to an absence of objection for the purpose only of determining whether the Secretary-General should be authorized to receive in deposit instruments of acceptance from Members of the United Nations or of a specialized agency. The authority of the Secretary-General to receive instruments in deposit is to arise at the end of the twelve months' period if a majority of the parties have not up to then made any objection. But such "tacit consent" of the majority would not, it appears, suffice to give legal effect to the instruments of acceptance deposited with the Secretary-General even vis-à-vis those parties whose consent is thus presumed. For paragraph 3 of the draft resolution recommends all the parties also to recognize the legal effect of the instruments and to communicate to the Secretary-General their consent to the participation of the states concerned in the treaties.

43. The various points made in the Sixth Committee with regard to the three-Power draft resolution have been noted in paragraphs 30-34 above, and the question of the bearing of state succession upon the identification of the parties to the League treaties has already been discussed in paragraphs 36-37. It is for the Sixth Committee finally to appraise the legal merits or demerits of that draft resolution as a means of solving the present problem. The Commission will therefore limit itself to certain observations of a general nature with a view to assisting the Sixth Committee in arriving at its decision as to the best procedure to adopt in all the circumstances of the case.

44. The procedure proposed in the three-Power draft resolution, though it offers the prospect of somewhat speedier action than might be obtainable through an amending protocol, does not avoid some of the latter's other defects. Its entry into effect is made dependent on the tacit consent of a "majority of the parties," thereby appearing to require an exhaustive determination of the states ranking as parties in order to ascertain the date when the procedure begins to become effective. In this connexion, it may

be noted that the later United Nations protocols seek to minimize the difficulty arising from the need to identify the parties to League treaties by making the entry into force of the amendments dependent upon the acceptances of a specified number, rather than of a majority of the parties.

45. At the same, it may be pointed out that the requirement of a simple majority laid down in the draft resolution, as in the United Nations protocols, is not in conflict with the rule formulated in Article 9, paragraph 1 (a), of the Commission's draft articles, which contemplates a two-thirds majority for the opening of multilateral treaties to additional participation. That rule was proposed by the Commission *de lege ferenda* and under it the consent of a two-thirds majority would operate with binding effect for all the parties. But under the three-Power draft resolution and the United Nations protocols the consent of a simple majority of the parties modifies the treaty only with effect *inter se* the parties which give their consent.

46. Finally, it is necessary to examine the point made in the Sixth Committee as to possible constitutional objections to the procedure of tacit consent. Under the draft resolution, as its sponsors pointed out, tacit consent would operate only to establish the authority of the Secretary-General to receive instruments in deposit and it would be open to each party to follow whatever procedure it wished for the purpose of "recognizing" the legal force and effect of the instruments deposited with the Secretary-General. If this feature of the resolution may diminish the force of the constitutional objections, it also involves a certain risk of delaying the completion of the procedure and of obtaining only incomplete results. The Legal Counsel, at the 748th meeting of the Sixth Committee, put the matter on somewhat broader grounds.⁹⁹ "A number of the protocols," he said, "made more extensive amendments than merely opening the old treaties to new parties, and hence a formal procedure for consent was suitable; but where the only object is to widen the possibilities for accession the Committee may find that no such formality is necessary."

47. A participation clause, as already pointed out, is one of the "final clauses" of a treaty and is, in principle, on the same footing as a clause appointing a depositary. It differs, it is true, from a depositary clause in that it affects the scope of the operation of the treaty and therefore the substantive obligations of the parties. But it is a final clause and it is one which furnishes the basis upon which the constitutional processes of ratification, acceptance and approval by individual states take place. In the present instance the relation between the participation clauses of the League treaties and the constitutional processes of the individual parties may, it is thought, be significant. In twenty-one out of the twenty-six treaties, as already mentioned, the participation clauses were so formulated as to make the treaty open to participation by any Member of the League and any additional states to which the Council of the League should communicate a copy of the treaty for that purpose. Thus, not only did the negotiating representatives intend, when they drew up the treaty, to

⁹⁹ A/C.6/L.506.

authorize the Council of the League to admit any further state to participation in the treaty, but each party when it gave its definitive consent to the treaty expressly conferred that authority upon the Council. In short, in the case of these twenty-one treaties, any state organ which ratified, consented to or approved the treaty in order to enable the state to become a party by so doing gave its express consent to the admission to the treaty not only of any Member of the League but of any further state at the decision of an external organ, the Council of the League. This being so, any possible constitutional objection to the use of a less formal procedure for modifying the participation clause would seem to be of much less force in the case of these treaties. Further, the very fact that the remaining five treaties were originally designed as closed treaties suggests that they may not be of great interest to new states today, and it may be found, on examination, that the problem in fact concerns only the twenty-one treaties and, perhaps, only a very limited number of these treaties.

48. The special form of the participation clauses of the twenty-one treaties further suggests that it may be worth examining the possibility of dealing with the problem on the basis that what is involved is a simple adaptation of the participation clauses to the change-over from the League to the United Nations. The case may not be identical with that of the transfer of the depositary functions from the League to the United Nations, in that the participation clauses touch the scope of the operation of the treaties. But consideration should, it is thought, be given to the possibility of devising some procedure analogous to that used in the case of the depositary functions.

ALTERNATIVE SOLUTION

49. The special form of the participation clauses of the twenty-one treaties suggested to the Commission that it might be worth examining the possibility of dealing with the problem along the lines adopted in 1946 with regard to the transfer of the depositary functions of the League Secretariat to the Secretariat of the United Nations. The case might not be identical in that the participation clauses touch the scope of the operation of the treaty and that the functions of the Council of the League under those clauses were not purely administrative. But the Commission felt that in essence what was involved was an adaptation of the participation clauses of the League treaties to the change-over from the League to the United Nations. On this basis the General Assembly, by virtue of all the arrangements made in 1946 for the transfer of powers and functions from the League to the United Nations, would be entitled to designate an organ of the United Nations to act in the place of the Council of the League, and to authorize the organ so designated to exercise the powers of the Council of the League in regard to participation in the treaties in question. If this course were to be adopted, it would seem appropriate that the resolution of the General Assembly designating an organ of the United Nations to fulfil the League Council's functions under the treaties should: (a) recall

the recommendation of the League Assembly that Members of the League should facilitate in every way the assumption by the United Nations of functions and powers entrusted to the League under international agreements of a technical and non-political character; (b) recite that by the resolution those Members of the United Nations which are parties to the League treaties in question give their assent to the assumption by the designated organ of the functions hitherto exercised by the League Council under the treaties in question; and (c) request the Secretary-General, as depositary of the treaties, to communicate the terms of the resolution to any party to the treaties not a Member of the United Nations.

CONCLUSIONS

50. The conclusions resulting from the Commission's study of the question referred to it by the General Assembly may, therefore, be summarized as follows:¹⁰⁰

(a) The method of an amending protocol and the method of the three-Power draft resolution both have their advantages and disadvantages. But both methods take account of the applicable rule of international law that the modification of the participation clauses requires the assent of the parties to the treaties, and the Commission does not feel called upon to express a preference between them from the point of view of the constitutional issues under internal law. At the same time, it has pointed out that the special form of the participation clauses of the treaties under consideration appears to diminish the force of the possible constitutional difficulties which were referred to in the Sixth Committee.

(b) While the topic of state succession has a certain relevance in the present connexion and is a complicating element in the procedures of amending protocol and three-Power draft resolution, the adoption of these procedures need not prejudice the work of the Commission on this topic or preclude the use of either of those procedures, if so desired.

(c) However, in the light of the arrangements which were made on the occasion of the dissolution of the League of Nations and the assumption by the United Nations of some of its functions and powers in relation to treaties concluded under the auspices of the League, the General Assembly appears to be entitled, if it so desires, to designate an organ of the United Nations to assume and fulfil the powers which, under the participation clauses of the treaties in question, were formerly exercisable by the Council of the League. This would provide, as an alternative to the other two methods, a simplified and expeditious procedure for achieving the object of extending the participation in general multilateral treaties concluded under the auspices of the League. It would, indeed, be administrative action such as was envisaged by the Commission in 1962, and would avoid some of the difficulties attendant upon the use of the other methods.

¹⁰⁰ For the various views expressed by the members of the Commission during the discussion, see A/CN.4/SR.712 and 713.

(d) Even a superficial survey of the twenty-six treaties listed in the Secretariat memorandum indicates that today a number of them may hold no interest for states. The Commission suggests that this aspect of the matter should be further examined by the competent authorities. Subject to the outcome of this examination, the Commission reiterates its opinion that the extension of participation in treaties concluded under the auspices of the League is desirable.

(e) The Commission also suggests that the General Assembly should take the necessary steps to initiate an examination of the general multi-lateral treaties in question with a view to determining what action may be necessary to adapt them to contemporary conditions.

CHAPTER IV

PROGRESS OF WORK ON OTHER QUESTIONS UNDER STUDY BY THE COMMISSION

A. STATE RESPONSIBILITY: REPORT OF THE SUB-COMMITTEE

51. The Commission considered this question at its 686th meeting. Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility, introducing the Sub-Committee's report (A/CN.4/152),¹⁰¹ drew special attention to the conclusions set out and the programme of work proposed in the report.

52. All the members of the Commission who took part in the discussion expressed agreement with the general conclusions of the report, *viz.*: (1) that, in an attempt to codify the topic of state responsibility, priority should be given to the definitions of the general rules governing the international responsibility of the state, and (2) that in defining these general rules the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the persons or property of aliens, should not be overlooked and that careful attention should be paid to the possible repercussions which developments in international law may have had on responsibility.

53. Some members of the Commission felt that the emphasis should be placed in particular on the study of state responsibility in the maintenance of peace, in the light of the changes which have occurred in recent times in international law. Other members considered that none of the fields of responsibility should be neglected and that the precedents existing in all the fields in which the principle of state responsibility had been applied should be studied.

54. The members of the Commission also approved the programme of work proposed by the Sub-Committee, without prejudice to their position on the substance of the questions set out in that programme. Thus, during the discussion, doubts or reservations were expressed with regard to the solution to be given to certain problems arising in connexion with some of the questions listed. In this connexion, it was pointed out that these questions were intended solely to serve as an *aide-mémoire* for the Special

¹⁰¹ See Annex I to the present report.

Rapporteur when he came to study the substance of particular aspects of the definition of the general rules governing the international responsibility of states, and that the Special Rapporteur would not be obliged to pursue one solution in preference to another in that respect. The Sub-Committee's suggestion that the study of the responsibility of other subjects of international law, such as international organizations, should be left aside also met with the general approval of the members of the Commission.

55. After having unanimously approved the report of the Sub-Committee on State Responsibility, the Commission appointed Mr. Ago as Special Rapporteur for the topic of state responsibility. The Secretariat will prepare certain working papers on this question.

B. SUCCESSION OF STATES AND GOVERNMENTS:
REPORT OF THE SUB-COMMITTEE

56. The report of the Sub-Committee on the Succession of States and Governments (A/CN.4/160)¹⁰² was discussed by the Commission at its 702nd meeting. Mr. Manfred Lachs, Chairman of the Sub-Committee, introduced the report and explained the Sub-Committee's conclusions and recommendations. All the members of the Commission who took part in the discussion fully approved the delimitation of the topic and the approach thereto, the proposed objectives, and the plan of work drawn up.

57. The Commission considered that the priority given to the study of the question of state succession was fully justified. The succession of governments will, for the time being, be considered only to the extent necessary to supplement the study on state succession. During the discussion, several members of the Commission stressed the special importance which the problems of state succession had at the present time for the new states and for the international community, in view of the modern phenomenon of decolonization; in consequence they emphasized that, in the codification of the topic, special attention should be given to the problems of concern to the new states.

58. The Commission approved the Sub-Committee's recommendations concerning the relationship between the topic of state succession and other topics on the Commission's agenda. Succession in the matter of treaties will therefore be considered in connexion with the succession of states rather than in the context of the law of treaties. Furthermore, the Commission considered it essential to establish some degree of co-ordination between the Special Rapporteurs on, respectively, the law of treaties, state responsibility, and the succession of states, in order to avoid any overlapping in the codification of these three topics.

59. The objectives proposed by the Sub-Committee—*viz.*, a survey and evaluation of the present state of the law and practice in the matter of state succession and the preparation of draft articles on the topic in the light of new developments in international law—were approved by all the

¹⁰² See Annex II to the present report.

Commission's members. Some considered that the existing general rules and practice should be adapted to present-day situations and aspirations, and that in consequence the codification of state succession would necessarily include, to a large extent, provisions belonging rather to the progressive development of international law. Other members of the Commission, while recognizing that account would have to be taken of the new spirit and of the new aspects which were becoming manifest in international relations, shared the view that first there should be thorough research into past practice before one could undertake the creation of such elements of new law as were necessary.

60. The broad outline, the order of priority of the headings and the detailed division of the topic were agreed to by the Commission, it being understood that its approval was without prejudice to the position of each member with regard to the substance of the questions included in the programme. The programme lays down guiding principles to be followed by the Special Rapporteur, who, however, will not be obliged to conform to them in his study in every detail.

61. The Commission, after having unanimously approved the Sub-Committee's report, appointed Mr. Lachs as Special Rapporteur on the topic of the succession of states and governments. The Commission adopted a suggestion by the Sub-Committee that governments should be reminded of the note circulated by the Secretary-General asking them to furnish him with the text of all treaties, laws, decrees, regulations, diplomatic correspondence, etc., relating to the process of succession and affecting states which have attained independence since the Second World War.¹⁰³ At the same time, the Commission suggested that the deadline for the communication of comments by governments should be prolonged to 1 January 1964. The Secretariat will circulate the texts of the comments submitted by governments in response to the said circular note and will prepare an analysis of these comments and a memorandum on the practice followed, in regard to the succession of states, by the specialized agencies and other international bodies.

C. SPECIAL MISSIONS

62. The Commission discussed this topic at its 711th and 712th meetings. It had before it a memorandum prepared by the Secretariat (A/CN.4/155). During the discussion it was agreed to resume consideration of the topic of special missions in conformity with Resolution 1687 (XVI) adopted by the General Assembly on 18 December 1961. As the rules regarding permanent missions had been codified by the Vienna Convention on Diplomatic Relations, 1961, the Commission expressed the belief that it should now draw up the rules applicable to special missions to supplement the codification of the law relating to diplomatic relations among states.

63. With regard to the scope of the topic, the members agreed that the topic of special missions should also cover itinerant envoys, in accordance

¹⁰³ Official Records of the General Assembly, 17th Sess., Supp. No. 9 (A/5209 and Corr. 1), par. 73 [57 A.J.I.L. 262 (1963)].

with its decision at its 1960 session.¹⁰⁴ At that session the Commission had also decided ¹⁰⁵ not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between states and inter-governmental organizations. At the present session, the question was raised again, with particular reference to conferences convened by states. Most of the members expressed the opinion, however, that for the time being the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences.

64. With regard to the approach to the codification of the topic, the Commission decided that the Special Rapporteur should prepare a draft of articles. These articles should be based on the provisions of the Vienna Convention on Diplomatic Relations, 1961, but the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions. In addition, the Commission thought that the time was not yet ripe for deciding whether the draft articles on special missions should be in the form of an additional protocol to the Vienna Convention, 1961, or should be embodied in a separate convention or in any other appropriate form, and that the Commission should await the Special Rapporteur's recommendations on that subject.

65. Lastly, at its 712th meeting, the Commission appointed Mr. Milan Bartoš as Special Rapporteur for the topic of special missions.

D. RELATIONS BETWEEN STATES AND INTER-GOVERNMENTAL ORGANIZATIONS

66. In accordance with the Commission's request at its Fourteenth Session, the Special Rapporteur, Mr. El-Erian, submitted at the present session a first report (A/CN.4/161 and Add.1), consisting of a preliminary study on the scope of and approach to the topic of "Relations between States and inter-governmental organizations." He submitted also a working paper (A/CN.4/L.103) on the scope and order of future work on the subject. At its 717th and 718th meetings, the Commission had a first general discussion of this report and asked the Special Rapporteur to continue his work and prepare a second report containing a set of draft articles, with a view to further consideration of the question at a later stage.

CHAPTER V

OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. CO-OPERATION WITH OTHER BODIES

67. The Commission considered the item concerning co-operation with other bodies at the 715th meeting.

¹⁰⁴ Yearbook of the International Law Commission, 1960, Vol. I, 565th meeting, par. 26.

¹⁰⁵ *Ibid.*, par. 25.

68. The Inter-American Juridical Committee was represented by Mr. José Joaquín Caicedo Castilla, and the Asian-African Legal Consultative Committee by Mr. H. W. Tambiah; they both addressed the Commission.

69. The Commission, after considering the invitation addressed to it by the Secretary of the Asian-African Legal Consultative Committee, decided to ask its Chairman, Mr. Eduardo Jiménez de Aréchaga, to attend the Committee's next session in the capacity of observer, or, if he was unable to do so, to appoint another member of the Commission or its Secretary to represent the Commission at that session. The next session of the Asian-African Legal Consultative Committee will open at Cairo on 15 February 1964, and will last for two weeks.

70. The Commission expressed the hope that the relevant regulations of the United Nations would be so adapted as to ensure a better exchange of documentation between the Commission and the bodies with which it co-operates. The Commission further recommended that the Secretariat should make whatever arrangements were needed for the purpose.

B. PROGRAMME OF WORK, DATE AND PLACE OF THE NEXT SESSION

71. The Commission adopted the following programme of work for 1964: (1) law of treaties (application, interpretation and effects of treaties); (2) special missions (first report with draft articles); (3) relations between states and inter-governmental organizations (first report on general directives (A/CN.4/161 and Add.1) and another report with draft articles); (4) state responsibility (preliminary report, if ready); (5) succession of states and governments (preliminary report on the aspect of treaties, if ready).

72. Since it will not be possible to deal with all items at the regular session, which should be mainly devoted to the law of treaties, and, if there is a possibility, to a first discussion of the preliminary reports on state responsibility and succession of states and governments, it was decided that a three-week winter session of the Commission should take place at Geneva from 6 to 24 January 1964.

73. In this winter session, the Commission should consider the draft articles to be submitted by the Special Rapporteur on special missions and consider the first report and general directives to the Special Rapporteur on the subject of relations between states and intergovernmental organizations.

74. It was suggested that measures should be taken now to arrange also for a winter session in January 1965, in order to continue the consideration of the two topics which complete the codification of diplomatic law without thereby detracting from the time required for the work of the Commission on the law of treaties.

75. In accordance with the decision taken by the Commission during its Fourteenth Session,¹⁰⁶ it was decided that the regular session of the Commission would be held at Geneva from 4 May to 10 July 1964.

¹⁰⁶ Official Records of the General Assembly, 17th Sess., Supp. No. 9 (A/5209 and Corr. 1), par. 88 [57 A.J.I.L. 263 (1963)].

C. PRODUCTION AND DISTRIBUTION OF DOCUMENTS,
SUMMARY RECORDS AND TRANSLATIONS

76. The Commission expressed its satisfaction at the very considerable improvement in the facilities put at its disposal for the production of documents, summary records and translations—a matter which had been the subject of some criticism at the previous session.¹⁰⁷

77. There had still been some delay, however, in the translation of documents into Spanish, and the Commission expressed the hope that further improvements would be made in that respect.

78. The Commission also expressed the hope that its preparatory documents would be sent to members by air mail, to allow them sufficient time to study the documents before the opening of the session.

D. DELAY IN THE PUBLICATION OF THE YEARBOOK

79. The Commission has noted with concern that publication of the volumes of the Yearbook of the International Law Commission is being subjected to an increasing delay. The Commission expresses the hope that steps will be taken to ensure that in future the Yearbook will be published as soon as possible after the termination of each annual session.

E. REPRESENTATION AT THE EIGHTEENTH SESSION OF
THE GENERAL ASSEMBLY

80. The Commission decided that it would be represented at the Eighteenth Session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Eduardo Jiménez de Aréchaga.

ANNEXES

ANNEX I

REPORT BY MR. ROBERTO AGO, CHAIRMAN OF THE SUB-COMMITTEE
ON STATE RESPONSIBILITY

(Approved by the Sub-Committee)

1. The Sub-Committee on State Responsibility, set up by the International Law Commission at its 637th meeting on 7 May 1962 and consisting of the following ten members: Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka, Mr. Tunkin and Mr. Yasseen, held its second meeting at Geneva from 7 to 16 January 1963. The terms of the reference of the Sub-Committee, as laid down by the Commission at its 668th meeting on 26 June 1962,^a were as follows:

“(1) The Sub-Committee will meet at Geneva between the Commission's current session and its next session from 7 to 16 January 1963;

¹⁰⁷ *Ibid.*, pars. 84 and 85.

^a Official Records of the General Assembly, 17th Sess., Supp. No. 9 (A/5209 and Corr. 1), par. 68 [57 A.J.I.L. 261 (1963)].

"(2) Its work will be devoted primarily to the general aspects of state responsibility;

"(3) The members of the Sub-Committee will prepare for it specific memoranda relating to the main aspects of the subject, these memoranda to be submitted to the Secretariat not later than 1 December 1962 so that they may be reproduced and circulated before the meeting of the Sub-Committee in January 1963;

"(4) The Chairman of the Sub-Committee will prepare a report on the results of its work to be submitted to the Commission at its next session."

2. The Sub-Committee held seven meetings ending on 16 January 1963. All its members were present with the exception of Mr. Lachs, who was absent because of illness. The Sub-Committee had before it memoranda prepared by the following members:

Mr. Jiménez de Aréchaga (ILC (XIV) SC.1/WP.1)

Mr. Paredes (ILC (XIV) SC.1/WP.2 and Add.1, A/CN.4/WP.7)

Mr. Gros (A/CN.4/SC.1/WP.3)

Mr. Tsuruoka (A/CN.4/SC.1/WP.4)

Mr. Yasseen (A/CN.4/SC.1/WP.5)

Mr. Ago (A/CN.4/SC.1/WP.6)

3. The Sub-Committee held a general discussion of the questions to be studied in connexion with the work relating to the international responsibility of states, and with the directives to be given by the Commission to the Rapporteur on that topic.

4. Some members of the Sub-Committee expressed the view that it would be desirable to begin the study of the very vast subject of the international responsibility of the state by considering a well-defined sector such as that of responsibility for injuries to the person or property of aliens. Other members, on the other hand, argued that it was desirable to carry out a general study of the subject, taking care not to confuse the definition of the rules relating to responsibility with that of the rules of international law—and in particular those relating to the treatment of aliens—the breach of which can give rise to responsibility. Some of the members in this second group stressed in particular that, in the study of the topic of responsibility, new developments of international law in other fields, notably that of the maintenance of peace, ought also to be taken into account.

5. In the end, the Sub-Committee agreed unanimously to recommend that the Commission should, with a view to the codification of the topic, give priority to the definition of the general rules governing the international responsibility of the state. It was agreed, firstly, that there would be no question of neglecting the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility.

6. Having reached this general conclusion, the Sub-Committee discussed in detail an outline programme of work submitted by Mr. Ago. After this debate, it decided unanimously to recommend to the Commission the following indications on the main points to be considered as to the general aspects of the international responsibility of the state; these indications may serve as a guide to the work of a future special rapporteur to be appointed by the Commission.

Preliminary point: Definition of the concept of the international responsibility of the state.^b

First point: Origin of international responsibility

(1) *International wrongful act*: the breach by a state of a legal obligation imposed upon it by a rule of international law, whatever its origin and in whatever sphere.

(2) *Determination of the component parts of the international wrongful act*:

(a) *Objective element*: act or omission objectively conflicting with an international legal obligation of the state.^c Problem of the abuse of right. Cases where the act or omission itself suffices to constitute the objective element of the wrongful act and cases where there must also be an extraneous event caused by the conduct.

(b) *Subjective element*: imputability to a subject of international law of conduct contrary to an international obligation. Questions relating to imputation. Imputation of the wrongful act and of responsibility. Problem of indirect responsibility.

Questions relating to the requirement that the act or omission contrary to an international obligation should emanate from a state organ. System of law applicable for determining the status of organ. Legislative, administrative and judicial organs. Organs acting *ultra vires*.

State responsibility in respect of acts of private persons. Question of the real origin of international responsibility in such cases.

Must there be fault on the part of the organ whose conduct is the subject of a complaint? Objective responsibility and responsibility related to fault *lato sensu*. Problems of the degree of fault.^d

(3) *The various kinds of violations of international obligations*. Questions relating to the practical scope of the distinctions which can be made.

International wrongful acts arising from conduct alone and those arising from events. The causal relationship between conduct and event. Practical consequences of the distinction.

^b The Sub-Committee suggested that the question of the responsibility of other subjects of international law, such as international organizations, should be left aside.

^c The question of possible responsibility based on "risk," in cases where a state's conduct does not constitute a breach of an international obligation, may be studied in this connexion.

^d It would be desirable to consider whether or not the study should include the very important questions which may arise in connexion with the proof of the events giving rise to responsibility.

International wrongful acts and omissions. Possible consequences of the distinction, particularly with regard to *restitutio in integrum*.

Simple and complex, non-recurring and continuous international wrongful acts. Importance of these distinctions for the determination of the *tempus commissi delicti* and for the question of the exhaustion of local remedies.

Problems of participation in the international wrongful act.

(4) *Circumstances in which an act is not wrongful*

Consent of the injured party. Problem of presumed consent;
Legitimate sanction against the author of an international wrongful act;

Self-defence;

State of necessity.

Second point: The forms of international responsibility

(1) *The duty to make reparation*, and the right to apply sanctions to a state committing a wrongful act, as consequences of responsibility. Question of the penalty in international law. Relationship between consequences giving rise to reparation and those giving rise to punitive action. Possible distinction between international wrongful acts involving merely a duty to make reparation and those involving the application of sanctions. Possible basis for such a distinction.

(2) *Reparation*. Its forms. *Restitutio in integrum* and reparation by equivalent or compensation. Extent of reparation. Reparation of indirect damage. Satisfaction and its forms.

(3) *Sanction*. Individual sanctions provided for in general international law. Reprisals and their possible role as a sanction for an international wrongful act. Collective sanctions.

7. In accordance with the Sub-Committee's decision, the summary records giving an account of the discussion on substance, and the memoranda by its members mentioned in paragraph 2 above, are attached to this report.*

ANNEX II

REPORT BY MR. MANFRED LACHS, CHAIRMAN OF THE SUB-COMMITTEE
ON THE SUCCESSION OF STATES AND GOVERNMENTS

(Approved by the Sub-Committee)

1. The International Law Commission, at its 637th meeting on 7 May 1962, set up the Sub-Committee on the Succession of States and Governments, composed of the following ten members: Mr. Lachs (Chairman), Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin. The Commission, at its 668th meeting on 26 June 1962, took the following decisions with regard to the work of the Sub-Committee:*

* These summary records and memoranda will appear in the Yearbook of the International Law Commission, 1963.

* Official Records of the General Assembly, 17th Sess., Supp. No. 9 (A/5209 and Corr. 1), par. 72 [57 A.J.I.L. 261 (1963)].

“(1) The Sub-Committee will meet at Geneva on 17 January 1963, immediately after the session of the Sub-Committee on State Responsibility, for as long as necessary but not beyond 25 January 1963;

“(2) The Commission took note of the Secretary's statement in the Sub-Committee regarding the following three studies to be undertaken by the Secretariat:

(a) A memorandum on the problem of succession in relation to membership of the United Nations,

(b) A paper on the succession of states under general multilateral treaties of which the Secretary-General is the depositary,

(c) A digest of the decisions of international tribunals in the matter of state succession;

“(3) The members of the Sub-Committee will submit individual memoranda dealing essentially with the scope of and approach to the subject, the reports to be submitted to the Secretariat not later than 1 December 1962 to permit reproduction and circulation before the January 1963 meeting of the Sub-Committee;

“(4) Its chairman will submit to the Sub-Committee, at its next meeting or, if possible, a few days in advance, a working paper containing a summary of the views expressed in the individual reports;

“(5) The Chairman of the Sub-Committee will prepare a report on the results achieved for submission to the next session of the Commission.”

2. In accordance with these decisions, the Sub-Committee met at the European Office of the United Nations on 17 January 1963. As the Chairman of the Sub-Committee, Mr. Lachs, was prevented by illness from being present, the Sub-Committee unanimously elected Mr. Erik Castrén as Acting Chairman. The Sub-Committee held nine meetings, and ended its session on 25 January 1963. It was decided that the Sub-Committee would meet again, with the participation of the Chairman, Mr. Lachs, at the beginning of the Fifteenth Session of the International Law Commission in order to approve its final report. The Sub-Committee approved its final report at its 10th meeting held on 6 June 1963, during the Fifteenth Session of the International Law Commission, with the participation of the Chairman, Mr. Lachs, and all its members.

3. The Sub-Committee had before it memoranda submitted by the following members:

Mr. Elias (ILC(XIV) SC.2/WP.1 and A/CN.4/SC.2/WP.6)

Mr. Tabibi (A/CN.4/SC.2/WP.2)

Mr. Rosenne (A/CN.4/SC.2/WP.3)

Mr. Castrén (A/CN.4/SC.2/WP.4)

Mr. Bartoš (A/CN.4/SC.2/WP.5).

The Chairman, Mr. Lachs, also submitted a working paper (A/CN.4/SC.2/WP.7) which summarized the views expressed in the foregoing memoranda. The Sub-Committee decided to take Mr. Lachs' working paper as the main basis of its discussion.

4. The Sub-Committee also had before it the three following studies prepared by the Secretariat:

The succession of states in relation to membership in the United Nations (A/CN.4/149);

The succession of states in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150 and Corr.1);

Digest of decisions of international tribunals relating to state succession (A/CN.4/151).

5. The Sub-Committee discussed the scope of the topic of succession of states and governments, the approach to be taken to it and the directives which might be given by the Commission to the Special Rapporteur on that subject. Its conclusions and recommendations were as follows:

I. The Scope of the Subject and the Approach to It

A. SPECIAL ATTENTION TO PROBLEMS IN RESPECT OF NEW STATES

6. There is a need to pay special attention to problems of succession arising as a result of the emancipation of many nations and the birth of so many new states after World War II. The problems concerning new states should therefore be given special attention and the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter.

7. Some members wished to indicate that special emphasis should be given to the principles of self-determination and permanent sovereignty over natural resources; others thought such an indication superfluous, in view of the fact that these principles are already contained in the United Nations Charter and the resolutions of the General Assembly.

B. OBJECTIVES

8. The objectives are a survey and evaluation of the present state of the law and practice on succession, and the preparation of draft articles on the topic having regard also to new developments in international law in this field. The presentation should be precise, and must cover the essential elements which are necessary to resolve present difficulties.

C. QUESTIONS OF PRIORITY

9. The Sub-Committee recommends that the Special Rapporteur, who should be appointed at the Fifteenth Session of the International Law Commission, should initially concentrate on the topic of state succession,

and should study succession of governments insofar as necessary to complement the study of state succession. Within the field thus delimited, the Sub-Committee's opinion is that priority should be given to the problems of succession in relation to treaties.

D. RELATIONSHIP TO OTHER SUBJECTS ON THE AGENDA OF THE
INTERNATIONAL LAW COMMISSION

(a) *Law of treaties*

10. The Sub-Committee is of the opinion that succession in respect of treaties should be dealt with in the context of succession of states, rather than in that of the law of treaties.

(b) *Responsibility of states, and relations between states and
inter-governmental organizations*

11. The fact that these subjects are also on the agenda of the International Law Commission calls for special attention in order to avoid overlapping.

(c) *Co-ordination of the work of the four Special Rapporteurs*

12. It is recommended that the four Special Rapporteurs (on succession of states and governments, on the law of treaties, on responsibility of states and on relations between states and inter-governmental organizations) should keep in close touch and co-ordinate their work.

E. BROAD OUTLINE

13. In a broad outline the following headings are suggested:

- (i) Succession in respect of treaties
- (ii) Succession in respect of rights and duties resulting from other sources than treaties
- (iii) Succession in respect of membership of international organizations.

14. The Sub-Committee was divided on the question whether the foregoing outline should include a point on adjudicative procedures for the settlement of disputes. On the one hand, it was argued that the settlement of disputes was in itself a branch of international law, which was extraneous to the branch relating to succession of states and governments to which the Commission had been asked to give priority. On the other hand, other members, stressing that the outline was only a list of points to be examined by the Special Rapporteur, expressed the view that the Special Rapporteur should be asked to consider whether some particular system for the settlement of disputes should be an integral part of the régime of succession.

F. DETAILED DIVISION OF THE SUBJECT

15. The Sub-Committee was of the opinion that in a detailed study of the subject the following aspects, among others, will have to be considered:

(a) *The origin of succession:*

Disappearance of a state;
Birth of a new state;
Territorial changes of states.

(b) *Ratione materiae:*

Treaties;
Territorial rights;
Nationality;
Public property;
Concessionary rights;
Public debts;
Certain other questions of public law;
Property, rights, interests and other relations under private law;
Torts.

(c) *Ratione personae:*

Rights and obligations:

- (i) Between the new state and the predecessor state;
- (ii) Between the new state and third states;
- (iii) Of the new state with respect to individuals (including legal persons).

(d) *Territorial effects:*

Within the territory of the new state;
Extra-territorial.

II. Studies by the Secretariat

16. The Sub-Committee decided to request the Secretariat to prepare, if possible by the Sixteenth Session of the Commission in 1964:

(a) An analytical restatement of the material furnished by governments in accordance with requests already made by the Secretariat;

(b) A working paper covering the practice of specialized agencies and other international organizations in the field of succession;

(c) A revised version of the Digest of the Decisions of International Tribunals relating to State Succession (A/CN.4/151), incorporating summaries of the relevant decisions of certain tribunals other than those already included.

17. The Sub-Committee noted the statement by the Director of the Codification Division that the Secretariat would submit at the earliest

opportunity the publication described under paragraph 16 (a) above, that it would publish the information requested under 16 (b) as soon as it could be gathered, and that the request under 16 (c) would be given earnest consideration, in the light of the availability of the decisions in question.

III. Annexes to the Report

18. The Sub-Committee decided that the summary records giving an account of the discussion on substance, and the memoranda and working papers by its members mentioned in paragraph 3 above, should be attached to its report.^b

(EUROPEAN) CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS¹

PROTOCOL No. 2

CONFERRING UPON THE EUROPEAN COURT OF HUMAN RIGHTS COMPETENCE TO GIVE ADVISORY OPINIONS

Signed at Strasbourg, May 6, 1963²

The Member States of the Council of Europe signatory hereto,

Having regard to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as "the Convention") and, in particular, Article 19 instituting, among other bodies, a European Court of Human Rights (hereinafter referred to as "the Court");

Considering that it is expedient to confer upon the Court competence to give advisory opinions subject to certain conditions;

Have agreed as follows:

ARTICLE 1

1. The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the Protocols thereto.

2. Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section 1 of the Convention and in the Protocols thereto, or with any other questions which the Commission, the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

^b These annexes will appear in the Yearbook of the International Law Commission, 1963.

¹ European Treaty Series, No. 5; 213 U.N. Treaty Series 221; 45 A.J.I.L. Supp. 24 (1951).

² European Treaty Series, No. 44. The texts of the three Protocols have been supplied through the courtesy of the Directorate of Human Rights of the Council of Europe.

3. Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a two-thirds majority vote of the representatives entitled to sit on the Committee.

ARTICLE 2

The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its consultative competence as defined in Article 1 of this Protocol.

ARTICLE 3

1. For the consideration of requests for an advisory opinion, the Court shall sit in plenary session.

2. Reasons shall be given for advisory opinions of the Court.

3. If the advisory opinion does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

4. Advisory opinions of the Court shall be communicated to the Committee of Ministers.

ARTICLE 4

The powers of the Court under Article 55 of the Convention shall extend to the drawing up of such rules and the determination of such procedure as the Court may think necessary for the purposes of this Protocol.

ARTICLE 5

1. This Protocol shall be open to signature by Member States of the Council of Europe, signatories to the Convention, who may become Parties to it by:

- (a) signature without reservation in respect of ratification or acceptance;
- (b) signature with reservation in respect of ratification or acceptance, followed by ratification or acceptance.

Instruments of ratification or acceptance shall be deposited with the Secretary-General of the Council of Europe.

2. This Protocol shall enter into force as soon as all States Parties to the Convention shall have become Parties to the Protocol, in accordance with the provisions of paragraph 1 of this article.

3. From the date of the entry into force of this Protocol, Articles 1 to 4 shall be considered an integral part of the Convention.

4. The Secretary-General of the Council of Europe shall notify the member States of the Council of:

- (a) any signature without reservation in respect of ratification or acceptance;
- (b) any signature with reservation in respect of ratification or acceptance;

- (c) the deposit of any instrument of ratification or acceptance;
- (d) the date of entry into force of this Protocol in accordance with paragraph 2 of this article.

In witness whereof, the undersigned, being duly authorized thereto, have signed this Protocol.

Done at Strasbourg, this 6th day of May 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory states.^a

PROTOCOL No. 3

AMENDING ARTICLES 29, 30 AND 34 OF THE CONVENTION

Signed at Strasbourg, May 6, 1963^a

The Member States of the Council of Europe, signatories to this Protocol,

Considering that it is advisable to amend certain provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as "the Convention") concerning the procedure of the European Commission of Human Rights,

Have agreed as follows:

ARTICLE 1

1. Article 29 of the Convention is deleted.
2. The following provision shall be inserted in the Convention:

"Article 29

After it has accepted a petition submitted under Article 25, the Commission may nevertheless decide unanimously to reject the petition if, in the course of its examination, it finds that the existence of one of the grounds for non-acceptance provided for in Article 27 has been established.

In such a case, the decision shall be communicated to the parties."

ARTICLE 2

In Article 30 of the Convention, the word "Sub-Commission" shall be replaced by the word "Commission."

^a Signatures omitted. The Protocol was signed on behalf of Austria, Denmark, Germany, Ireland, Italy, Luxembourg, The Netherlands, Norway, Sweden, Turkey, and the United Kingdom, all except Denmark and the United Kingdom with reservation in respect of ratification or acceptance.

^a European Treaty Series, No. 45.

ARTICLE 3

1. At the beginning of Article 34 of the Convention, the following shall be inserted:

“Subject to the provisions of Article 29 . . .”

2. At the end of the same article, the sentence “the Sub-Commission shall take its decisions by a majority of its members” shall be deleted.⁵

PROTOCOL No. 4

SECURING CERTAIN RIGHTS AND FREEDOMS OTHER THAN THOSE ALREADY INCLUDED IN THE CONVENTION AND IN THE FIRST PROTOCOL THERETO⁶

Signed at Strasbourg, September 16, 1963⁷

PREAMBLE

The Governments signatory hereto, being Members of the Council of Europe,

Being resolved to take steps to ensure the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950 (hereinafter referred to as “the Convention”) and in Articles 1 to 3 of the First Protocol to the Convention, signed at Paris on 20th March 1952,

Have agreed as follows:

ARTICLE 1

No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.

ARTICLE 2

1. Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of “ordre public,” for the prevention of crime, for the pro-

⁵ Art. 4 and the final clauses are omitted. Their language is almost identical with that of Art. 5 (less paragraph 3 thereof) and the final clauses of Protocol No. 2. The signatures, and the conditions thereon, are the same as those appended to Protocol No. 2.

⁶ European Treaty Series, No. 9; 213 U.N. Treaty Series 262.

⁷ Council of Europe Doc. No. H (63) 4 Revised.

tection of health or morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

ARTICLE 3

1. No one shall be expelled, by means either of an individual or of a collective measure, from the territory of the state of which he is a national.

2. No one shall be deprived of the right to enter the territory of the state of which he is a national.

ARTICLE 4

Collective expulsion of aliens is prohibited.

ARTICLE 5

1. Any High Contracting Party may, at the time of signature or ratification of this Protocol, or at any time thereafter, communicate to the Secretary-General of the Council of Europe a declaration stating the extent to which it undertakes that the provisions of the Protocol shall apply to such of the territories for the international relations of which it is responsible as are named therein.

2. Any High Contracting Party which has communicated a declaration in virtue of the preceding paragraph may, from time to time, communicate a further declaration modifying the terms of any former declaration or terminating the application of the provisions of this Protocol in respect of any territory.

3. A declaration made in accordance with this article shall be deemed to have been made in accordance with paragraph 1 of Article 63 of the Convention.

4. The territory of any state to which this Protocol applies by virtue of ratification or acceptance by that state, and each territory to which this Protocol is applied by virtue of a declaration by that state under this article, shall be treated as separate territories for the purpose of the references in Articles 2 and 3 to the territory of a state.

ARTICLE 6

1. As between the High Contracting Parties the provisions of Articles 1 to 5 of this Protocol shall be regarded as additional articles to the Convention, and all the provisions of the Convention shall apply accordingly.

2. Nevertheless, the right of individual recourse recognised by a declaration made under Article 25 of the Convention, or the acceptance of the compulsory jurisdiction of the Court by a declaration made under Article 46 of the Convention, shall not be effective in relation to this Protocol unless the High Contracting Party concerned has made a statement

recognising such right, or accepting such jurisdiction, in respect of all or any of Articles 1 to 4 of the Protocol.

ARTICLE 7

1. This Protocol shall be open for signature by the Members of the Council of Europe who are the signatories of the Convention; it shall be ratified at the same time as or after the ratification of the Convention. It shall enter into force after the deposit of five instruments of ratification. As regards any signatory ratifying subsequently, the Protocol shall enter into force at the date of the deposit of its instrument of ratification.

2. The instruments of ratification shall be deposited with the Secretary-General of the Council of Europe, who will notify all Members of the names of those who have ratified.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Protocol.

Done at Strasbourg, this 16th day of September 1963, in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory states.⁸

UNITED STATES OF AMERICA-UNITED MEXICAN STATES

CONVENTION FOR THE SOLUTION OF THE PROBLEM OF THE CHAMIZAL

Signed at Mexico City, August 29, 1963¹

The United States of America and the United Mexican States:

Animated by the spirit of good neighborliness which has made possible the amicable solution of various problems which have arisen between them;

* Signatures omitted. The Protocol was signed on behalf of Austria, Belgium, Denmark, Germany, Ireland, Italy, Luxembourg, Norway, Sweden, and the United Kingdom. The following declaration was made on behalf of the Government of the Republic of Austria at the time of signature:

"Protocol No. 4 is signed with the reservation that Article 3 shall not apply to the provisions on the Law of 3rd April 1919, StGBL No. 209 concerning the banishment of the House of Habsburg-Lorraine and the confiscation of their property, as set out in the Act of 30th October 1919, StGBL No. 501, in the Federal Constitutional Law of 26th January 1928, BGBl. No. 80, and taking account of the Federal Constitutional Law of 4th July 1963, BGBl. No. 172."

The following declaration was made on behalf of the Irish Government:

"The reference to extradition contained in paragraph 21 of the Report of the Committee of Experts on this Protocol and concerning paragraph 1 of Article 3 of the Protocol includes also laws providing for the execution in the territory of one Contracting Party of warrants of arrest issued by the authorities of another Contracting Party."

As to the law of Ireland concerning this matter, see O'Higgins, "Irish Extradition Law and Practice," 34 Brit. Year Book of Int. Law 274 (1958).

¹ 49 Dept. of State Bulletin 480 (1963).

Desiring to arrive at a complete solution of the problem concerning El Chamizal, an area of land situated to the north of the Rio Grande, in the El Paso-Ciudad Juarez region;

Considering that the recommendations of the Department of State of the United States and the Ministry of Foreign Relations of Mexico of July 17, 1963, have been approved by the Presidents of the two Republics;

Desiring to give effect to the 1911 arbitration award² in today's circumstances and in keeping with the joint communique of the Presidents of the United States and of Mexico issued on June 30, 1962; and

Convinced of the need for continuing the program of rectification and stabilization of the Rio Grande which has been carried out under the terms of the Convention of February 1, 1933, by improving the channel in the El Paso-Ciudad Juarez region,

Have resolved to conclude a Convention and for this purpose have named as their plenipotentiaries:

The President of the United States of America:

His Excellency Thomas C. Mann, Ambassador of the United States of America to Mexico,

and

The President of the United Mexican States:

His Excellency Manuel Tello, Minister of Foreign Relations,

Who, having communicated to each other their respective Full Powers, found to be in good and due form, have agreed as follows:

Article 1

In the El Paso-Ciudad Juarez Sector, the Rio Grande shall be relocated into a new channel in accordance with the engineering plan recommended in Minute No. 214 of the International Boundary and Water Commission, United States and Mexico.³ Authentic copies of the Minute and of the map attached thereto, on which the new channel is shown, are annexed to this Convention and made a part hereof.

Article 2

The river channel shall be relocated so as to transfer from the north to the south of the Rio Grande a tract of 823.50 acres composed of 366.00 acres in the Chamizal tract, 193.16 acres in the southern part of Cordova Island, and 264.34 acres to the east of Cordova Island. A tract of 193.16 acres in the northern part of Cordova Island will remain to the north of the river.

² 5 A.J.I.L. 782 (1911).

³ Minute No. 214, Aug. 28, 1963, "Engineering Considerations Relating to Relocation of the Rio Grande at El Paso, Texas, and Ciudad Juarez, Chihuahua," 49 Dept. of State Bulletin 482 (1963); not printed here; reprinted in 2 International Legal Materials 877 (1963).

Article 3

The center line of the new river channel shall be the international boundary. The lands that, as a result of the relocation of the river channel, shall be to the north of the center line of the new channel shall be the territory of the United States of America and the lands that shall be to the south of the center line of the new channel shall be the territory of the United Mexican States.

Article 4

No payments will be made, as between the two Governments, for the value of the lands that pass from one country to the other as a result of the relocation of the international boundary. The lands that, upon relocation of the international boundary, pass from one country to the other shall pass to the respective Governments in absolute ownership, free of any private titles or encumbrances of any kind.

Article 5

The Government of Mexico shall convey to the Banco Nacional Hipotecario Urbano y de Obras Publicas, S.A., titles to the properties comprised of the structures which pass intact to Mexico and the lands on which they stand. The Bank shall pay the Government of Mexico for the value of the lands on which such structures are situated and the Government of the United States for the estimated value to Mexico of the said structures.

Article 6

After this Convention has entered into force and the necessary legislation has been enacted for carrying it out, the two Governments shall, on the basis of a recommendation by the International Boundary and Water Commission, determine the period of time appropriate for the Government of the United States to complete the following:

- (a) The acquisition, in conformity with its laws, of the lands to be transferred to Mexico and for the rights of way for that portion of the new river channel in the territory of the United States;
- (b) The orderly evacuation of the occupants of the lands referred to in paragraph (a).

Article 7

As soon as the operations provided in the preceding article have been completed, and the payment made by the Banco Nacional Hipotecario Urbano y de Obras Publicas, S.A., to the Government of the United States as provided in Article 5, the Government of the United States shall so inform the Government of Mexico. The International Boundary and Water Commission shall then proceed to demarcate the new international boundary, recording the demarcation in a Minute. The relocation of the

international boundary and the transfer of lands provided for in this Convention shall take place upon express approval of that Minute by both Governments in accordance with the procedure established in the second paragraph of Article 25 of the Treaty of February 3, 1944.

Article 8

The costs of constructing the new river channel shall be borne in equal parts by the two Governments. However, each Government shall bear the costs of compensation for the value of the structures or improvements which must be destroyed, within the territory under its jurisdiction prior to the relocation of the international boundary, in the process of constructing the new channel.

Article 9

The International Boundary and Water Commission is charged with the relocation of the river channel, the construction of the bridges herein provided for, and the maintenance, preservation and improvement of the new channel. The Commission's jurisdiction and responsibilities, set forth in Article XI of the 1933 Convention for the maintenance and preservation of the Rio Grande Rectification Project, are extended upstream from that part of the river included in the Project to the point where the Rio Grande meets the land boundary between the two countries.

Article 10

The six existing bridges shall, as a part of the relocation of the river channel, be replaced by new bridges. The cost of constructing the new bridges shall be borne in equal parts by the two Governments. The bridges which replace those on Stanton-Lerdo and Santa Fe-Juarez streets shall be located on the same streets. The location of the bridge or bridges which replace the two Cordova Island bridges shall be determined by the International Boundary and Water Commission. The agreements now in force which relate to the four existing bridges between El Paso and Ciudad Juarez shall apply to the new international bridges which replace them. The international bridge or bridges which replace the two Cordova Island bridges shall be toll free unless both Governments agree to the contrary.

Article 11

The relocation of the international boundary and the transfer of portions of territory resulting therefrom shall not affect in any way:

(a) The legal status, with respect to citizenship laws, of those persons who are present or former residents of the portions of territory transferred;

(b) The jurisdiction over legal proceedings of either a civil or criminal character which are pending at the time of, or which were decided prior to, such relocation;

(c) The jurisdiction over acts or omissions occurring within or with respect to the said portions of territory prior to their transfer;

(d) The law or laws applicable to the acts or omissions referred to in paragraph (c).

Article 12

The present Convention shall be ratified and the instruments of ratification shall be exchanged at Mexico City as soon as possible.

The present Convention shall enter into force upon the exchange of instruments of ratification.

DONE at Mexico City the 29th day of August, 1963, in the English and Spanish languages, each text being equally authentic.

For the Government of
The United States of America
/s/ THOMAS C. MANN

For the Government of
The United Mexican States
/s/ MANUEL TELLO

DIVERSITY AND UNIFORMITY IN THE LAW OF NATIONS ¹

BY PHILIP C. JESSUP

Judge, International Court of Justice

In addressing oneself to the subject of "diversity and uniformity in the law of nations," it is well to suggest at the outset that these two attributes are perennially present not only in the international legal system but in many, if not all, legal systems. This is a statement of the obvious, but it merits some attention at a time when there is such a spate of writing about the changes in international law which are said to be required to meet the needs of an international society which is itself experiencing great changes.

Back in 1931 Maurice Bourquin gave a description so applicable to the situation today that it merits quotation at some length:

C'est devenu une banalité de dire que le droit international est en pleine transformation. Non seulement ses emprises sur la vie des peuples se multiplient, mais les conceptions qui l'inspirent subissent un profond renouvellement. Certains juristes, par attachement à la tradition, s'efforcent de minimiser la portée de ce mouvement, de la présenter comme un simple prolongement du passé, dont les assises resteraient intactes. Assurément, tout s'enchaîne plus ou moins dans le développement des sociétés, et les révolutions elles-mêmes, malgré certaines apparences, se soudent à l'état de choses qu'elles ambitionnent de détruire. Mais s'il n'y a point, à vrai dire, de solutions de continuité, il y a des phases d'évolution rapide, où le paysage ancien se désagrège sous les regards du spectateur, pour laisser apparaître l'ébauche d'un paysage nouveau, dont le temps précisera les contours et qui finira par régner sans partage. Que nous soyons dans une telle période, trop de signes l'attestent pour qu'il soit permis d'en douter.

C'est ce qui fait aujourd'hui l'intérêt passionnant du droit international. C'est ce qui fait en même temps la difficulté de son étude. L'image qu'il offre est complexe, pleine de traits contradictoires, de

¹ This article substantially reproduces a lecture delivered at the University of Leiden on Feb. 20, 1964, as one of a series of lectures arranged by the Dag Hammarskjöld Foundation and subsequently to be published by the Foundation. The lecture was introduced by the following two paragraphs:

"It is my privilege to deliver this lecture as one of a series organized by the Dag Hammarskjöld Foundation in tribute to the memory of the late Secretary-General of the United Nations, a man rich in resources of intellect and of spirit which he spent freely in the service of mankind. He added new luster to a name already notable in the annals of international law. As his annual reports and occasional addresses demonstrate, he cared deeply about the international rule of law as a fundamental tenet of the United Nations and was convinced that lawless policies were unsound policies. It has been well said of Dag Hammarskjöld that he was 'imbued with the spirit of law.' One may appropriately dedicate to his memory a lecture on the law of nations.

"Nor could one find a more suitable milieu for a lecture on international law than this great University in this country long identified with many of the great exponents of that law."

plans qui ne s'alignent pas dans une même perspective. Ceux qui le contemplent et cherchent à l'exprimer courent un double risque: fermer les yeux sur les innovations qui brouillent le dessin des institutions anciennes, ou bien, au contraire, ne s'attacher qu'aux indications qu'elles fournissent et construire, avec ces points de repère, un avenir plus ou moins imaginaire.²

Similarly stimulating is Baron van Asbeck's vision of the purpose of the study of international law:

To explore how the present law has come to be what it is, how it is involved in a process of reform and extension and intensification, in order that we may be able to assist in the building, stone upon stone, in storm and rain, of a transnational legal order for States and peoples and men.³

I shall not dwell upon the myth that change in international law is disastrous or even novel. I shall call attention to a few examples of the way in which new legal rules or doctrines have been advanced by states—some successfully, some unsuccessfully. Attention will then be drawn to what may be called regional law, with first emphasis upon the developments in the European Community both in the creation of new law and in the unification or assimilation of existing laws. Then aspects of the development of maritime law, in what one may call a functional rather than a regional community, will preface a brief reference to the origins of international law and to some of its evolutionary characteristics. Again the reader will be asked to turn attention to law unification, taken as a symbol of the fact that, while diversity of law among interacting groups has been tolerated, uniformity has often been sought as an end in itself in federal states, in Europe, in Africa, and on the international level especially again where we find an international functional community.

Granted that some law has geographical, personal or temporal limitations upon its applicability and binding force, and granted also that certain courts are limited to the application—as law—of certain defined or prescribed bodies of rules and principles, nevertheless law in the large has a certain unity, and no body of law is an island complete unto itself.⁴ That is why it is pertinent for the Statute of the International Court of Justice to list the general principles of law among the sources of law which the Court is to apply. That is why the system of private international law is a system of tolerance, particularly in applications of the doctrine of comity. The Chief Justice of the Federal Supreme Court of the Federation of Rhodesia and Nyasaland pointed to the need for tolerance of legal rules strange to the *lex fori*, since, without such tolerance, "the effectiveness of private international law, the system without which it would be impossible to maintain the legal relationships existing between the inhabitants of the

² 35 Académie de Droit International, Recueil des Cours 5 (1931, I).

³ Baron Frederik van Asbeck, "Growth and Movement of International Law," Farewell Lecture at Leiden University, Tr. in 11 Int. and Comp. Law Q. 1054, 1072 (1962).

⁴ In delivering the Storrs Lectures at Yale University in 1956, I indicated the extent of my indebtedness to the late Professor Georges Scelle; Transnational Law 3 (1956).

various countries . . . would be most seriously impaired."⁵ I would go on to say that the effectiveness of *public* international law, the system without which it would be impossible to maintain the legal relationships existing between the various states of the world, would be seriously impaired if there were no tolerance of certain differences stemming from various legal systems. "Nations are, and should be, different from one another," writes Margaret Mead.⁶

Within the bounds of this article, it would be impossible to inventory and even more to analyze all the interesting current views about change in international law. There is no pretense that references which follow are exhaustive. It will suffice if some realms of legal interest worth further exploration are identified by brief illustrations.⁷

Among the changes in the international society to which current books and scholarly journals keep calling our attention are certain prevalent differences in ideological approaches and the entry into the family of nations of many new states in Asia and Africa. One may pertinently recall that with reference to many of the newer states there has been an evolution in the terminology—an evolution which was due to certain important psychological and political factors. A few years ago one found references to the economically "undeveloped" countries. A seeming pejorative connotation of that adjective led to the use of the term "underdeveloped," which has now been widely supplanted by the adjective "developing." Perhaps international law suffered from the fact that, in many quarters and over decades, it was considered to be the law of an undeveloped or underdeveloped international society. Let us assert that international law is—and long has been—a *developing* legal system.

"I am certainly not an advocate for frequent and untried changes in laws and institutions," Thomas Jefferson wrote to a friend in 1816. "But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manner and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times."⁸ So, too, Bynkershoek in

⁵ *Estate Mehta v. Acting Master of the High Court of Southern Rhodesia*, 1958 R. and N. 570, 588.

⁶ Mead, "The Underdeveloped and Overdeveloped," 41 *Foreign Affairs* 78, 89 (1962). Professor Maxwell Cohen draws our attention to the "three-dimensional character . . . of international law as comparative law, including the extent to which it has fed on two great legal systems and the 'regionalism' that early appeared in the evolution of special doctrines of the classical system." Cohen, "Some Main Directions of International Law: a Canadian Perspective," 1 *Canadian Yr. Bk. of Int. Law* (1968) 15, 26. Cf. Seidl-Hohenveldern, "Methods for a Comparative Approach to Public International Law," *Festschrift Egawa* 153; but in this study the learned author quite misunderstands the subtitle and therefore the spirit of the great treatise of Charles Cheney Hyde.

⁷ It is sometimes necessary "to use rather broad generalizations somewhat freely and to be illustrative rather than complete, and provocative rather than authoritative." Jenks, "The Scope of International Law," 81 *Brit. Yr. Bk. of Int. Law* 1, 11 (1954).

⁸ 15 *The Writings of Thomas Jefferson* 40 (Lipscomb ed.), as quoted in Stein and Hay, *Cases and Materials on the Law and Institutions of the Atlantic Area* iii (1968).

1737 told his readers, "as customs change, so the law of nations changes."⁹

Each generation imagines it is confronted with stupendous unprecedented novelties. One might read in a dozen sources today an analysis like this: "Prosperity never before imagined, power never yet wielded by man, speed never reached by anything but a meteor, had made the world irritable, nervous, querulous, unreasonable and afraid." Actually this is what Henry Adams wrote in his *Education* during what we are apt to consider the tranquil era of the first decade of the century.¹⁰

It may well be said that one cannot posit the co-existence in international law of two mutually contradictory rules or principles both of which would be legally valid. States may disagree as to the rule itself or as to some factual application of the rule. One or the other view may eventually prevail and be blended into uniformity, as the result of the abandonment of one view, the negotiation of a treaty, the decision of a duly empowered tribunal, or a process such as any one of those taken into account by the United Nations International Law Commission.¹¹ One may examine a few historical samples which illustrate different types of legal diversity.¹² And since uniformity of law is sought and achieved at various levels, we may examine how this comes about. We may find that many of the processes, even in the private law field, can make their contribution to that international harmony which it is the function of international law to promote and which may best be attained by gradual stages.

When the United States of America became a new member of the society of nations toward the end of the eighteenth century, there had been some two centuries of experience with the law of neutral rights and duties. Certain rules and principles had become clearly enough established by customary practices embodied in national ordinances, prize court decisions (jurisprudence), the customs of merchants and a very large number of treaties, chiefly bilateral. There was general recognition of certain rules applicable to blockades and blockade running, and of the principle that a ship taken within the waters of a neutral state was not good prize if the neutral state objected. The basic notion that certain goods were contraband and that under some circumstances they were forfeit to a belligerent captor, was not controverted, but there were vast differences in national definitions of contraband and on such issues as whether free ships made free goods. The principal maritime carriers—at one period the Dutch and Hansa Towns for example—naturally sustained rules which provided the maximum protection to neutral shipping. The Scandinavian countries, as

⁹ Bynkershoek, *Quaestiones ad lectorem* (1737) 7 (Carnegie Endowment for International Peace, 1930. Tenney Frank, Tr.).

¹⁰ *The Education of Henry Adams* (1905), Ch. XXXV, p. 499 (Modern Library ed., 1931).

¹¹ "The truth is that the law is never quite the same again once the Commission has presented its progressive consensus to the world family." Cohen, *loc. cit.* 31.

¹² Some comparable collections of examples are given in Friedmann, "The Position of Underdeveloped Countries and the Universality of International Law," 2 *Int. Law Bulletin* (The Columbia Society of International Law) 5 (1963); Lisakryn, "International Law in a Divided World," *International Conciliation*, No. 542, March, 1963.

suppliers of masts, timbers, pitch and tar, maintained that these products were at least no more than conditionally contraband. The United States, espousing the rôle of a neutral as a matter of political and economic policy, long favored total freedom for neutral trade at sea, so consistently indeed that it refused to ratify the 1856 Declaration of Paris, even though that Declaration contained the major concession of free ships, free goods, because it did not go all the way toward meeting the American desideratum. A few years later, during the Civil War, the same Government eagerly invoked every possible belligerent right against neutral shipping. But the geographical and naval situations of the end of the eighteenth century led the new Western Republic to a novel emphasis upon neutral duties in addition to neutral rights—a position which stood it in good stead when it came to arbitrating with Great Britain the *Alabama* claims. The contention for total freedom of neutral trade at sea was never embodied in international law, but much of the American doctrine of neutral duties did become part of that law.

The basic general concept of the rule of continuous voyage (but not the extreme extensions to “ultimate destination”), against strong opposition from whatever countries happened to be neutral during certain conflicts, was eventually accepted as law probably because it was essentially realistic and reasonable, but not because it could be supported by logic, since rules historically evolved by compromise cannot be extended by logic.¹³

This whole branch of law affords numerous examples of the way in which national interests dictate national views on what are the rules of international law. The diversities were often met by impartial adjudication (whether in national prize courts or in international arbitrations), by bilateral treaties, or by more general agreements reached in international conferences. From the point of view of our present consideration, it is most interesting to note over centuries how rare it was for a government, whether belligerent or neutral, to take the anarchic stand that no law of neutral rights and duties existed. In other words, there was a basic uniformity on a legal principle. Moreover, in numerous instances, states small in military power could still, as neutrals, exercise important international influence through the disposal of access to their ports, by their economic resources, or by adopting with other small neutrals a solidary posture.

There is another set of legal rules applicable in time of war (although it may be a matter of debate whether or not these rules are part of the *corpus* of public international law), which reveals an interesting diversity, this time between the Anglo-American common-law systems on the one hand and the civil-law systems of Europe on the other. Both systems agree that the outbreak of war has certain legal consequences in its effect on pre-existing legal relationships. In the common-law system, on the outbreak of war it immediately becomes illegal to have intercourse with the enemy, even in the carrying out of private contracts or personal correspondence;

¹³ See *passim*, *Neutrality, Its History, Economics and Law*: Jessup and Deak, Vol. I, *The Origins* (1935); Phillips, Vol. II, *The Napoleonic Period*; Turlington, Vol. III, *The World War Period*; Jessup, Vol. IV, *Today and Tomorrow* (1936).

all these contacts are illegal unless specifically licensed. Under the civil-law system, private commercial and personal contacts continue to be legal unless specifically prohibited. Over the years, neither concept has prevailed over the other, but in any protracted war the end results can scarcely be distinguished.

To illustrate further a kind of uniformity in practice despite diversity in doctrine, one may refer to the question of what criminal jurisdiction a state, under customary international law and in the absence of treaties, is entitled to exercise over foreign ships in its ports. Traditionally, under what has been called the French doctrine, the local state is not entitled to exercise criminal jurisdiction over events on a foreign ship in port unless there is some felt consequence on shore—disturbance of the tranquillity of the port, involvement of shore personnel, or an appeal to local authorities for help. Yet under the French practice, a murder, no matter how quietly committed below decks on such a ship, may be considered a disturbance of the tranquillity and jurisdiction may be exercised. Under the United States doctrine, the local state's sovereignty is supreme, and a foreign ship in port is considered fully subject to that sovereignty. In practice, American courts will, in the exercise of their discretion, generally refrain from exercising jurisdiction except in the three types of cases admitted by French doctrine, including the liberal French interpretation of what constitutes a disturbance of the port's tranquillity.

A more serious clash has historically sprung from a United States doctrine, espoused when the country loomed small on the world stage, and opposed by most other countries. This was the United States doctrine of the right of expatriation, which was obviously in the interest of a young country needing and welcoming immigrants, but which was flatly opposed to English and European doctrines of indelible allegiance. The United States Congress in mid-nineteenth century eloquently stated the American claim in terms of what today we call human rights, although actually the issue was whether the automatic legal effect of naturalization was the termination of the prior nationality, even when the individual's former sovereign insisted that he could not lose his nationality of origin without his sovereign's consent. After decades of incidents on land and sea and long diplomatic arguments, treaties which struck a compromise between the just interests of both sides eliminated most controversies, but many authorities would insist that the United States never succeeded in establishing its doctrine as a part of international law.

One doctrine, although it still does not pass unchallenged, which came to be established in international law in derogation of a pre-existing rule, sprang from the national jurisprudence of the Belgian and Italian courts rather than from diplomatic asseverations. This was the holding that a state is not entitled to the usual sovereign immunity from proceedings in the courts of another state, if the activity in question is pursued *jure gestionis* rather than *jure imperii*.

Still another doctrine, now uniformly accepted in principle but diversely applied in practice, was widely admitted so rapidly that one can scarcely

detect a period of diversity as to the doctrine itself, which one might therefore describe as merely an acceptable formulation of existing customary international law; this is the doctrine of the continental shelf, quickly imitated—and sometimes misunderstood or distorted—after its enunciation by the United States Government in 1945.

On the other hand, the British Government's espousal of Sir Hersch Lauterpacht's proposition, that under international law there is an absolute duty to grant recognition under certain circumstances, does not seem as yet to have commanded general support. On the question whether the proposition itself was soundly based in law, I do not venture to express an opinion.

In another geographical region, states of South and Central America and Mexico have evolved and contended for various doctrines suited to their national interests—doctrines bearing such names as those of Calvo, Drago, Tobar and Estrada. The Calvo Doctrine, for example, was clearly designed to meet conflicts with governments of states in other parts of the world whose citizens made and followed investments. On the other hand, the familiar and distinctive *uti possidetis* doctrine has developed chiefly for the solution of territorial disagreements among the states themselves of the Western Hemisphere south of the Rio Grande. The name of the late Judge Alvarez will always be associated with the idea of an "American international law," considered to have a regional applicability.

But what is a "region"? It may never be necessary to suggest a definition in applications of Chapter VIII of the Charter of the United Nations, but in the development of law the identification of regional interests or concerns may have an importance. On a previous occasion I have tried to explain why I thought that "One's idea of what constitutes a 'region' is apt to be artificial and highly subjective," and I ventured to suggest some parallels between national and international regional situations especially from the point of view of human welfare.¹⁴

Professor van Panhuys wisely entitled his inaugural lecture at Leiden "Regional or General International Law? A Misleading Dilemma."¹⁵ In one sense it is a misnomer to speak of regional international law, since it seems to deny the universality of the applicability of the law of nations. On the other hand, even without utilizing the concept of "transnational law," one is bound to recognize that substantial portions of what is with precision denominated "international law" are regional in character. The example just noted of the Latin American doctrine of *uti possidetis* is a case in point. The most notable instance is the rapidly growing law of the European Communities. The basic treaties are pure international law, as is the rule which makes these treaties binding—*pacta sunt servanda*. But the jurisprudence of the Court of Justice of the European Communities shows that to a great extent the law of the Communities is something different—something which I would call "transnational," which may be in part international law in the sense in which that term is used in Article 38

¹⁴ Transnational Law, *op. cit.* 26, and in general, Ch. I.

¹⁵ 8 Netherlands Int. Law Rev. 146 (1961).

of the Statute of the International Court of Justice, and partly law which has certain other characteristics.¹⁶

None of the Community treaties specifies the sources of law which the European Court of Justice is to use in the interpretation of treaties. The Court has said: ". . . notre Cour n'est pas une juridiction internationale mais la juridiction d'une Communauté créée par six Etats . . ." ¹⁷ But again: "Quant aux sources de ce droit, rien ne s'oppose évidemment à ce qu'on les recherche, le cas échéant, dans le droit international, mais normalement, et le plus souvent, on les trouvera plutôt dans le droit interne des divers Etats membres . . ." ¹⁸ Moreover, the Avocat Général, while modestly protesting that he was not an international law specialist, in one case supported his arguments by showing the similarity between the approaches of international law and of national law in determining norms of interpretation.¹⁹ The Court, in turn, invoked the common approach as part of the justification of its decision.²⁰

But the Court revealed how it stands on new frontiers of international law when in 1963 it said that the Community constitutes "a new juridical order in international law" and that Article 12 of the Treaty

must be interpreted in the sense that it produces immediate effects and creates individual rights that internal jurisdictions must safeguard.²¹

More broadly, the European Communities are engaged in a process of attaining uniformity at a different level, that is, by assimilating—at least in some aspects—the legal systems of the member states. Although this effort has much in common with the uniformity and unification of law movements (which we may consider in turn), it differs in at least two important respects:

First, assimilation of national laws in the Community is an integral part of an intricate plan for a progressive coalescence of the national economies of the six member states. . . . Second, the assimilation takes place within a new and unique institutional framework; the institutions of the Community have the legal power to order the na-

¹⁶ Against the background of one of his learned historical surveys, Professor Guggenheim analyzes the development in the European Communities as perhaps leading to the creation of a new "droit public européen distinct de l'ordre international du droit des gens et de l'ordre juridique étatique." "Droit International Général et Droit Public Européen," 18 *Annuaire Suisse de Droit International* 9, 28 (1961).

¹⁷ 2 *Recueil de la Jurisprudence de la Cour* (1955-56) 263.

¹⁸ *Ibid.* Cf. 6 *Recueil* 652 (1960).

¹⁹ 2 *ibid.* 263-264.

²⁰ *Loc. cit.* 305.

²¹ 9 *Recueil* 1 (1963), digested in 58 *A.J.I.L.* 194 (1964). I have used the translation of Mr. Homer G. Angelo in his report to the Section on International and Comparative Law of the American Bar Assn. (1963), p. 12. In addition to the studies of Prof. Eric Stein, partly cited below, see Bebr, "The Development of a Community Law by the Court of the European Coal and Steel Community," 42 *Minnesota Law Rev.* 845 (1958); McMahon, "The Court of the European Communities: Judicial Interpretation and International Organization," 37 *Brit. Yr. Bk. of Int. Law* (1961) 320.

tional governments to make the adjustments in their legal systems necessary for the accomplishment of the assimilation. . . .²²

One may recall that, with the creation of the International Labor Organization, the—by comparison, extremely modest—governmental obligation to submit to the appropriate local authority for approval agreed proposals for what one may call the assimilation of labor standards, was hailed as a tremendous advance along the road to the establishment of an effective international community. If the progress in the entire international community is slower than that in the more limited European Communities, it is because, as Professor Eric Stein says:

Even within a nation-state, a legal norm is the ultimate expression of the will and values of the society; only after the conflicting economic and social forces have been composed may the resulting consensus crystallize into a general norm. . . .²³

Although progress in law assimilation within the European Communities may be achieved in certain areas with relative speed because of supra-national characteristics, including the powers of the Council of Ministers under Article 100 of the Treaty, the Community still must rely at times on the traditional international process of concluding a multilateral treaty. This was the case in connection with the important establishment of a uniform rule within the Community for creating patent rights which would be valid throughout the Community.²⁴ The same need for the use of the treaty process has been evidenced in connection with the recognition and execution of judgments of the national courts of the several member states.²⁵

Within the limits of this article, one can go no further in considering the development of the European Community law except to recall in passing the important provision of Article 177 of the Rome Treaty which empowers the Court of Justice of the Communities to give binding interpretations which a national court of last resort under certain circumstances is bound to seek.²⁶ Thus uniformity of interpretation is assured. Although in general practice there are numerous clauses in multilateral treaties conferring jurisdiction on an international tribunal to interpret the treaty on the application of one of the parties thereto, such clauses are rarely invoked because, as Mr. Wilfred Jenks has pointed out,

the disadvantage of the existence of divergent views regarding the interpretation of a general international convention of a technical character is rarely regarded by those responsible for the foreign policy of a State as a sufficient reason for accepting the political responsibility involved in instituting contentious proceedings against another State.²⁷

²² Stein, "Assimilation of National Laws as a Function of European Integration," 58 A.J.I.L. 1-2 (1964).

²³ *Ibid.* 3.

²⁴ *Ibid.* 25 ff. Stein also calls attention to the current projects of the Nordic Council for agreement among the Scandinavian states on rules for an "all-Scandinavian" patent.

²⁵ Stein, *loc. cit.* 28.

²⁶ *Ibid.*

²⁷ I venture to refer to previous comments on this point which I have made in 99 Académie de Droit International, Recueil des Cours 3, 14 (1960, I), and 60 Columbia Law Rev. 29 (1960).

Perhaps this difficulty which has been referred to as "the psychology of the litigant," might be dissipated if, through an appropriate international convention, a wider circle of states than those which are members of the European Communities were to agree that in given circumstances a national court would refrain from passing final judgment on a question of treaty interpretation (or indeed of the scope of a rule of customary international law) until an international jurisdiction, appropriately empowered, had given at least an advisory opinion on the question at issue. Such a step would be far short of all of the obligations already accepted by the members of the European Communities, but it would mark a spectacular advance toward uniformity in the field of public international law.²⁸

As already noted, Stein points out that a basic plan for a progressive coalescence of the national economies of the six member states is the motive force for the assimilation of national legal systems. Without such a deliberate plan, the needs of trade and commerce have in the past afforded examples of international processes by which legal diversity has been supplanted by uniformity in regard to maritime law. It might be said that, even though the seas do not constitute a "region," the maritime interests of the world have long given evidence that to a degree they constitute a functional international community. The customs of merchants and seafaring men tended to unify maritime law as far back at least as the seventh century B.C. In the 1860's, modern shipping interests, including prominently underwriters, felt the need for more precise agreement upon some of the applicable rules of law. First steps were non-governmental and directed toward producing uniformity in various national applications of the law of general average. Preliminary consideration was given to the device of drafting a uniform law to be enacted voluntarily by the legislatures of all maritime states. This procedure was discarded in favor of the device of voluntary private agreement. As the final result of numerous non-governmental conferences, agreement was reached upon the text of the York-Antwerp Rules, which today constitute uniform law by virtue of the fact that they are incorporated by reference in bills of lading and charter parties throughout the world. This is one of the situations where a new member of the international society would have no occasion to debate whether or not the existing rule seemed to it the most desirable; the necessities and the conveniences of international shipping point to but one conclusion.

The method discarded in connection with unification of the law of gen-

²⁸ One may cite an example of an agreement upon a kind of co-operation between two tribunals on the international level: Art. VIII, sec. 21, of the Headquarters Agreement of June 26, 1947, between the United Nations and the United States provides for referring disputes over the interpretation of the Agreement to a tribunal of three Arbitrators. The Secretary General or the United States may ask the General Assembly to request the International Court of Justice to give an advisory opinion on any legal question arising in the course of the proceedings before the arbitrators. "Pending the receipt of the opinion of the Court, an interim decision of the arbitral tribunal shall be observed by both parties. Thereafter, the arbitral tribunal shall render a final decision, having regard to the opinion of the Court." 43 A.J.I.L. Supp. 8 at 15 (1949).

eral average, namely, the adoption of identical legislation in many states, was, at about the same time, successful in bringing about uniformity in the rules of the road at sea. Within the comparatively brief span of a dozen years, more than thirty maritime states had enacted identical rules in their respective legislation. On various other subjects of maritime private law, the international maritime community has utilized the time-honored method of multilateral international conventions.²⁹ This is the method used also in connection with other maritime interests, such as fisheries, and still more broadly in the recent Geneva Conferences on the Law of the Sea, when the international community made use of another useful process which is itself the product of general advances in international organization, namely, the United Nations International Law Commission.

We have invoked the most recent interstatal or transnational experience with uniformity in the circle of the European Communities and we have referred briefly to some of the modern portions of the history of one of the oldest bits of transnational law—the law of the sea. We might have gone back of the Rhodian law to the earlier potent influence of the Phoenicians and thus have suggested a bridge from Middle Eastern to European origins of various concepts. Sometimes one notes that the origins of modern international law are traced to Europe or to Judaic-Christian precedents which already move one geographically off the European Continent, whatever may be the continuity of thought.

Any identification of a specific limited geographic or civilizational origin in Europe of those basic legal concepts which came to be accepted by the whole international community, is a myth. International law, as we commonly think of it, probably cannot trace its origins back of the sixteenth century, but we are familiar with the fact that many of its particularities reflect practices of much more ancient times, as Grotius was assiduous in pointing out. Even when we find maxims of the Roman law quoted as applicable to the solution of international law problems today, we are aware that law did not begin with Rome. Professor Speiser makes a persuasive case for finding the origins of many of our legal concepts in ancient Mesopotamia from the middle of the third to the end of the first millennium B.C., where he finds “the initial chapter in the history of jurisprudence in general.” Pertinent to the theme we are now exploring is his observation that “the legal tradition concerned is closely integrated in spite of the underlying differences in date, geography, political background and language.” *Inter alia*, he reminds us of Mesopotamian legal precepts that laws reflect truths which are timeless and impersonal; that the interpretation of laws must be entrusted to professional judges and that these judges must look to precedents. In this law the written document found its high place and this was but one of the legal concepts passing on with trade and the shifts in political influence through the Phoenicians, the Hittites, the Egyptians and so on into Greece and Rome.

²⁹ Transnational Law, *op. cit.* 109–111.

Today, though we freely acknowledge our manifold debt to Greece and the Bible, we do not always appreciate the extent to which Israel and Greece contributed to one of our fundamental affirmations, namely that truly constructive power is power vested outside the agent who wields it. This abiding truth, however, was discovered long before the start of the Biblical and Greek experiences. It was first glimpsed in ancient Mesopotamia; and once glimpsed, it was held on to tenaciously as a source of strength at home and an example to others abroad.⁸⁰

May it be said that the truly constructive power of *international* law is to be found in the fact that, being the law of all the nations in the international community, it cannot be wielded to fit the interest or the whim of any one member of the community which seeks to invoke it?

I agree, too, that it is a myth which perpetuated the "falsely mechanical image of the legal process that conceived of law as a method for achieving the objective application of the single rule that alone properly governs the outcome of a legal controversy," and I pay tribute to the service which Professor Myres McDougal and his school have rendered in destroying such myths.⁸¹ In more conventional language, Wilfred Jenks has remarked

that international law is not a set of rigid rules inherited from the past and allowing no scope for development but a body of living principles in the light of which new problems can be resolved as international relations develop.⁸²

Wolfgang Friedmann, with his usual insight, points to the applicability to international law of an analysis which Professor H. L. A. Hart had applied to law in general. Hart in his *Concept of Law* pointed out:

The power . . . conferred on individuals to mould their legal relations with others by contracts, wills, marriages, etc., is one of the great contributions of law to social life; and it is a feature of law obscured by presenting all law as a matter of orders backed by threats.

So, writes Friedmann, the "developing 'cooperative' law of nations" has "a fundamentally different character" from traditional international law—"the steadily increasing scope and variety of international conventions, agreements, or, in some cases even new customs, which bind the nations, not in the traditional rules of abstention and respect, but in positive principles of cooperation for common interests."⁸³

⁸⁰ Speiser, "Cuneiform Law and the History of Civilization," 107 Proceedings, Am. Philosophical Soc. 536-541 (1963), and references in his footnotes. Prof. Ada B. Bozeman's skillful tapestry of Politics and Culture in International History (1960), carries the thread of law as one essential part of the pattern from the times and regions with which Prof. Speiser deals up to the present era.

⁸¹ McDougal's contribution is so voluminous that I shall mention here only the critical summary appraisal by one of his brilliant disciples, in which numerous references will be found: Richard A. Falk, "McDougal and Feliciano's Law and Minimum World Order," a review article in 8 Natural Law Forum 171 (Notre Dame Law School, 1963). The quotation in the text above is from p. 172.

⁸² The Common Law of Mankind 121 (1958).

⁸³ Friedmann, "National Sovereignty, International Cooperation, and the Reality of International Law," 10 U.C.L.A. Law Rev. 739 (1963).

Starting from such premises, it is by no means irrelevant to note how consistently human societies, as they enter upon more complex relationships, are impelled to seek greater uniformity in the legal system which theretofore had been traditional and perhaps unquestioned. I find it convenient, with a glance back over our shoulder at the contemporaneous developments in the European Communities to which we have already referred, to note the experience of other federal groupings.³⁴

We tend to assume that any diversity in the views of states concerning some particular rule of international law proves that one of the states must be repudiating the rule of international law. In some cases this is true, but we have already noted some national peculiarities which certainly did not constitute repudiations. Thus there may be agreement that international law authorizes a state to claim a belt of territorial waters, but disagreement on the base line from which the outer limits of the belt are to be measured. So it is in national legal systems. In the United States, for example, that a contract is concluded by offer and acceptance is a common principle, but the courts of different States of the Union have different views as to whether the contract is made at the moment when a letter of acceptance is posted or at the moment when the letter is received. The doctrine of contributory negligence, as distinct from comparative negligence, persists in the great majority of United States jurisdictions, although comparative negligence is the rule in admiralty, as it almost universally is in civil-law countries.

One of the most striking illustrations—and one which is not without pertinence to an evolving branch of international law—is the principle of strict liability when a person “damages another by a thing or activity unduly dangerous.”³⁵ In 1955 it was reported that the doctrine was still rejected in ten American States and approved in twenty. *Mutatis mutandis*, the explanation of the rejection describes the frame of mind of some governments in considering rules of international law:

One important reason often given for the rejection of the strict liability was that it was not adapted to an expanding civilization. Dangerous enterprises, involving a high degree of risk to others, were clearly indispensable to the industrial and commercial development of a new country and it was considered that the interests of those in the vicinity of such enterprises must give way to them, and that too great a burden must not be placed on them.

Similarly, local conditions have influenced the acceptance or rejection of the common-law rule of strict liability for animal trespasses. In western parts of the United States, where cattle grazed at large on the range, some States by statute enacted that the duty lies rather with a crop grower to fence the cattle out than with the cattleman to fence his cattle in.³⁶ (I

³⁴ There may be difference of view whether it is appropriate to refer to the European Community experience as “federal,” but see *Federalism, Mature and Emergent* (Arthur W. Macmahon, ed., Columbia University Bicentennial Conference Series, 1955).

³⁵ Prosser, *Law of Torts*, Sec. 59 (Hornbook Series, 2d ed., 1955), expounding the rule of *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868). For present purposes, qualifications of the rule are omitted.

³⁶ *Ibid.* 319–321.

interrupt a consideration of United States experience to suggest that, just as law in some American States reflects the invasion of cattle ranges by crop farmers, so in a West African district, where the scant population in a large forested area formerly made it unnecessary to delimit tribal boundaries by specific metes and bounds, the construction of a highway through the district made it of immense practical importance to know which tribe or whether both tribes had proprietary rights to the roadsides.)

Returning to a consideration of United States experience, to prevent misunderstanding of the meaning behind what some may consider a juristic minuet in which national and international law are ill-matched partners, I hasten to note that the States of the United States, in regard to such legal matters as are not regulated by the Federal Constitution, are under no obligation to maintain a rule of the common law but are quite free to adopt by statute a directly contrary rule. Quite different is the position of a state member of the family of nations, which has no right to enact by statute a rule contradictory to international law; for example, to enact a law denying all immunities to foreign ambassadors.

While legal diversity thus continues to prevail among States of the United States, in many respects, particularly in commercial and financial matters, it became evident that diversity in legal rules was distinctly disadvantageous, and measures to secure uniformity were adopted. When the American Bar Association was founded in 1878 it dedicated itself in part to securing "uniformity of legislation . . . throughout the nation." Twelve years later, the Association appointed a Special Committee on Uniform State Laws, and in 1892 was held the first National Conference of Commissioners on Uniform State Laws, in which all States of the Union now participate. Over one hundred of the uniform laws which the Conference has drafted and approved are still current, although the number of States which have enacted them varies from one subject to another. For some forty years, the American Law Institute has pursued an additional process for securing uniformity by preparing *Restatements* of various branches of law. These *Restatements*, by reason of the excellence of the rapporteurs and the painstaking process by which the drafts are examined, re-examined, and finally approved after debate by the most distinctively qualified group drawn from Bench, Bar and law faculties, have become standard authority, gaining still more authority from year to year as they are cited by the courts throughout the United States.

Somewhat comparable developments have taken place in Canada through a Conference of Commissioners on Uniformity of Legislation, although it has not been easy to unify the law of Quebec and that of the other Provinces. So in Australia, the individualism of the six States long hampered the adoption of uniform laws, although today considerable progress is made through a somewhat different type of body—the Standing Committee of Commonwealth and State Attorneys-General.³⁷

In Europe, more broadly than in a federal context, the activity of the

³⁷ Leach, "The Uniform Law Movement in Australia," 12 Am. J. Comp. Law 206 (1963).

Institut International de Rome pour l'Unification du Droit Privé, has had the support of the League of Nations and subsequently of many individual governments. The Consultative Assembly of the Council of Europe in 1962 invoked the aid of the Rome Institute as well as that of the Max Planck Institute in Hamburg in an opinion which endorsed the view of the Austrian Minister of Justice "that the unification or harmonisation of the legislation of member States is already possible not only in special branches of law, but also with regard to fundamental legal concepts."³⁸

Again more broadly than in a federal context, and at times more narrowly within the confines of a unitary political state, but with abundant variety, past, present and future, the experiences in Asia and in Africa present to the non-specialist a bewildering fascination. A former Chief Justice of India has referred to the problem of "How to weave tribal customs and institutions into the fabric of a modern state without disrupting the lives of the people too deeply." He identified the problem as still existing widely over the African continent and in parts of Asia, but already faced and solved in India, Pakistan, Burma and Ceylon.³⁹

We are reminded of the prevalence of Islamic law throughout the Arabian Peninsula and its position as a fundamental unifying source of legal rules in numerous other countries of Asia and Africa. Much recent attention has fortunately been paid to expounding the lessons to be learned from the law of ancient India.⁴⁰ Some of the recent writings about African law seem to have a somewhat defensive tone, as if the writers were conscious that they needed to dispel the uninformed assumption that African law cannot be identified in such way as to afford a basis for comparison with legal systems of Europe and the Americas, for example. But Herskovits insisted that the evidence showed that, throughout the East African area, despite tribal variations, the dispute-settling process has a logic that makes it "as a whole comparable, in terms of ethical assumption and procedural regularity, to Euro-American legal thought and procedure, however different the forms in which they are cast may be."⁴¹

To the same effect, and with special reference to the law of Ghana, Allot writes:

African law has a certain unity, deriving principally from its being customary and unwritten in character. . . . There are many coincidences of legal rule in different systems; but the wider unity is more a question of spirit, approach and the legal complex than of detailed resemblances.⁴²

And again in writing on Basuto law he describes their concept

³⁸ Council of Europe, Consultative Assembly, 14th Ordinary Sess., 1st Pt., May 15-18, 1962; Opinion 87 (1963).

³⁹ Address of Hon. Vivian Bose, Aug. 10, 1961, 7 Columbia Law School Law Alumni Bulletin 2 (1962).

⁴⁰ See, for example, Anand, "Rôle of the New Asian-African Countries in the Present International Legal Order," 56 A.J.I.L. 383, 393 ff. (1962), and authorities there cited.

⁴¹ Herskovits, *The Human Factor in Changing Africa* 70 (1962).

⁴² Allot, *Essays on African Law* 66 (1960).

that the law derives ultimately from God and the fundamental conscience and ethical beliefs of mankind, so that it is the expression of, or linked with, *morality, reasonableness*, justice between man and man; that law is *flexible* in its application, the traditional norms merely establishing a broad framework within which justice is done in the particular dispute . . . All these features and attitudes are widespread in negro African legal systems.⁴³

But the existence of common philosophical or religious basic tenets does not eliminate the need for unification of law, as is apparent in the Euro-American experience. In geographically and politically complex situations, active steps are being taken to collate and to synthesize customary law.⁴⁴ The outcome of a representatively attended colloquium organized by the *Fondation Giorgio Cini* and the *Société Africaine de Culture*, in Venice in October, 1963, to consider the development of traditional African law to modern law, was a final resolution which registered agreement

que le relevé systématique des coutumes et leur rédaction dans une langue et sous une forme juridique appropriés, constitue une étape importante dans la connaissance du Droit africain et une condition essentielle de son évolution; . . . que l'harmonisation des législations nouvelles des Etats Africains est, dans la mesure où elle est possible, de nature à faciliter des échanges humains, culturels et économiques entre ces Etats et l'évolution de l'Afrique vers l'unité.⁴⁵

From these excursions into the domain of attempts to unify private law, I would divert attention to another legal phenomenon, this time on the international level, which does not have a regional basis but which again recalls that functional bonds may be just as dynamic, may have just as much, if not more, motivating power. The story is a familiar one and details may be omitted as one recalls how members of the international society of states have organized themselves from time to time on the basis of common economic interests—interests which arose, for example, from the common concern with transportation on great European river systems, shared interest in the production and consumption of commodities such as wheat, sugar, coffee, tin. As often pointed out, the degree of importance and of voting strength in organizations formed on such functional lines is not based upon the traditional symbols of military power, but upon economic interest resulting from geographical, economic, agricultural, or mineralogical facts. One of the lessons to be learned from such groupings and the ensuing “cooperative law of nations,” to return to Friedmann’s phrase, is the fact that it has been found possible to design and to use

⁴³ *Ibid.* 87. So, too, Gluckman: “We cannot understand any African tribe’s law in isolation. . . .” “African Jurisprudence,” *Advancement of Science* 439, 448 (London, Jan. 18, 1962).

⁴⁴ Cory, *Sukuma Law and Custom* (1953); La rédaction des coutumes dans le passé et dans le présent, colloque organisé les 16 et 17 mai 1960 sous la direction de John Gilissen, *Étude d’histoire et d’ethnologie juridiques*, Centre d’Histoire et d’Ethnologie Juridique, Université Libre de Bruxelles; Cotran, “Some recent developments in the Tanganyika judicial system,” 6 *Journal of African Law* 19 (1962); Konan Bédié, “The Judicial System of the Republic of Ivory Coast,” 10 *A. J. Comp. Law* 151 (1961).

⁴⁵ Mimeographed report.

new methods of settling disputes. It has been said that "The legislative process of compromise, rather than the judicial process of victory-defeat, is considered more suitable to the resolution of disputes in . . . relatively new and uncharted paths of economic cooperation among nations."⁴⁶ But this is not universally true, as is shown by some of the experiences in the European Communities, and there is the significant point that it has often been agreed that questions of fact may be determined by an international body, as by the Permanent Sugar Commission under the Brussels Convention of 1902.⁴⁷

The "legislative process" is indeed a process of compromise and the international community has produced a vast amount of international legislation, as Hudson's great collection shows. It would be safe to say that at least a very large number, if not all, of the great multilateral lawmaking treaties were finally drafted in and out of international conferences with much give and take in the common interest of finding a uniform rule for some particular activity—a rule which had to be a compromise among conflicting interests and positions, since, if this were not true, the need for concluding a convention to establish a uniform rule would not have arisen.

The same observation is applicable to what is often called the codification process in international law. The process is different from the legislative-conference method. Just as the uniform law movement in the United States is aided and abetted by the non-governmental *Restatements* of the American Law Institute, so in the international field, numerous private institutes and associations have provided invaluable aid to the intergovernmental process, which can be traced from the creation of the International Commission of Jurists at the Third Inter-American Conference of 1906, on through the Preparatory Commission of the League of Nations, to the present vital activity of the United Nations International Law Commission in gradually transforming into uniform law clouded areas in which the General Assembly decides that it will be in the common interest to eliminate diversity.⁴⁸ If the process seems slow, one must think of the present size and variety of the international community and recall that in a single national entity the preparation of the German Imperial Civil Code began with the appointment of a preparatory commission in 1874, which reported in 1887, and whose work as revised did not finally become law until 1900.

⁴⁶ Metzger, "Settlement of International Disputes by Non-Judicial Methods," 48 A.J.I.L. 408 (1954).

⁴⁷ Lambrinidis, "The Emergence of Quasi Judicial Quasi Administrative Organs and Methods for the Settlement of International Disputes," 16 *Revue Hellénique de Droit International* 78 (1968). And one may note the ingenuity with which a convention has been drafted which makes it possible to have a commercial arbitration agreement "largely or wholly divorced from any system of municipal law"; Benjamin, "The European Convention on International Commercial Arbitration," 37 *Brit. Yr. Bk. of Int. Law* 478 (1961). Cf. van Asbeck, "Quelques Aspects du Contrôle International non-judiciaire de l'Application par les Gouvernements de Conventions Internationales," 6 *Netherlands Int. Law. Rev.* 27 (July, 1959, special issue in honor of Professor J.P.A. François).

⁴⁸ The regional approach to the codification of international law is still to be noted in the Americas, and to some extent in the work of the Asian-African Legal Consultative Committee.

At conferences convened to transform drafts of the International Law Commission into multipartite conventions, diversities of view are inevitably revealed, but one has had occasion to point out that in the conferences on the law of the sea the national differences did not follow any pattern of alignment among Powers great and small, new and old, East and West, or North and South. Without attributing to the fact undue significance, one notes illustratively that after a variety of views had been argued on one or another detail, the Vienna Convention on Diplomatic Relations was adopted as a whole on April 14, 1961, by 72 votes to none, with 1 abstention.

In the conclusions to his penetrating study of "International Law in a Divided World," Professor Lissitzyn makes a statement to which one gives full agreement:

The absolutist dichotomy between the presence and absence of world-wide agreement on values is false. In the world community, as in national societies, there is a broad spectrum of values and of degree of consensus on them. A large measure of agreement on values does, of course, strengthen the cohesiveness of a community and the efficacy of its legal order. But it is not a question of all or nothing.⁴⁹

It is indeed true that "No one is asking for a complete rejection of what we know as international law. No one is asking that the books be burned and that we start afresh in rejection of the lessons history has given as to the rules which minimize friction."⁵⁰ In his distinguished contribution to the series of lectures in honor of Dag Hammarskjöld, Secretary General U Thant made a plea for a world "made safe for diversity," and the same plea was echoed by the President of the United States in his State of the Union Message. In a world so oriented, none need despair that there will be general international realization of the common interest or that the timeless tide will still flow toward uniformity in the law of nations.

⁴⁹ *Op. cit.* 68.

⁵⁰ Hazard, "A Pragmatic View of the New International Law," 1963 Proceedings, Am. Soc. Int. Law 79.

A SOVIET CONTRIBUTION TO INTERNATIONAL ADJUDICATION: PROFESSOR KRYLOV'S JURISPRUDENTIAL LEGACY

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This article deals with Professor Sergei Borisovich Krylov's (1888-1958) work as an example of the impact of Soviet theory and practice on international adjudication.¹ Krylov's statements and performance regarding this institution are examined in the light of his relationship with his state. By bringing out some of the factors that motivate an individual acting in a state-oriented society, further appraisals of the rôle and the effective limits of international adjudication, with Soviet participation, may be aided.

Soviet philosophy holds that progress is best promoted by central planning; that knowledge is an instrument for achieving definite social, economic, political, and military goals of the country; and that the learning process serves to demonstrate and apply truths already discovered, proclaimed, and beyond challenge.² Devotion to these principles is demanded from legal science, which is directly concerned with safeguarding the foundations of the new order and with designing procedures for the attainment of its objectives. The tasks of legal scholars are, therefore, defined in political programs.³ Under these conditions, some views attributed to Krylov may in reality not have been his. Conversely, it is possible that in a number of instances Krylov was not free to express himself adequately on other issues.

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¹ The term "adjudication," as used here, describes a procedure whereby pacific settlement of an international dispute is sought by means of a binding decision of a third party; it thus includes arbitration. Insofar as the discussion concerns the International Court of Justice and its predecessor, the Permanent Court of International Justice, both contentious and advisory proceedings are included.

² Berman, "The 'Right to Knowledge' in the Soviet Union," 54 Columbia Law Review 749, 756-764 (1954).

³ E.g., "XX s" ezd KPSS i zadachi sovetskoi pravovoi nauki [The Twentieth Congress of the CPSU and the Tasks of Soviet Legal Science], "Sovetskoe Gosudarstvo i Pravo, No. 2 (1956), p. 3.

Biography⁴

In Russia Krylov was known chiefly as an educator. A 1910 honor graduate in law of the University of St. Petersburg, he was retained for advanced academic training. Krylov's career was briefly interrupted by military service during the first World War but, soon after the events of 1917, he joined the faculty of the Institute for Soviet Construction and Law in Leningrad. His interests were broad but they tended to gravitate towards public international law. In 1942 Krylov moved to Moscow, where he lectured on international law at the Academy of Social Sciences of the Communist Party and at the Higher School of Diplomacy. From 1943 on he held a professorial chair in international law at the Institute of International Relations of the Ministry of Foreign Affairs. During the later years of his life, Krylov served as the Vice Chairman of the Soviet Association of International Law. He was the author or editor of numerous books, including standard student texts, writings on the United Nations, and translations of foreign treatises. Krylov was also the moving power behind the initiation of the *Soviet Yearbook of International Law*; he completed the editing of the first volume shortly before his death.⁵

Foreigners became aware of the stocky professor during the last years of the second World War, when he spearheaded the Soviet entry into the International Court of Justice and various international associations of jurists. One might say that Krylov personified the postwar Soviet concern for the international legal order. He was one of the leading advisers to his government during the relatively co-operative negotiations which led to the formation of the United Nations (1944-1945),⁶ the first Soviet judge in a world court (1946-1952), the first Soviet lawyer to deliver a course at the Academy of International Law at The Hague (1947),⁷ and the first Soviet international lawyer to be elected to the *Institut de Droit International* (1947-1958).⁸ After his retirement from the bench, Krylov served on the International Law Commission (1954-1956),⁹ where his ini-

⁴ The writer has relied mainly on Krylov's biographies in: *Sovetskoe Gosudarstvo i Pravo*, No. 10 (1958), p. 132; *ibid.*, No. 1 (1959), p. 181; 1958 Soviet Yearbook of International Law 482; and 48 *Annuaire, Institut de Droit International* 472 (1959, II).

⁵ On Krylov's rôle in this project, see Hazard, book review, 54 *A.J.I.L.* 428 (1960).

⁶ Dumbarton Oaks Conference (1944); U.N. Conference on International Organization (U.N.C.I.O.), Committee of Jurists, Washington (1945); U.N.C.I.O., Commission I/Committees 1 & 2 and Commission IV/Committees 1 & 2, San Francisco (1945); Executive Committee of the Preparatory Commission, for a while chairman of Committee 5 (1945). 1946-1947 U.N. Year Book 43-48. Soviet biographies commonly list Krylov as a U.S.S.R. delegate to the first part (London) of the first session of the General Assembly. The list of delegates found *ibid.* at 304-307 does not corroborate this assertion.

⁷ Krylov, "Les Notions Principales du Droit des Gens (La Doctrine Soviétique du Droit International)," 70 *Hague Academy Recueil des Cours* 411 (1947, I). For Krylov's own account, see S.K., "Gaagskaia i Gavanskaia Akademii mezhdunarodnogo prava," *Sovetskoe Gosudarstvo i Pravo*, No. 2 (1948), p. 53, at 54-55.

⁸ 41 *Annuaire, Institut de Droit International* 275 (1947, II).

⁹ Krylov succeeded Korotsky (1st to 3rd Sess.) and Kozhevnikov (4th to 5th Sess.). He was followed by Tunkin (since 9th Sess.).

tiative secured the publication of its fine *Yearbooks*.¹⁰ In addition, Krylov was a member of the Soviet National Group in the Permanent Court of Arbitration (1955–1958) and a representative of the U.S.S.R. at the United Nations Conference on the Law of the Sea (1958).¹¹

The Years of Professor Krylov's "Political Maturing"

Soviet biographies portray Krylov as belonging to "those representatives of Russian intelligentsia who, from the early days of the Great October Socialist Revolution, took a resolute stand on the side of the insurgent people."¹² Indeed, the early resumption of academic work by Krylov testifies to his acceptance of the Revolution as well as to the new regime's acceptance of him. All through the comparatively relaxed 1920's, a period of recovery under the New Economic Policy, Krylov wrote prolifically, publishing not less than thirty articles, notes and reviews, mostly on international law.¹³ He also completed a treatise on the budgetary law within the Soviet federal system.¹⁴ Proficient in several European languages, Krylov freely used foreign materials.¹⁵ In addition, he had the ability to synthesize and coherently to present complex legal material, including the disorganized Soviet legislation of the early period.¹⁶

Krylov's erudition and his keen sense for detail, laudable qualities of which he seemed to be justifiably proud,¹⁷ did not commend him during the "dark age" of Soviet law. The onset of this period roughly coincided with the elimination of the market as a mechanism of economic production and distribution and its replacement by centralized planning (beginning with the First Five-Year Plan initiated in 1928). The militant traditions of the early post-revolutionary years reappeared to accompany the drive for industrialization and collectivization. The new policies called for execration of the past. Daily slogans tended to degrade intellectualism, including legal science. Scapegoats were sought for failures. The editors

¹⁰ Proposal by Mr. Krylov Concerning the Publication of the Documents of the International Law Commission, 1 I.L.C. Yearbook (1955) 238–240, 246 (A/CN.4/Ser.A/1955).

¹¹ Krylov worked mainly on the Third Committee (High Seas—Fishing—Conservation of Living Resources).

¹² Sovetskoe Gosudarstvo i Pravo, No. 1 (1959), p. 131.

¹³ See the index in Sovetskoe Pravo, No. 1 (1927), pp. 167–181.

¹⁴ Krylov, *Biudzhethnoe pravo SSSR: Federal'nye osnovy* [The Budgetary Law of the U.S.S.R.: Federal Principles] (Leningrad, 1928).

¹⁵ E.g., Krylov, "Optatsiia i plebistsit i nachalo samoopredeleniia v sovetskikh mezh-dunarodnykh dogovorakh [Option and Plebiscite and the Principle of Self-Determination in Soviet Treaties]," Sovetskoe Pravo, No. 2 (1923), p. 43; Krylov, "Ob anglo-ameri-kanskoi i evropeiskoi kontinental'noi sudebnoi praktike v ee otnoshenii k sovetskoj vlasti [On Anglo-American and Continental Judicial Practice Relative to the Soviet Regime]," Sovetskoe Pravo, No. 5 (1926), p. 104; Krylov, "Vozmeshchenie ubytkov v mezh-dunarodnom prave [Compensation for Damages in International Law]," Sovetskoe Pravo, No. 5 (1927), p. 53.

¹⁶ E.g., Krylov, "Sovetskoe konsul'skoe pravo [Soviet Consular Law]," Sovetskoe Pravo, No. 1 (1924), p. 111; Krylov, "Istoricheskii protsess razvitiia sovetskogo federalizma [The Historical Development of Soviet Federalism]," *Ibid.*, No. 5 (1924), p. 36.

¹⁷ See Krylov, book review, Sovetskoe Pravo, No. 4 (1926), p. 126.

of the leading Soviet law journal, *Sovetskoe Pravo* [Soviet Law], in explaining its change in name to *Sovetskoe Gosudarstvo i Revoliutsiia Prava* [Soviet State and Revolution in Law], laid down the new guidelines:

The battle colors of our journal must call us to war for proletarian dictatorship and against all open and hidden enemies, against bourgeois ideologists and opportunists. . . .¹⁸

Krylov's preoccupation with purely legal analysis and his neglect of the theoretical foundations of law had laid him open to criticism before.¹⁹ Now his shortcomings were seized upon more readily and with greater vehemence. His first treatise on private international law²⁰ came off the press just as the new wave of revolutionary sentiment was beginning to permeate Soviet legal circles. The book was immediately denounced as a specimen of "anti-Marxian literature" and useless "from the point of view of Marxian methodology."²¹ The "oral declarations by Comrade Krylov and other eclectics regarding acknowledgment on their part of the fundamental assumptions of the Marxian theory" were deemed "unsatisfactory."²² In particular, Krylov's sympathetic appraisal of the movement for the unification of private international law outside the Soviet Union was branded as an error, explainable only by the author's blindness to the "sharpening contradictions" between capitalist states in the epoch of imperialism, which precluded progressive co-operation among them.²³ He was severely berated for his tacit assumption that there was a body of international law above class law and for suggesting that Soviet legal science might derive authoritative help from such agencies of bourgeois ideology as the *Institut de Droit International* and the International Law Association.²⁴ Following this verbal chastisement, Krylov ceased to write for the next few years. The year 1933 was an exception and was perhaps the most critical time in Krylov's professional career. The crisis was caused by the publication of his book on air law²⁵ in 1933. The moment was hardly propitious because the reaction against intellectualism was then nearing its climax in an atmosphere saturated with mutual recriminations and self-humiliation. Publication at that time was not Krylov's choice. Actually, the work had been finished years before, but its printing had been delayed by a shortage of paper. Krylov again reported considerable uniformity of law among capitalist states, which he attributed to the demands of parallel technological advances, thus overlooking the "objective conditions of the historical epoch." He also noted that the international agencies

¹⁸ *Sovetskoe Gosudarstvo i Revoliutsiia Prava*, No. 1 (1930), p. 3, at 4.

¹⁹ See Durdenevsky, book review, *Sovetskoe Pravo*, No. 5 (1928), p. 92.

²⁰ Krylov, *Mezhdunarodnoe chastnoe pravo* [Private International Law] (Leningrad, 1930).

²¹ Kozhevnikov, book review, *Sovetskoe Gosudarstvo i Revoliutsiia Prava*, No. 7 (1930), p. 218.

²² Raevich, "O sovremennom sostoianii sovetskoi literatury po mezhdunarodnomu chastnomu pravu [On the Present State of the Soviet Literature on Private International Law]," *Sovetskoe Gosudarstvo i Revoliutsiia Prava*, No. 9 (1931), p. 144, at 145.

²³ Kozhevnikov, *loc. cit.* note 21, at 219. ²⁴ Raevich, *loc. cit.* note 22, at 145.

²⁵ Krylov, *Vozdushnoe pravo SSSR* [Air Law of the U.S.S.R.] (Leningrad, 1933).

of air transportation were pursuing narrowly limited objectives in the field of commercial airways. According to his reviewers he should have unmasked these agencies as fronts of the "imperialist conspiracy." This work was judged to be worse than useless; it was, in the words of one critic,

far removed from the spirit of Marxism-Leninism and represent[ed], indeed a step backwards even when measured against the old literature which . . . [had] been criticized as not corresponding to our needs.²⁶

Further harsh words and accusations cast serious doubts upon Krylov's political acumen and loyalty to the Soviet state. Evidently the gravity of the situation persuaded Krylov openly to confess his errors and try simultaneously to deny any vicious motives. There was a note of distress in Krylov's public statement:

In conclusion, however, I cannot refrain from protesting against the accusations by Comrade Vinogradov [the reviewer] that "the author, on every occasion, worships bourgeois jurisprudence," "entirely identifies himself with bourgeois scholars," etc. Such assertions are refuted not only by my published works, in which bourgeois law is put into sharp contrast to Soviet law, but also by my entire work on the educational front, by the very tenor of my life.²⁷

During the early 1930's, when few individuals were sure of the correct attitude towards most issues of importance, convincing resoluteness was demanded from Soviet legal scholars. Since the Marxian-Leninist line itself constantly shifted in search of the true dogma, it was dangerous either to stand still or to attempt to bend with the political winds. The downfall of Pashukanis, the renowned leader of Soviet legal science, vividly illustrated this dilemma. For an international lawyer, one relatively safe mode of conduct was to attack the foreign policies of non-Soviet countries and deliver tirades on "the world crisis" and "the threats of new wars and interventions against the U.S.S.R.," without touching upon the issues of international law. Unlike some of his contemporaries, Krylov chose to remain inconspicuous rather than descend to their level. This tactic worked for him, as he had sinned not as an announced theoretician but only incidentally. Leaving the literary scene was reasonably easy for him, in comparison with such a man as Korovin, the importance of whose views was recognized abroad and whose mistakes were causing embarrassment to the Soviet leaders. A man of Korovin's stature simply had to go on and either try to theorize himself out of his predicament or risk perdition with the label of a traitor and wrecker.

Krylov survived and reappeared in 1936, in the days of Stalin's celebrated call for "stability of laws."²⁸ His re-emergence was marked by an article on "Regulation of Radio Communications and Radio Broadcast-

²⁶ Vinogradov, book review, *Sovetskoe Gosudarstvo*, No. 3 (1934), p. 119, at 122.

²⁷ Krylov, letter to the editors, *ibid.*, Nos. 1-2 (1935), p. 228, at 229.

²⁸ Stalin, "On the Draft Constitution of the U.S.S.R.," in Stalin, *Problems of Leninism* 679, 708 (Moscow, 1953). The decision to give the U.S.S.R. a foundation of socialist law was made in November, 1935. The phrase "stability of laws" was actually used by Stalin a year later.

ing in International Law."²⁹ This was a prelude to bigger things. Early in 1938 he pursued the topic of wireless communications further, this time with a study of problems under the Soviet domestic law.³⁰ In his opinion the Soviet Union was sovereign in the area of radio communications, although it did, on occasion, co-operate with capitalist states in the interests of peace. In the fall of that year Krylov defended his doctoral dissertation on the international aspects of the same subject before the Law Institute of the Academy of Sciences of the Soviet Union.³¹ As a part of what probably was a package deal, he also published a short article calling on the Communist Party to work out an approved history of Soviet foreign relations (along the lines of the *History of the Communist Party of the Soviet Union: Short Course*, just released) for the guidance of the international lawyer.³² A year later his treatise on private international law was republished under joint authorship,³³ apparently without adverse comment. With his appointment to a consultative position within the Ministry of Foreign Affairs in 1942, Krylov's rehabilitation was well under way. By this time the trying environment had produced in Krylov an acceptable blend of professional skill and political trustworthiness. In 1946 at the ripe age of 58, Krylov became both a member of the International Court of Justice and a member of the Communist Party.³⁴ For the next decade Krylov was the best-known Soviet international lawyer and, as once during the 1920's, one of the most prolific of Soviet publicists.³⁵

Soviet Attitude towards International Adjudication

Whereas the Soviet Union regards itself as fairly well cleansed of domestic enemies, its Marxian-Leninist notions of sustained conflict with external enemies continue to mold the Soviet outlook towards international law and relations.³⁶ Many concepts of international law recognized by non-

²⁹ Krylov, "Mezhdunarodnopravovoe regulirovanie radiosvazi i radioveshchaniia," *Sovetskoe Gosudarstvo*, No. 6 (1936), p. 87.

³⁰ Krylov, "Sovetskoe pravo o radiosvazi i radioveshchanii [Soviet Law of Radio Communications and Radio Broadcasting]," *Sotsialisticheskaiia Zakonnost'*, No. 3 (1938), p. 77.

³¹ *Sovetskoe Gosudarstvo i Pravo*, No. 1 (1939), p. 129.

³² Krylov, "'Kratkii kurs (istorii) VKP (B)' i razrabotka istorii sovetskikh mezhdunarodno-pravovykh otnoshenii [The 'Short Course of the History of the All-Union CP (B)' and Preparation of a History of Soviet Attitudes towards International Law]," *Sovetskoe Gosudarstvo*, No. 6 (1938), p. 97.

³³ Peretersky and Krylov, *Mezhdunarodnoe chastnoe pravo* [Private International Law] (Moscow, 1940).

³⁴ *Sovetskoe Gosudarstvo i Pravo*, No. 1 (1959), p. 131.

³⁵ Krylov's output was highest in the 1920's and the 1950's. Soviet bibliographies indicate that he did not publish anything in 1932, 1934 (except for the release of the text of a speech given by him in March, 1933), 1935, 1937, 1942 and 1945. *Sovetskaia literatura po mezhdunarodnomu pravu: Bibliografiia 1917-1957* [Soviet Literature on International Law: Bibliography 1917-1957] (Moscow, 1959); *Literatura po sovetskomu pravu: Bibliograficheskii ukazatel'* [Literature on Soviet Law: Index of Bibliography] (Moscow, 1960).

³⁶ See, generally, Triska, "A Model for Study of Soviet Foreign Policy," 52 *American Political Science Review* 64 (1958).

Communist nations have been redefined and the direction of its growth differently appraised. The usefulness and justification of several existing and developing institutions are either partly or wholly rejected.

The Soviet Union has had little sympathy for international adjudication, except when the initiation of the proceedings remains with the states concerned and the controversy is either technical or involves merely the rights of individuals. But even in this limited rôle, the Soviets have been extremely hesitant to permit adjudication. Instead, they have always stressed a preference for direct negotiation.³⁷ Upon its entry into the world arena the Soviet Union made known its distrust of the impartiality of non-Communist arbitrators and judges. In Litvinov's words, "[o]nly an angel could be unbiased in judging Russian affairs."³⁸ In refusing to co-operate in the proceedings concerning the *Status of Eastern Carelia*,³⁹ Chicherin telegraphed to the Permanent Court of International Justice that the Soviet Government could not consider "the so-called League of Nations and the Permanent Court as impartial in this matter."⁴⁰

Once it had been accepted that the "imperialist" Members of the League of Nations had utilized the Permanent Court of International Justice for aggressive and anti-Soviet aims,⁴¹ it was difficult for the Soviet Union to be enthusiastic about the successor institution, the International Court of Justice, a body in which non-Communist states continued to be numerically predominant. The political reasons which induced the participation of the Soviet Union were played down by emphasizing the absence of continuity between the two tribunals. The International Court of Justice was represented as a *new* court.⁴²

Although coarse language was not indulged in during the days of the formation of the United Nations Organization, there was a latent suspicion towards international adjudication manifested in the inflexible insistence by the Soviet Union on giving only restricted powers to the Court. All proposals to endow the Court with any compulsory jurisdiction were reso-

³⁷ Korovin, *Sovremennoe mezhdunarodnoe publichnoe pravo* [Contemporary Public International Law] 137 (Moscow, 1926); Memorandum on the Soviet Doctrine and Practice with Respect to Arbitral Procedure (A/CN.4/36) (1950); Lapenna, *Conceptions Soviétiques de Droit International Public* 297-298 (Paris, 1954). The distrust for non-Soviet adjudicators is great even on the level of private rights. Pisar, "Communist System of Foreign-Trade Adjudication," 72 *Harvard Law Review* 1409, 1413-1415 (1959). On primacy of negotiations, see Bogdanov, "Peregovory—Osnovnoe sredstvo mirnogo uregulirovaniia mezhdunarodnykh raznoglasii [Negotiations—The Basic Means for Peaceful Regulation of International Differences]," *Sovetskoe Gosudarstvo i Pravo*, No. 7 (1957), p. 71.

³⁸ Litvinov's Statement at the Conference on Russian Affairs, The Hague, July 12, 1922, in Sohn, *Cases and Materials on World Law* 1046 (1950).

³⁹ P.C.I.J., Publications, Series B, No. 5 (1923).

⁴⁰ P.C.I.J., Publications, Series C, No. 3, Vol. 1, p. 67 at 70 (1923).

⁴¹ Lisovsky, *Mezhdunarodnoe pravo* [International Law] § 149 (Kiev, 1955).

⁴² Krylov, "Sozdanie i nachalo deiatel'nosti Mezhdunarodnogo suda Ob''edinennykh Natsii [The Creation and the Commencement of Activities of the International Court of the United Nations]," in Hudson, *Mezhdunarodnye sudy v proshlom i budushchem* [International Courts Past and Future] 332, 334-336 (Russian trans., Moscow, 1947); Poliansky, *Mezhdunarodnyi sud* [The International Court] 48-53 (Moscow, 1951).

lutely rejected. On record, the Soviet delegates, not unlike many Westerners, were motivated by a desire to protect the prestige and effectiveness of the institution.⁴³ To the Soviet readers, however, this was confided as a move in the defense of the interests of the "socialist states,"⁴⁴ an explanation which implied the familiar distrust of the inter-war period. As the Court developed, the Soviet Union was alert to fight any attempts to expand its functions or invigorate its activities, whether the question involved the permissible scope of its advisory opinions, the broadening of its jurisdiction under the optional clause, or simply the encouragement of states to request its services.⁴⁵

The elucidation of Krylov's ties to the Soviet state and of the position of that state towards international adjudication has prepared us to raise the central question. To what degree did the official stand of the Soviet Government influence Krylov's views and actions in respect to international adjudication? Since the available evidence is indirect, the conclusions must be regarded as inferential and subject to correction. Krylov's own utterances on international adjudication are found principally in three types of sources: (a) his voting record and opinions as a judge of the International Court of Justice,⁴⁶ (b) his commentaries on the creation of the Court⁴⁷ and on the Court's performance, published both while serving as a judge and after his retirement from the bench (many of them under the pen name "S. Borisov"),⁴⁸ and (c) his statements in the International Law Commission.

⁴³ 14 U.N.C.I.O. Docs. 151 (1945); 13 *ibid.* 226.

⁴⁴ Krylov, *Materialy k istorii Organizatsii Ob'edinennykh Natsii* [Materials on the History of the United Nations Organization] 212 (Moscow, 1949). Krylov's book was reviewed by Schapiro in 28 *Brit. Yr. Bk. Int. Law* 429 (1951), who characterized it as largely a dry documentary account, yet openly political in its aims. The second edition of Krylov's book, bearing the title "*Istoriia sozdaniia OON*" [History of the Creation of the U.N.] (Moscow, 1960), does not contain the reference to the interests of socialist states.

⁴⁵ U.N. General Assembly, 2nd Sess., Official Records, Resolutions 103-104 (A/519) (1948); see also p. 373 below.

⁴⁶ Despite the fact that Krylov had three successors on the bench—Golunsky (1952-1953), Kozhevnikov (1953-1960), and Koretsky (1960)—he enjoyed the unique distinction of being the only Soviet judge in the International Court who had ever written a fully separate opinion, until Koretsky's dissent on July 20, 1962. See also pp. 384-385 below.

⁴⁷ *E.g.*, the two works by Krylov cited in notes 42 and 44 above. Also, Krylov, "*Reglament Mezhdunarodnogo suda Ob'edinennykh Natsii* [The Rules of the International Court of the United Nations]," *Sovetskoe Gosudarstvo i Pravo*, No. 10 (1946), pp. 38 and 44.

⁴⁸ For identification, see Krylov, *Mezhdunarodnyi sud Organizatsii Ob'edinennykh Natsii* [The International Court of the United Nations Organization] 5 (Moscow, 1958). Borisov's real identity at the time was well concealed. A clever use of the pen name was to have Borisov speak out in support of Krylov. *E.g.*, Borisov, "*Iuridicheskie izmyshleniia Gansa Kel'zena* [The Juridical Concoctions of Hans Kelsen] (Hans Kelsen, *The Communist Theory of Law*, London, 1955)," *Mezhdunarodnaia Zhizn'*, No. 10 (1955), p. 147. It is possible that Krylov has used other pen names as well. *E.g.*, the following book review has been identified as Krylov's product: S. Sergeev, "*Memuary delegata Konferentsii v San-Frantsisko* [Memoirs of a Delegate

Professor Krylov on the Rôle and Limits of International Adjudication

The tone of Krylov's evaluation of international adjudication depended on the occasion and the forum. His performance as a judge of the International Court and as a member of the International Law Commission, while generally consistent with the official views of the Soviet Union, was accompanied by restrained language and sometimes supported by cogent reasoning. By comparison, his comments on the same or analogous events and problems published at home were much less careful of words and more decidedly partisan. In the early 1950's in his articles on the work of the International Court, Krylov alternately called it an instrument of the United States Department of State or praised it, depending on the nature of the particular judgment or advisory opinion it had rendered.⁴⁹ Later, surveying the first ten years of the Court,⁵⁰ Krylov was more tolerant and optimistic than the sum total of his earlier pronouncements might have led one to expect:

If we ask whether the Court after ten years of existence serves the cause of international legality and of peaceful coexistence, we must, even taking into account . . . [some] deficiencies in the work of the Court and its generally modest role in international life, answer that question in the affirmative.⁵¹

Krylov criticized⁵² Poliansky, the author of the first Soviet treatise on the International Court,⁵³ for exaggerating the requirements for the effective functioning of the Court. It is unfortunate for a student of this problem that Krylov neglected to elaborate this point beyond the general observation. Poliansky's disenchantment had been that of a good Marxist-Leninist who saw international adjudication in terms of an adjuvant struggle and, as a consequence, felt that the fate of the Court hinged upon the continuation of the "imperialist voting machine" in the United Nations.⁵⁴ He assumed the inevitability of conflict between social orders built on different class structures and economic interests. After all, it is commonly stated by Soviet authorities on international law that the reactionary classes will, during their losing battle, manipulate the institution of international adjudication to their advantage and against historical progress.⁵⁵ Krylov's own estimate⁵⁶ of the practice of the Court leaves one puzzled as to the real basis for his guarded optimism. According to Krylov, one finds in the Court's work a mixture of good and bad. This is hardly an

to the San Francisco Conference] (Virginia Crocheron Gildersleeve, *Many a Good Crusade: Memoirs*, New York 1954),'' *Mezhdunarodnaia Zhizn'*, No. 1 (1956), p. 147. 47 *Annuaire, Institut de Droit International* 550 (1957, II).

⁴⁹ This observation is borrowed from Kulski, "Soviet Comments on International Law and International Relations," 46 *A.J.I.L.* 719, 722 (1952).

⁵⁰ Krylov, *op. cit.* note 48 above.

⁵¹ *Ibid.* at 164.

⁵² *Ibid.* at 4.

⁵³ Poliansky, *op. cit.* note 42 above.

⁵⁴ *Ibid.* at 233.

⁵⁵ Korovin, "Mezhdunarodnyi sud na sluzhbe anglo-amerikanskogo imperializma [The International Court in the Service of Anglo-American Imperialism]," *Sovetskoe Gosudarstvo i Pravo*, No. 5 (1950), p. 57; Lisovsky, *op. cit.* note 41 above, §150.

⁵⁶ Krylov, *op. cit.* note 48 above, at 163-164.

astounding proposition. What is far more important is the reason given in each case for classifying the ruling as the one or the other. Thus there have been unsatisfactory decisions in which the majority on the Court perpetuated a discriminatory policy against European people's democracies (e.g., *Corfu Channel Case (Merits)*⁵⁷ and *Interpretation of Peace Treaties*⁵⁸), and principles of colonialism against underdeveloped countries (e.g., *International Status of South-West Africa*⁵⁹ and *Case Concerning Rights of Nationals of the United States in Morocco*⁶⁰). On the other hand, there are also correct decisions and positive contributions to international legality (e.g., *Anglo-Iranian Oil Co. Case (Preliminary Objection)*⁶¹ and *Interpretation of Peace Treaties (Second Phase)*⁶²). Krylov appeared undisturbed by the prospect that, once a lack of integrity was imputed to the most important adjudicatory body of the world, on purely doctrinal grounds, little, if any, solace could be derived from other portions of the very same political doctrine:

It follows from the possibility of peaceful coexistence and cooperation between states having different social systems, capitalist and socialist, that there is a possibility of regulating differences between them by peaceful means.⁶³

Krylov's explanations of Soviet coolness towards international adjudication often failed to explain anything:

(a) On the failure of the Soviet Union to accede to the Statute of the Permanent Court of International Justice:

The U.S.S.R., not being a member of the League of Nations until 1934 and not participating in the creation of the Permanent Court, did not join the latter even after 1934, inasmuch as membership in the League did not entail compulsory participation in the Permanent Court.⁶⁴

(b) On the failure of the Soviet Union to accept the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court:

[The U.S.S.R. has not accepted the jurisdiction of the Court under the optional clause] on the ground that the jurisdiction of the Court should be voluntary.⁶⁵

On other occasions Krylov was less evasive. On December 5, 1949, he replied to a questionnaire of the *Institut de Droit International* stating, in substance, that the concept of domestic jurisdiction was imbedded in positive international law and went hand in hand with the idea of state sovereignty. He thought that it was impossible to define in advance the precise bounds of this reserved domain, because the need for invoking its

⁵⁷ [1949] I.C.J. Rep. 4.

⁵⁸ *Ibid.* 128.

⁶¹ *Ibid.* 93.

⁶³ Krylov, "Mirnoe razreshenie mezhdunarodnykh sporov [Pacific Settlement of International Disputes]," appearing as Ch. IX in *Mezhdunarodnoe Pravo* [International Law] 366 (Moscow, 1957).

⁶⁵ *Ibid.* at 380-381.

⁵⁸ [1950] *ibid.* 65.

⁶⁰ [1952] *ibid.* 176.

⁶² [1950] *ibid.* 221.

⁶⁴ *Ibid.* at 378.

protection could be determined only in the face of concrete disputes. The existence of an international obligation did not do away with the reserved domain, but merely limited it. Article 2, paragraph 7, of the Charter of the United Nations, Krylov continued, supported his view. By contrast, Article 15, paragraph 8, of the League of Nations Covenant had had a narrow scope. Finally, declarations of acceptance of the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute established only a rough outline of the reserved domain, a state still having the right to withdraw behind the protective walls of that sphere, if a concrete case happened to fall outside the scope of the optional clause. A recourse to an international judge in such a case would not yield useful results.⁶⁶

Similarly, on specific jurisdictional issues, Krylov constantly advocated a restricted rôle for international adjudication. In the first case before the International Court of Justice, the *Corfu Channel Case (Preliminary Objection)*,⁶⁷ he felt constrained to hold with the other members of the Court, save the *ad hoc* judge, that Albania had accepted the Court's jurisdiction by consent expressed in a letter to the Court. He did not, however, forego the opportunity to say a word against compulsoriness. Joining in a separate concurring opinion with six other judges, Krylov deplored the unwillingness of the majority to consider whether Article 36, paragraph 1, of the Statute of the Court ("all matters specially provided for in the Charter"), in conjunction with Articles 32, 25, and 36, paragraph 3, of the Charter of the United Nations, could result in the Court's having compulsory jurisdiction over a non-Member state pursuant to the recommendation of the Security Council to submit a legal dispute to the Court. Had the Court chosen to take up the question, Krylov said, it should have been answered in the negative.⁶⁸ He thus upheld the often reiterated Soviet view that the jurisdiction of the International Court was exclusively voluntary and that the Charter could not provide for the jurisdiction of the Court over disputes which the parties themselves had not referred to it.⁶⁹ In an article, Krylov alleged that the United Kingdom had contrived its argument for a broad construction of the jurisdictional provision with the sole aim of forcing Albania to conclude an agreement on special sub-

⁶⁶ 43 *Annuaire, Institut de Droit International* 5 ff., 33-35 (1950, I).

⁶⁷ [1948] I.C.J. Rep. 15.

⁶⁸ *Ibid.* at 31-32 (joint separate opinion of Basdevant, Alvarez, Winarski, Zoričić, DeVisscher, Badawi, and Krylov).

⁶⁹ Simis, "Mezhdunarodnyi sud [The International Court]," a comment in 2(I) Oppenheim, *Mezhdunarodnoe Pravo* [International Law] 109, 111 (Russian trans., Moscow, 1949); Krylov, *op. cit.* note 44 above, at 223-224. Krylov also praised the Court for having restated the principle of voluntary jurisdiction in the Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Objection), [1954] I.C.J. Rep. 19, and in the Case of the Treatment in Hungary of Aircraft of the United States of America, *ibid.* 99 and 103 (orders). Borisov, "Sessia Mezhdunarodnogo suda OON v 1954 g. [The 1954 Term of the International Court of the U.N.]," *Sovetskoe Gosudarstvo i Pravo*, No. 8 (1954), p. 107, at 108.

mission. Krylov implied that the majority had conspired to suppress the discussion of this point.⁷⁰

Krylov later carried his opposition to the compulsory jurisdiction of the Court to the International Law Commission, where he contended that the element of compulsoriness was rapidly disappearing from procedures of pacific settlement, and in effect was being taken seriously only by small states and by jurists who were either misled or naïve. He pointed to Article 33 of the Charter of the United Nations as providing an adequate machinery for resolution of disputes, but did not imply that any of the procedures therein described were binding.⁷¹ During the discussion of the Provisional Articles Concerning the Regime of the High Seas,⁷² especially Article 31, he strove relentlessly to separate the principle of adjudication from the provisions allowing coastal states to make unilateral determinations regarding the adjacent seas.⁷³ When accused of proposing international anarchy,⁷⁴ Krylov endeavored to show that he was not inimical to compulsory adjudication in *some* cases. Indeed, he hastened to add, a number of treaties concluded by the Soviet Union, *e.g.*, those concerning suppression of the traffic in narcotics, contained arbitration clauses. In the case of narcotic drugs, the eradication of a recognized evil called for firm measures. The issues regarding fisheries, Krylov contended, were quite different: "there the remedy of compulsory arbitration was out of proportion to the issues at stake."⁷⁵ As to the rôle which the International Court of Justice should play in this process, Krylov showed no great consistency. He initially maintained that questions of conservation of resources of the sea and of fisheries were too specialized and technical for the International Court.⁷⁶ He therefore proposed that technical arbitration boards be set up, excluding any jurists. When the majority of the Commission insisted that at least one person on the board should be versed in international law, Krylov did not budge from his position and voted against the "hybrid proposal."⁷⁷ He voted for a later proposal which, in one instance, substituted the International Court of Justice for an arbitration board, making it clear, however, that "States would be bound by the judgment of the Court only if they had accepted its jurisdiction under the optional clause."⁷⁸ This understanding was to defeat the jurisdiction of the Court under

⁷⁰ Borisov, "Albano-britanskii spor o kompetentsii Mezhdunarodnogo suda OON [The Albanian-British Dispute over the Jurisdiction of the International Court of the U.N.]," *Sovetskoe Gosudarstvo i Pravo*, No. 11 (1948), p. 9, at 15; Krylov, *op. cit.* note 48 above, at 21.

⁷¹ The references, in notes 71-84, to International Law Commission (I.L.C.) 7th Sess., Summary Record (A/CN.4/SR. 282-330) (1955), and 8th Sess., Summary Record (A/CN.4/SR. 331-381) (1956), are cited by meeting and paragraph. The statement in the text is supported by 352nd Meeting, para. 43-44.

⁷² I.L.C. Report, 7th Sess., 2 I.L.C. Yearbook (1955) (A/CN.4/SER.A/1955/Add.1).

⁷³ 309th Meeting, para. 7-9; 352nd Meeting, para. 62-63.

⁷⁴ 309th Meeting, para. 13 and 20; letter to the editors, *Times* (London), June 2, 1956, p. 7, col. 5.

⁷⁵ 360th Meeting, para. 53.

⁷⁶ 297th Meeting, para. 59.

⁷⁷ *Ibid.*; 302nd Meeting, para. 45; 305th Meeting, para. 22, 53, 62 and 82; 327th Meeting, para. 43; 330th Meeting, para. 36.

⁷⁸ 361st Meeting, para. 3.

Article 36, paragraph 1, of the Statute ("all matters specially provided for . . . in treaties and conventions in force") and allow the Soviet Union to sign the proposed Convention Concerning the Regime of the High Seas without fearing that its interests could ever be adversely affected by international adjudication. In the light of this, it is interesting to note that the Court's decisions relating to the powers of coastal states over adjacent waters had actually been to Krylov's liking. This applies to both the *Corfu Channel Case (Merits)*⁷⁹ (holding the United Kingdom's "Operation Retail" to violate the sovereignty of Albania) and the *Fisheries Case*⁸⁰ (accepting the Norwegian delimitation of its territorial sea). The *Fisheries Case*, in particular, was a source of constant joy to Krylov, a great contribution to "case law" with which one ought not to tamper.⁸¹ This decision, certainly, had added force to the unilateral Soviet claim to a twelve-mile limit of territorial waters and to the denial of the existence of a rule of international law governing the ten-mile maximum width of an entrance to a national bay.⁸² Notwithstanding all this, Krylov was hostile to a proposal whereby the Commission would suggest a minimum breadth of the territorial sea for acceptance by states and leave to the International Court of Justice to decide any claims over and above such minimum. In this case, he felt, the Commission would be transgressing the terms of the statute "if it sought to grant legislative power to the International Court of Justice."⁸³ To complicate the picture even more, in commenting on the question whether the right of innocent passage should be preserved in case of straits which do not link two parts of the high seas but provide the only means of access to a port of another country, Krylov stated that the question sounded far more like a case for the International Court than for the International Law Commission.⁸⁴ The issue, having been raised by the Israeli Government, obviously referred to the Gulf of Aqaba and did not involve any analogous situation affecting the Soviet Union. Conceivably, it was the absence of such an interest of his state that enabled Krylov, this time, to come out as a champion of international adjudication.

At the 1958 United Nations Conference on the Law of the Sea, Krylov said nothing substantially new. It was regrettable, he observed, that the International Law Commission should have played up the notion of compulsoriness in adjudication. Arbitration was acceptable, but compulsory arbitration was "unrealistic." He reminded the participants that the Charter of the United Nations contained no clause making recourse to arbi-

⁷⁹ [1949] I.C.J. Rep. 4. For Krylov's comment, see Krylov, *op. cit.* note 48 above, at 101.

⁸⁰ [1951] I.C.J. Rep. 116. For Krylov's comment, see Borisov, "Mezhdunarodnyi sud o territorial'nykh vodakh [The International Court on Territorial Waters]," *Sovetskoe Gosudarstvo i Pravo*, No. 8 (1952), p. 52, at 54.

⁸¹ 816th Meeting, paras. 79, 80, 81 and 82; 317th Meeting, paras. 9 and 10; 365th Meeting, para. 20, 22 and 35.

⁸² The acceptance of wider entrances would help the Sovietization of the four Arctic seas of the Soviet Union. See Kulaki, "Soviet Comments on International Law and International Relations," 47 *A.J.I.L.* 308, 318-314 (1953).

⁸³ 311th Meeting, par. 40; 312th Meeting, par. 67.

⁸⁴ 366th Meeting, paras. 101 and 102.

tration or to the International Court of Justice mandatory. It was beyond him why, in matters of fishing, it was necessary to depart from the wisdom of the authors of the Charter. Finally, he could not quite see what law the proposed commissions would apply.⁸⁵

In cases in which the jurisdiction of the International Court of Justice had been established in principle, Krylov repeatedly fought in favor of restrictive interpretation of its scope. Thus, in both the *Corfu Channel Case (Merits)*⁸⁶ and the *Corfu Channel Case (Assessment of Compensation)*,⁸⁷ he would have held that the Court had no jurisdiction to assess damages against Albania on the basis of the writings which constituted the special submission.⁸⁸ Again, although Krylov had taken no part in either the *Anglo-Iranian Oil Co. Case (Interim Protection)*⁸⁹ or the *Anglo-Iranian Oil Co. Case (Preliminary Objection)*,⁹⁰ he subsequently commented on the two decisions, praising the latter⁹¹ and condemning the former. In his opinion, granting measures of interim protection had been a flagrant violation of the Court's powers. Irrespective of some lack of clarity in Article 61 of the Rules of the Court, Krylov wrote, it followed from the very essence of international justice that the first question before an international tribunal was the determination of its jurisdiction.⁹²

[By allowing the interim measures in the *Anglo-Iranian Oil Co. Case*], the majority of the Court upheld the intrigues of Anglo-American reaction and made an attempt to forestall the national emancipation struggle of the Iranian nation.⁹³

Had the Order of July 5, 1951, been carried out, its results would have been dangerous and shameful for international law and justice and led to the establishment of a new regime of capitulations for the benefit of the nationals of the great powers and detrimental to the interests of small and weak states. In particular, the Court interfered in the international affairs of Iran by setting up the so-called observation commission and, thus, not only overstepped its competence but also violated the principle of freedom of nations.⁹⁴

Krylov also thought that the Iranian Government had been correct in saying that its acceptance of the compulsory jurisdiction of the Court had been with reference to international agreements and conventions only and not to concessions; and that the Court should not have taken jurisdiction because the dispute, by its nature, had been mainly political.⁹⁵

The last point relates to the troublesome distinction between "legal"

⁸⁵ U.N. Conference on the Law of the Sea, 5 Official Records, Third Committee (High Seas—Fishing—Conservation of Living Resources) 77, 85 (A/CONF.13/41) (1958).

⁸⁶ [1949] I.C.J. Rep. 4.

⁸⁷ *Ibid.* 244.

⁸⁸ *Ibid.* 4, 73 (dissenting opinion of Krylov); *ibid.* 244, 251 (Krylov's declaration of dissent).

⁸⁹ [1951] *ibid.* 89.

⁹⁰ [1952] *ibid.* 98.

⁹¹ P. 368 above.

⁹² Krylov, *op. cit.* note 48 above, at 33-34.

⁹³ Borisov, "Narusenie Mezhdunarodnym sudom suverennykh prav Irana [Violation of the Sovereign Rights of Iran by the International Court]," *Sovetskoe Gosudarstvo i Pravo*, No. 1 (1952), p. 69, at 73.

⁹⁴ Krylov, *op. cit.* note 48 above, at 33.

⁹⁵ Borisov, *loc. cit.* note 93 above, at 72.

and "political" questions (the problem of "justiciability"), much discussed in connection with advisory opinions. During the early years of the United Nations, the Soviet Delegation upheld with great persistence the thesis that constituent bodies of the Organization had no right to ask the International Court of Justice for advisory opinions concerning the interpretation of the Charter and that the Court was not empowered to respond to such requests. In 1947, when the General Assembly had before it a recommendation urging the various organs of the United Nations to refer to the Court, for its advisory opinion, difficult and important points of law, in particular those involving interpretation of the Charter,⁹⁶ the Soviet Union went on record against the proposal:

The representative of the U.S.S.R. [on the Sixth Committee] requested the insertion in the summary record of its dissenting opinion, the gist of which is that the International Court of Justice has no jurisdiction for interpreting the Charter. In particular, it has expressed the opinion that the recommendation would be contrary to the Charter and therefore illegal, inasmuch as it would amount to adding to the Charter a provision which is not in it and which in fact was rejected in San Francisco. The delegation of the U.S.S.R. feels that such an illegal modification of the Charter would be yet another blow to the Charter and would weaken and undermine it.⁹⁷

Subsequently, Vyshinsky contended that the draft resolution was a device to amend the Charter by a procedure other than that provided for in Chapter XVIII. In his opinion each organ itself was to interpret those provisions it had to apply, no extraneous body having the final word. Vyshinsky did not think much of a suggestion that advisory opinions were not necessarily binding. What, he asked, was the utility of advice that could be freely ignored? Such practice would only serve to detract from the Court's stature. Vyshinsky also argued that there was nothing in the Charter upon which the draft resolution could rest, because the "legal questions" of Article 65 of the Statute of the Court were confined to the four categories of questions enumerated in Article 36, paragraph 2, and that interpretation of the Charter, a treaty *sui generis*, could not be regarded as "interpretation of a treaty" (Article 36, paragraph 2, subparagraph a). Finally, even if Article 65 alone were relied on (*i.e.*, as including interpretation of the Charter under the label "any legal question"), one would have to concede immediately that the interpretation of this constitutional document could not be designated a legal question pure and simple, but that it was, instead, an essentially political matter.⁹⁸ The substance of Vyshinsky's reasoning, repeated in Soviet legal literature,⁹⁹ is probably traceable to the same dread of the Soviet Union of procedures by which important decisions might be made without observing the principle of unanimous consent of those affected.

⁹⁶ U.N. General Assembly, 2nd Sess., Official Records, Resolutions 103-104 (A/519) (1948).

⁹⁷ *Ibid.*, 6th Committee 320 (A/C.6/W.5/Add.1) (1947).

⁹⁸ *Ibid.*, Plenary Meetings 877-886 (remarks of Andrei Vishinsky) (A/P.V. 113) (1947).

⁹⁹ See, *e.g.*, Simis, *loc. cit.* note 69 above, at 113.

The first request for an advisory opinion to come before the International Court of Justice concerned the *Admission of a State to the United Nations (Charter, Article 4)*.¹⁰⁰ As to the Court's jurisdiction, the majority held:

Nowhere is any provision to be found forbidding the Court, "the principal judicial organ of the United Nations," to exercise in regard to Article 4 of the Charter, a multilateral treaty, an interpretative function which falls within the normal exercise of its judicial powers.¹⁰¹

By this the Court rejected the core of the argument of the Soviet Union as advanced by the latter both prior to the proceedings and during their written stage.¹⁰² It is to be noted that even the dissenting judges conceded that the Court had the power to interpret the Charter. All but Krylov did so expressly.¹⁰³ By not insisting that interpretation of the Charter could not *per se* be a "legal question" within the meaning of Article 65, but arguing, instead, that the specific question before the Court was political, Krylov tacitly accepted the same proposition. He felt that the Court should have candidly admitted that the request for its opinion had not been born in a legal atmosphere and should therefore have refused, in its discretion ("The Court may give an advisory opinion . . .," Article 65, paragraph 1, of the Statute of the Court), to entertain it.¹⁰⁴ The political coloring of the question, Krylov thought, could not be overcome by framing it in abstract terms:

Whereas the Permanent Court, in interpreting the Covenant of the League of Nations, sought to consider concrete situations or existing disputes, the Court, in the present case, is about to make a pronouncement, with quasi-legislative effect, concerning decisions to be taken by the political organs of the United Nations.¹⁰⁵

In an article discussing the decision, Krylov again said merely that interpretation of those provisions of the Charter which describe the competence of the principal organs of the United Nations should be left to those organs. As a reason for this, however, he suggested the possibility of non-compliance by the political organs, with all the ensuing damage to the Court's prestige, rather than the broader ground of the absence of jurisdiction to interpret the Charter at all.¹⁰⁶

Krylov's approach, whether or not taken with the knowledge and blessing of the Soviet Government, had the obvious advantage of being sufficiently flexible to permit the Soviet judge either to speak out on the merits of the request, whenever such pronouncements served the interests of his state, or to oppose the request on the ground of discretionary self-restraint. The next two advisory opinions seem to bear out this hypothesis. Although

¹⁰⁰ [1948] L.C.J. Rep. 57.

¹⁰¹ *Ibid.* at 61.

¹⁰² Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)—Pleadings, Oral Arguments, and Documents 29 (L.C.J., 1948).

¹⁰³ [1948] L.C.J. Rep. 57, 82 (joint dissenting opinion of Basdevant, Winiarski, McNair and Read); *ibid.* at 94 (dissenting opinion of Zoričić).

¹⁰⁴ *Ibid.* at 107-108 (dissenting opinion of Krylov).

¹⁰⁵ *Ibid.* at 108-109 (dissenting opinion of Krylov).

¹⁰⁶ Borisov, "Priem novykh chlenov v Organizatsiju Ob'edinennykh Natsii [Admission of New Members to the United Nations Organization]," *Sovetskoe Gosudarstvo i Pravo*, No. 9 (1948), p. 6.

in the written stage of the proceedings on the *Competence of the Assembly Regarding Admission to the United Nations*¹⁰⁷ the Soviet Union reasserted its earlier position against the Court's jurisdiction,¹⁰⁸ Krylov voted with the majority, which took up the question and rendered an opinion in harmony with the official Soviet view on restrictive admission procedures. Later, in explaining his vote, Krylov stated:

Thus, the International Court confirmed, within the limits of the question brought before it, the correctness of the position taken by the Soviet delegation since the inauguration of the United Nations, namely, that the principle of unanimity of the Great Powers is the cornerstone and the foundation of the Organization.¹⁰⁹

As a result of his unreserved participation in the majority opinion, Krylov approved it in its entirety. This includes the reaffirmation of the holdings in the advisory opinion concerning the *Admission of a State to the United Nations (Charter, Article 4)*,¹¹⁰ namely, (a) that the Court has jurisdiction to interpret the provisions of the Charter, and (b) that the Court should not feel constrained to refuse to answer a legal question for the reason that its opinion might have political consequences.¹¹¹ Even in his treatise on the International Court of Justice,¹¹² Krylov avoided a comparison of the two advisory opinions concerning admission.¹¹³ He was content to remark that the net outcome of the whole controversy had been a fiasco for the scheme of the "imperialists" to open the way to states which they supported and to preclude the admission of states sponsored by the Soviet Union and other "democratic states."¹¹⁴

Krylov's vote in the second case has been construed as a tacit disagreement with the point of view of the Soviet Government.¹¹⁵ If the reference is to the obvious discord between the import of Krylov's vote and the official communications during the written stage, the observation is entirely valid. On the other hand, an attempt on this basis to imply Krylov's independence from the influence of the Soviet state is open to serious criticism. It is a hasty conclusion which disregards the dilemma faced by a partisan

¹⁰⁷ [1950] I.C.J. Rep. 4.

¹⁰⁸ Competence of the Assembly—Pleadings, Oral Arguments, and Documents 100–105 (I.C.J., 1950).

¹⁰⁹ Borisov, "Neudavshaiasia ataka protiv printsipa edinoglasia velikikh derzhav v Sovete bezopasnosti [An Unsuccessful Attack on the Principle of Unanimity of the Great Powers in the Security Council]," *Sovetskoe Gosudarstvo i Pravo*, No. 6 (1950), p. 51, at 57–58. For another indication of Krylov's strong support of the veto power, see Borisov, book review, *Sovetskoe Gosudarstvo i Pravo*, No. 1 (1954), p. 152.

¹¹⁰ [1948] I.C.J. Rep. 57.

¹¹¹ [1950] *ibid.* 4, 6.

¹¹² Krylov, *op. cit.* note 48 above.

¹¹³ Compare: "In the case where there is divergence in legal views between the organs [of the United Nations] concerning the interpretation of the Charter, it is permissible to consult any competent institution, including the International Court of Justice, which may give an advisory opinion but not an [authoritative] interpretation. A contrary practice would place the Court above the Organization itself, in violation of the Charter." Koshevnikov, "Nekotorye voprosy teorii i praktiki mezhdunarodnogo dogovora [Some Problems in the Theory and Practice of Treaties]," *Sovetskoe Gosudarstvo i Pravo*, No. 2 (1954), p. 62, at 74.

¹¹⁴ Krylov, *op. cit.* note 48 above, at 52.

¹¹⁵ Lidsitzyn, book review, 53 A.J.I.L. 201, 202 (1959).

of Soviet interests. Had Krylov cast his vote *against* the majority, for whatever reason, there would have been one vote less to affirm the principle of unanimity of the great Powers. Moreover, Krylov's only brethren in dissent would have been Judges Alvarez and Azevedo, both, but especially the former, having misgivings concerning the applicability of the veto to admission of new Members.¹¹⁶ Such contradictions are far too common in Soviet law to permit one to regard the vote as significant. The principle of "proletarian internationalism" teaches that a legal form, depending on its historical context, may be either positive (progressive) or negative (reactionary).¹¹⁷ Hence much room for picking and choosing. Finally, taking into account the fact that Krylov had not closed the door to such an action because of his cautious reasoning in the first of the two cases, his subsequent stand should not have caused surprise.

The same tactic was well suited to the third advisory opinion calling for interpretation of the Charter, the *International Status of South-West Africa*.¹¹⁸ This time, none of the Soviet Members of the United Nations presented statements, although they followed a policy of sympathy for underdeveloped and colonial peoples. Krylov did not question the Court's jurisdiction, but wrote a partial dissent expressing his disappointment that the Court had refused to hold South Africa legally obligated to negotiate a trusteeship agreement for South West Africa.¹¹⁹

Krylov, alternately, urged the Court to decide questions unnecessary for the resolution of the dispute before it and, at other times, to practice judicial self-restraint in the same respect. In evaluating the *Norwegian Loans Case*,¹²⁰ Krylov concluded that the Court had very properly striven to limit itself to the principal issues without getting involved in extraneous arguments.¹²¹ On the other hand, he reproached the Court for not having taken up collateral issues. The examples singled out by Krylov are those in which he would have preferred the Court to speak out in accordance with the position of the Soviet Union. As stated earlier,¹²² in the *Corfu Channel Case (Preliminary Objection)*,¹²³ Krylov joined with six other judges to voice his regret over the Court's avoidance of the troublesome question of compulsory jurisdiction under Article 36, paragraph 3, of the Charter of the United Nations. Again, in the *Anglo-Iranian Oil Co. Case (Preliminary Objection)*,¹²⁴ the Court should have held that nationalization was a domestic matter of every state.¹²⁵

¹¹⁶ [1950] I.C.J. Rep. 4, 12 (dissenting opinion of Alvarez); *ibid.* at 22 (dissenting opinion of Azevedo).

¹¹⁷ For a striking assertion of this doctrine, see Korovin, "Proletarskii internatsionalizm v mezhdunarodnoi praktike [Proletarian Internationalism in International Practice]," *Mezhdunarodnaia Zhizn'*, No. 2 (1958), p. 29, esp. at 37.

¹¹⁸ [1950] I.C.J. Rep. 128.

¹¹⁹ *Ibid.* at 191 (dissenting opinion of Krylov).

¹²⁰ [1957] I.C.J. Rep. 9.

¹²¹ Krylov, *op. cit.* note 48 above, at 40.

¹²² P. 369 above.

¹²³ [1948] I.C.J. Rep. 15.

¹²⁴ [1952] *ibid.* 93.

¹²⁵ Krylov, *op. cit.* note 48 above, at 36; Borisov, "Dva sudebnykh dela v Mezhdunarodnom sude OON v 1952 g. [Two Cases before the International Court of the U.N. in 1952]," *Sovetskoe Gosudarstvo i Pravo*, No. 4 (1953), p. 153.

Another factor bearing upon the rôle and limits of international adjudication is the attitude of the participants towards the organic growth of the adjudicatory practice. The Soviet denial of continuity between the Permanent Court of International Justice and the International Court of Justice can, of course, be traced back to the political decision of the Soviet Union to follow a period of unconcealed ill will towards the former with the current period of actual, though unenthusiastic, participation in the work of the latter. Hence, the emphasis on the International Court of Justice as a *new* Court.¹²⁶ Krylov wrote in 1958:

The anti-historical attempt to tack the jurisprudence of the International Court of the U.N. on that of the Permanent Court of International Justice of the League of Nations, even if the latter contains a large number of interesting factual situations and judicial reflections, is one of the basic errors committed by foreign writers.¹²⁷

However, Krylov did not hesitate to commit identical "errors." He cited precedents from the practice of the Permanent Court whenever they served to buttress his current arguments. The two most disturbing cases from the Soviet point of view furnish the two striking instances of Krylov's reliance upon the past. He invoked the decision on the *Status of Eastern Carelia*¹²⁸ against the *Interpretation of the Peace Treaties*¹²⁹ to support his contention that here the request for an advisory opinion concerned a dispute actually pending between states: the three people's democracies (Bulgaria, Hungary and Rumania) *versus* the United States and the United Kingdom. Therefore, Rule 83 of the Court applied and the proceedings, for purposes of procedure, had to be regarded as contentious. For this reason, the consent of the states directly affected by the forthcoming decision was essential lest compulsory jurisdiction be surreptitiously introduced.^{129a} On this point, Krylov's views coincided with the written statements submitted by Soviet governments.¹³⁰ Similarly, in the advisory opinion regarding the *Admission of a State to the United Nations* (*Charter, Article 4*),¹³¹ he stressed that, in its eighteen years of work, the Permanent Court had never entertained a question *in abstracto*.¹³²

The question of the applicable law, although not commonly discussed by Soviet writers in conjunction with problems of international adjudication, has an overriding importance for the notion of a single body of world law. The enumeration in Article 38, paragraph 1, of the Statute of the International Court of Justice has little value if the concepts can be conveniently recast into molds of "proletarian internationalism." Although Soviet jurists perpetually debate the nature of international law, their leading school of thought denies precisely the existence of a world legal community. This theory selects principles and norms which, notwithstanding their bour-

¹²⁶ P. 365 above.

¹²⁷ Krylov, *op. cit.* note 48 above, at 5.

¹²⁸ P.C.I.J., Publications, Series B, No. 5 (1923).

¹²⁹ [1950] I.C.J. Rep. 65.

^{129a} *Ibid.* at 106-111 (dissenting opinion of Krylov).

¹³⁰ Interpretation of Peace Treaties—Pleadings, Oral Arguments, and Documents 198-201 (I.C.J., 1950).

¹³¹ [1948] I.C.J. Rep. 57.

¹³² *Ibid.* at 108 (dissenting opinion of Krylov).

geois origin, it regards as progressive, from those which are thought to be reactionary. The former, being accepted by both camps, constitute *general* international law. The residue of Western international law is merely *capitalist* international law. In addition, "the fraternal relations between the highly advanced people's democracies" have given rise to the third body of international law, *socialist* international law. General international law is transitory. In conformity with the precept that all roads lead to Communism, socialist law is expected to displace the capitalist heritage and become the future international law of general acceptance.¹³³

It seems that Krylov was of two minds about this problem. At times, he unequivocally accepted the tripartite division of international law:

While contributing new principles and institutions to international law, the U.S.S.R. also avails itself of the institutions of bourgeois international law, developing the progressive tendencies inherent in them. At the same time, however, Soviet diplomacy reveals the reactionary character of those principles and institutions of bourgeois international law which are instruments of subjugation of economically weaker countries by imperialist Great Powers. For international law is a battlefield of progressive and reactionary tendencies. Here, as everywhere else, victory will belong to the forces of progress.¹³⁴

But the East and the West are as far apart as ever on the meaning of "progress." The movement in the West toward consciousness of a global community is denounced in Soviet theory as "bourgeois cosmopolitanism," a smoke-screen to cover imperialistic maneuvering for power and expansion. The Soviet position asserts external sovereignty at every opportunity. It is the cornerstone of their international law. In his preface to the Russian translation of Oppenheim's *International Law*, Krylov noted that Oppenheim had based his work on the bourgeois ideas current in the late nineteenth and the early twentieth century. The author had properly stressed positivism and had endeavored to be objective. If he had not been entirely successful, that was due to his limited bourgeois outlook and methodology which did not permit him to grasp the social and political relationships that had shaped international law. Unfortunately, Krylov went on, many of the meritorious aspects of the treatise had been since ruined by Lauterpacht's additions, who, on the whole, appeared as "an apologist of contem-

¹³³ See, generally, Kozhevnikov, "Nekotorye voprosy mezhdunarodnogo prava v svete truda I.V. Stalina 'Marksizm i voprosy iazykozaniia' [Some Problems of International Law in the Light of I. V. Stalin's Work 'Marxism and Problems of Linguistics']," *Sovetskoe Gosudarstvo i Pravo*, No. 6 (1951), p. 25; Levin, *Osnovnye problemy sovremennoego mezhdunarodnogo prava* [The Basic Problems of Contemporary International Law] (Moscow, 1958); Korovin, *loc. cit.* note 117 above; Tunkin, "Novyi tip mezhdunarodnykh otnoshenii i mezhdunarodnoe pravo [A New Type of International Relations and International Law]," *Sovetskoe Gosudarstvo i Pravo*, No. 1 (1959), p. 81; *idem*, "Co-existence and International Law," 95 *Hague Academy Recueil des Cours* 1 (1958, III); Lapenna, "International Law Viewed through Soviet Eyes," 15 *Year Book of World Affairs* 204 (1961).

¹³⁴ Krylov, "The U.S.S.R.'s Struggle for the Fundamental Principles of International Law" [title of the summary in English], *Państwo i Prawo*, No. 11 (1950), p. 43 (the English summary appears on pp. 3-4 of a special supplement).

porary British imperialism."¹³⁵ In commenting on the litigation between Colombia and Peru,¹³⁶ Krylov remarked:

The acknowledgment by the Court of sovereignty as the fundamental principle of international law is juridically beyond reproach. Against the background of crying disregard of national sovereignty by governments of imperialist states, above all the United States of America, the Court's decision should be taken as a positive factor.¹³⁷

Years ago, Krylov wrote with ostensible conviction that the decisions of the International Court of Justice were "without the slightest doubt . . . [also] sources of international law," provided they were findings on legal (as contrasted to political) questions submitted to the Court.¹³⁸ Yet, only two years later, Krylov seemed to have abandoned his thesis, in the advisory opinion concerning *Reparation for Injuries Suffered in the Service of the United Nations*,¹³⁹ by narrowly construing the notion of "development of international law":

The Court can only interpret and develop international law in force; it can only adjudicate in conformity with international law. In the present case, the Court cannot found an affirmative reply to Question I (b) [which asked the Court whether the United Nations Organization was entitled to exercise functional protection on behalf of its agents] either on the existing international convention or on international custom (evidence of general practice), or again, on any general principle of law (recognized by the nations).¹⁴⁰

If there were still any lingering doubts as to what Krylov had meant, recent Soviet writings have clarified the matter. Such judicial decisions are, at best, "evidence" of the law and not its "source,"¹⁴¹ Krylov's reference to the *Fisheries* case as a great contribution to "case law"¹⁴² notwithstanding.

¹³⁵ Krylov, "Predialovie [Preface]," 1(I) Oppenheim, *Mezhdunarodnoe pravo* [International Law] 13 (Russian trans., Moscow, 1948).

¹³⁶ *Asylum Case*, [1950] I.C.J. Rep. 266; Interpretation of the Judgment in the *Asylum Case*, *ibid.* 395; *Haya de la Torre Case*, *ibid.* 71.

¹³⁷ Krylov, *op. cit.* note 48 above, at 135. Krylov also hailed the Court for its reaffirmation of state sovereignty in the opinion concerning Reservations to the Convention on Genocide, [1951] I.C.J. Rep. 15. Borisov, "Suverennoe pravo gosudarstv-uchastnikov mnogostoronnykh dogovorov zaslavliat' ogovorki [The Sovereign Right of States, Parties to Multilateral Treaties, to Append Reservations]," *Sovetskoe Gosudarstvo i Pravo*, No. 4 (1952), p. 64.

¹³⁸ Quoted by Triaka and Slusser, "Treaties and Other Sources of Order in International Relations: The Soviet View," 52 *A.J.I.L.* 699, 711 (1958).

¹³⁹ [1949] I.C.J. Rep. 174.

¹⁴⁰ *Ibid.* at 219 (dissenting opinion of Krylov).

¹⁴¹ *Mezhdunarodnoe pravo* [International Law] 9 (Moscow, 1957). Not even evidence. Tunkin, "Co-existence . . .," *loc. cit.* note 133 above, at 28-30.

¹⁴² P. 371 above. Compare Krylov's statement before the International Law Association, in which he criticized the distinction between so-called classical international law and international law of the United Nations. "We have no classical international law now, we have the law of the 81 States belonging to the United Nations." He said he was surprised to hear the *Caroline* case cited in support of the self-help doctrine, in the teeth of Art. 51 of the U.N. Charter. Furthermore, the *Corfu Channel Case* (Merits) was a precedent against the self-help doctrine. International Law Association, Report of the Forty-Eighth Conference, New York, September, 1958, pp. 512-513.

But it is by no means easy to ascertain the *generally* accepted principles of international law without consulting the policy-makers of the Soviet Union. Whereas the Soviets extol the maxim of *Pacta sunt servanda*, they are candid enough to admit that some treaties are more *servanda* than others. The exception embraces the so-called one-sided treaties,¹⁴³ classified, insofar as one can ascertain, on the basis of political expediency. For example, in Krylov's words, the decision of the International Court of Justice in the *Case Concerning Rights of Nationals of the United States of America in Morocco*,¹⁴⁴

legitimizing the consular jurisdiction of Americans and thus elevating the latter to a position of "masters" over the local population of Morocco, is one of the most reactionary decisions in the practice of the International Court.¹⁴⁵

At other times, Krylov's own performance was measured against the approved doctrine and found wanting. There were, of course, Krylov's blunders of the 1920's and 1930's.¹⁴⁶ But even as late as 1948, that is, after his election to the International Court of Justice, Krylov was criticized by no less a man than Korovin¹⁴⁷ for having helped to produce an international law textbook replete with errors, "both factual and politico-ideological."¹⁴⁸ Korovin was disturbed by the fact that Krylov and his co-author, Durdenevsky, had not sufficiently emphasized the existence of two antagonistic camps (the imperialistic camp headed by the United States, and the democratic camp headed by the Soviet Union), but merely noted the presence of "two courses of international policies" on the world scene. They had needlessly cited many foreign publicists, including Brazilians and Argentinians, as well as Russian émigrés:

As a rule, the bourgeois publicists are presented objectively, without indicating and exposing the class roots of their doctrines and theories.¹⁴⁹

On the other hand, not enough space had been given to the contributions of pre-Revolution Russian publicists, not to speak of the deficient treatment of the rôle of Marxian classics in the development of international law. A number of specific problems had been described in "un-Soviet terms" and based on "objectivistic 'non-partisan' (in the worst sense of the word) positions."

Thus, for example, in speaking of the subjects of future international law (p. 112), the authors think that, in the interests of protection of "human rights and fundamental freedoms," "the individual" will become such a subject. By this they are only pouring water on the mill of those governments which, under the pretext of defending "human rights," wish to secure for themselves an opportunity for constant interference in the internal affairs of the more advanced states (*cf.* Evatt proposal and the like). The U.S.S.R. has fought

¹⁴³ *Mezhdunarodnoe pravo* [International Law] 243 (Moscow, 1957).

¹⁴⁴ [1952] I.C.J. Rep. 176.

¹⁴⁵ Krylov, *op. cit.* note 48 above, at 106.

¹⁴⁶ Pp. 361-368 above.

¹⁴⁷ Korovin, "Novye uchebniki mezhdunarodnogo prava [New Textbooks on International Law]," *Sovetskoe Gosudarstvo i Pravo*, No. 8 (1948), p. 72.

¹⁴⁸ *Ibid.* at 74.

¹⁴⁹ *Ibid.* at 75.

and continues to fight such attempts untiringly since, after all, this "problem," insofar as the U.S.S.R. and the countries of the new democracy are concerned, ceased to be a "problem" long ago.¹⁵⁰

In speaking of the Pan American Union, complained Korovin, the authors had circumvented the origin of this Union as an instrument of United States imperialism. The Pact of Chapultepec had been presented as if it were based on such lofty principles as respect for international law, outlawry of aggressive war and defense of democracy. And, to top it all, they had opened the section on "Struggle for a New, Durable Peace" by citing the Atlantic Charter instead of the acts of Soviet diplomacy. Because of this, Sir Winston Churchill had been made to appear as a leading champion of such a peace.

In the light of the aforesaid, one is forced to conclude that the textbook of the Institute of Law is apolitical, has been written objectivistically, fails, in several instances, to express the Soviet line on international law, and, as regards certain questions, defends conceptions which are alien to Soviet science.¹⁵¹

Some three months later, Krylov and Durdenevsky replied to Korovin's fault-finding review, in a letter to the editors of *Sovetskoe Gosudarstvo i Pravo*.¹⁵² As to the two hostile camps in the international arena, they pointed out that an excerpt from Molotov's speech of October 29, 1946, had been quoted to demonstrate precisely that. Evaluation of such phenomena as the Marshall Plan, the Truman Doctrine, the legal regime of the Danube, the German question, et cetera, had been impossible, the authors maintained, because the crucial events had taken place after the completion of the manuscript.

As editors of the textbook, we wish, however, to emphasize that we fully acknowledge the commission of a number of substantial errors and the correctness of many remarks made by E. A. Korovin. . . .¹⁵³

Professor Krylov and Judicial Independence and Impartiality

One becomes acutely aware of the impact of the East-West rift when inquiry is directed to the personal qualities of individuals involved in international adjudication. The Soviet Union once having set up the "standard of an angel" for those it would consider fit to judge Soviet affairs, it is only natural that others should wonder about the heavenly attributes of Soviet judges called upon to judge *non-Soviet* affairs. Can a Soviet judge of the International Court of Justice be an "independent" judge?¹⁵⁴ Can his solemn declaration to perform his duties as a judge "impartially"¹⁵⁵ be taken seriously? Can a Soviet member of the International Law Commission, when dealing with such a sensitive issue for the Soviet Government as international adjudication, be expected to act solely as a person "of

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.* at 76.

¹⁵² Durdenevsky and Krylov, letter to the editors, *Sovetskoe Gosudarstvo i Pravo*, No. 11 (1948), p. 87.

¹⁵³ *Ibid.*

¹⁵⁴ Art. 2, Statute of the I.C.J.

¹⁵⁵ Art. 5, Rules of the I.C.J.

recognized competence in international law"¹⁵⁶ and not an advocate for its political, legal or social system?¹⁵⁷

By "independence" of a person we ordinarily mean that he does not act on instructions from superior authorities and that he is not accountable to them. We do not, of course, mean ideal independence, implying absence of any environmental influence. We should insist, however, that this influence stop short of destroying the individual's ability or willingness, or both, to search for facts, to question dogma, and to articulate his thoughts. On "impartiality" Professor Lissitzyn writes:

A judge ceases to be impartial if he lets himself be influenced by such considerations as his own personal advantage, personal liking or sympathy for a party to a case, or emotional preference for any relatively short-range policy not designed to effectuate the long-range policy he is called upon to implement. He is impartial if, undeterred by such considerations, he administers and develops the law in a way designed to accomplish its fundamental objectives, among which the *preservation of the community* is usually the supreme one.¹⁵⁸ (Emphasis added.)

Scholars and politicians have been considering the possibility that persons appointed to international judgeships might not display these desired attitudes. Hence we find the provision for *ad hoc* judges in world courts to assure the expression of a national point of view, and the clause against concentration of judges of the same nationality. But it has been said that these devices only affirm the suspicion of unfairness and partisanship.¹⁵⁹ The Soviets, on the other hand, do not disparage the idea behind such safeguards but, instead, deplore their inadequacy. They do not criticize the institution of *ad hoc* judges. And they complain that the single-judge rule, which ought to guarantee against the perversion of the Court into an instrument of the policies of any one state, has been ineffective. The alleged reason is that a whole line of Western states completely subordinate their foreign policy to the directives of the Anglo-American bloc. In the International Court of Justice, it is said, such external pressure may prove decisive.¹⁶⁰ It has been stated even more frankly that

[t]he present [1951] membership of the International Court of Justice does not, in the least, guarantee to the U.S.S.R. and the people's democracies objective examination of questions regarding them.¹⁶¹

¹⁵⁶ Art. 2, par. 1, Statute of the International Law Commission.

¹⁵⁷ A Soviet treatise on international law, published during Krylov's term on the International Law Commission, characterized the work of the Commission in these words:

"Taking into consideration the fact that American imperialists and their lackspittles have set out to employ international law for their criminal purposes, the Commission's work reflects a struggle between representatives of the camp of peace and democracy, headed by the Soviet Union, and representatives of the camp of war and lawlessness, headed by the United States of America.

"The imperialist states aim to use codification of international law by the U.N. for their reactionary purposes and to propagate their schemes under the guise of codifying rules of international law." Lisovsky, *op. cit.* note 41 above, at 33.

¹⁵⁸ Lissitzyn, *The International Court of Justice* 58 (1951).

¹⁵⁹ See, e.g., Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 279-289 (London, 1953). ¹⁶⁰ Simis, *loc. cit.* note 69 above, at 114.

¹⁶¹ *Mezhdunarodnoe pravo* [International Law] 488 (Moscow, 1951).

Krylov himself brought up the question of impartiality repeatedly by speaking of the "defense of the interests of the socialist states"¹⁶² and making outright objurgations, as in his evaluation of the Advisory Opinion regarding the *International Status of South-West Africa*:¹⁶³

It is evident that . . . [the decision] did not satisfy the African racists, inasmuch as it affirmed their duty to observe the mandate and excluded the possibility of international recognition of annexation.

[But, as to its refusal to demand that South-West Africa be made a trust territory] the International Court showed clear partiality and indulgence towards the South African imperialists and colonizers. By the same token, the Court's decision makes possible the perpetuation of the mandate which does not at all reflect either the spirit or the text of the Charter of the United Nations. . . .¹⁶⁴

When examining an international judge's record, one searches first for his stand on issues affecting his state, especially where the latter has been a party to the dispute. By means of this technique, strong national bias has been demonstrated in the early practice of the Permanent Court of International Justice.¹⁶⁵ However, the appropriateness of a statistical method has been questioned and a more detailed investigation of the relevant opinions demanded.¹⁶⁶ At any rate, Krylov also approached the problem of judicial integrity by ascribing great significance to a vote adverse to the judge's national interest.¹⁶⁷ He hailed Lord McNair for his stand against the United Kingdom in the *Anglo-Iranian Oil Co. Case (Preliminary Objection)*¹⁶⁸ and the *Corfu Channel Case (Merits)*,¹⁶⁹ and Basdevant of France for similar courage in the case of *Minquiers and Ecrehos*.¹⁷⁰ It is, therefore, a pity that the same yardstick cannot be applied to Krylov's performance, for the obvious reason that the Soviet Union has never been a litigant before the Court. At best, a comparable analysis could be made only by substituting other Soviet interests, e.g., decisions against other Communist states, decisions against underdeveloped or former colonial countries where the opponent is a Western Power, decisions involving principles that the Soviet Union considers part of its political framework, et cetera. However, the greater the number of relevant variables, the greater the possibility of wishful interpretation and inconclusiveness. For this reason, such analysis has not been tried in this study. At least one attempt has been made to correlate the votes of judges representing countries considered "Communist" (U.S.S.R., Poland, and Yugoslavia, at the time of the count). The three judges responded identically in the first three cases¹⁷¹ but not thereafter. Since many factors shape the voting pattern of the "Communist bloc," it should be studied in detail against the backgrounds of

¹⁶² P. 366 above.

¹⁶³ [1950] I.C.J. Rep. 128.

¹⁶⁴ Krylov, *op. cit.* note 48 above, at 75.

¹⁶⁵ Lauterpacht, *The Function of Law in the International Community* 230-232 (London, 1933).

¹⁶⁶ Hudson, *The Permanent Court of International Justice 1920-1942*, p. 355 (1943).

¹⁶⁷ Krylov, *op. cit.* note 48 above, at 164. ¹⁶⁸ [1952] I.C.J. Rep. 93.

¹⁶⁹ [1949] *ibid.* 4.

¹⁷⁰ [1953] *ibid.* 47.

¹⁷¹ MacLaurin, *The United Nations and Power Politics* 402-405 (London, 1951).

the individual judges and the characteristics of their states (*e.g.*, the break between the Soviet Union and Yugoslavia; the peculiarities of the status of Poland since 1956).¹⁷²

Krylov's judicial record is one of diminishing participation. He sat on the following cases:

<i>Corfu Channel Case (Preliminary Objection)</i>	Joining in a concurring opinion
<i>Admission of a State to the United Nations (Charter, Article 4)</i>	Dissenting opinion (ab. 4000 words)
<i>Corfu Channel Case (Merits)</i>	Dissenting opinion (ab. 4500 words)
<i>Reparation for Injuries Suffered in the Service of the United Nations</i>	Dissenting opinion (ab. 1500 words)
<i>Corfu Channel Case (Assessment of Compensation)</i>	Voted with the minority; appended a declaration (ab. 20 words)
<i>Competence of Assembly Regarding Admission to the United Nations</i>	Voted with the majority
<i>Interpretation of Peace Treaties</i>	Dissenting opinion (ab. 4500 words)
<i>International Status of South-West Africa</i>	Dissenting opinion (ab. 500 words)
<i>Interpretation of Peace Treaties (Second Phase)</i>	Voted with the majority; appended a declaration (ab. 45 words)
<i>Asylum Case</i>	Voted with the majority
<i>Interpretation of the Judgment in the Asylum Case.</i>	Voted with the majority

Krylov was absent, reportedly on account of illness, from:

Reservations to the Convention on Genocide
Haya de la Torre Case
Anglo-Iranian Oil Co. Case (Interim Protection)
Fisheries Case.

As the above list shows, Krylov at first wrote extensive individual opinions. Later, on two occasions, he used simple declarations of disagreement. This was to become the model for the future. Krylov's successor, Golunsky, never took his seat on the bench, also for health reasons. Kozhevnikov, the U.S.S.R. judge from 1954 to 1960, was notably silent, except for occasional declarations either of the exculpatory formula ("dislike for some reasons found in the majority's opinion") or of a rule of law.¹⁷³ This phenomenon

¹⁷² Rosenne classifies Krylov and Winiarski as representatives of "Communist law" and Zoričić as speaking for "Roman law (Balkans)." Rosenne, *The International Court of Justice* 139 (Leyden, 1957).

¹⁷³ See Kozhevnikov's curt declarations in the following cases: Southwest Africa—Voting Procedure, [1955] I.C.J. Rep. 67, 78–79; Admissibility of Hearing of Petitions by the Committee on Southwest Africa, [1956] *ibid.* 23, 33–34; Judgments of the Administrative Tribunal of the I.L.O., *ibid.* 77, 102–103; Interhandel Case (Interim Protection), [1957] *ibid.* 105, 114; Case Concerning the Right of Passage over Indian Territory (Preliminary Objection), *ibid.* 125, 153; Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants, [1958] *ibid.* 55, 72;

should be mulled over in the light of the following statement by the late Judge Lauterpacht:

[The system of dissenting opinions] constitutes a powerful safeguard. It precludes any charge of reliance on mere alignment of voting and lifts the pronouncements of the Court to the level of the inherent power of legal reason and reasoning.¹⁷⁴

May it not be that, where a dissent is not based on legal reason and reasoning, there is nothing for the dissenter to say in, or to gain by, a separate opinion? As a matter of fact, verbalization of the dissenter's motives may be quite harmful. When, in the course of argumentation, logic and common sense break down and inconsistencies crop up, the assumed validity of the "scientific and infallible" theory of Marxism-Leninism may be vitiated. Few, even among strong partisans of the Soviet outlook, will have the impudence of Stalin to assert:

[T]his is the Marxian formula. Is it "contradictory"? Yes, it is "contradictory." But this contradiction is life, and it reflects completely the Marxian dialectic.¹⁷⁵

Of course, there are other possible interpretations. Krylov may have been unable to write lengthy opinions in the later years of his term for reasons of health. Kozhevnikov, on the other hand, may not have been favorably disposed towards separate concurring or dissenting opinions for some unknown personal reason. Indeed, the present incumbent, Judge Koretsky, has broken the customary silence with a long dissent to the Advisory Opinion regarding *Certain Expenses of the United Nations*.¹⁷⁶ Only time will tell whether this has been a singular departure from a set pattern or the beginning of a new mode of behavior. Anyone concerned with the proper administration of international justice will, no doubt, welcome carefully reasoned explanations by judges of their votes. This writer, on his part, will be glad to see his preceding hypothesis disproved, at least prospectively, by future events.

The judicial function is a sensitive function. The behavior of a judge is watched off the bench as well as on the bench. Injudicious conduct by members of a court undermines its stature. With this in mind, the late Judge Hudson deplored intemperance on the part of judges in dissent, and insinuations of the majority's superficiality, shortsightedness, or any other dereliction in its duties.¹⁷⁷ The examples adduced by Hudson give the impression, however, that the deviations from propriety by members

Interhandel Case (Preliminary Objection), [1959] *ibid.* 6, 31-32; Case Concerning Right of Passage over Indian Territory (Merits), [1960] *ibid.* 6, 52.

¹⁷⁴ Lauterpacht, *The Development of International Law by the International Court of Justice* 69 (London, 1958).

¹⁷⁵ Political Report of the Central Committee to the Sixteenth Congress of the All-Union Communist Party (Bolsheviks), June 27, 1930 [by Stalin], *Shestnadsatyi s'ezd Vsesoiuznoi Kommunisticheskoi Partii (B.): Stenograficheskii otchet* [The Sixteenth Congress of the All-Union Communist Party (B.): Verbatim Record] 56 (Moscow, 1930).

¹⁷⁶ [1962] L.C.J. Rep. 151.

¹⁷⁷ Hudson, "The Twenty-Eighth Year of the World Court," 44 *A.J.I.L.* 1, 20-21 (1950).

of the International Court of Justice have been relatively mild. An American scholar, writing in 1951, expressed a belief that the atmosphere in which the Court operated was reasonably safe for the maintenance of its authority:

Governments on the losing side of the disputes or questions brought before the Court generally refrain from impugning the integrity of its motives. This has been true even of the governments in the Soviet bloc.¹⁷⁸

The statement oversimplifies the problem with respect to states which control the media of public information, direct the scope and contents of learning, and pass judgment on the product of the thought of the learned. Of course, if these factors are disregarded, then, as to the Soviet Union, the observation is true on its face because of the non-involvement of the Soviets in international adjudication. It is, however, from the Soviet side that calculated blows have been delivered against the prestige of the International Court of Justice and against the integrity of its personnel. Krylov's conduct off the bench was notorious and not without the blessing of the Soviet Government. In 1950, he published in *Izvestiia*, the official newspaper of the Government of the U.S.S.R., an article¹⁷⁹ dealing with the legal aspects of the Korean conflict, in which he prejudged the issues that might have come before the Court of which he was a member. This act was deservedly denounced in the Security Council.¹⁸⁰ There were other instances far more shocking, but which escaped public notice because camouflaged under Krylov's pen name, S. Borisov. Mr. S. Borisov not only freely prejudged the issues¹⁸¹ but, moreover, leveled devastating accusations against the International Court of Justice, constantly portraying it as a pliable instrument in the hands of the "imperialist" Powers.¹⁸²

As the years went by, the scholar who had been time and time again denounced for his lapses into objectivity, was gradually transformed into a trusted agent of the Soviet state on the international scene. He could be skillful and charming as a negotiator,¹⁸³ give the appearance of reasonable detachment on the bench and as a learned man of law during his international contacts,¹⁸⁴ or spurt defamation in the guise of S. Borisov. Krylov, who once, during a period when his life seemed to be endangered, chose silence rather than to engage in political slander unbecoming a scholar, appeared to have lost his scruples after his high rank in the Soviet

¹⁷⁸ Lissitzyn, *op. cit.* note 158 above, at 55.

¹⁷⁹ Reported in *The New York Times*, Aug. 20, 1950, p. 7, col. 1.

¹⁸⁰ U.N. Security Council, 5th Year, Official Records, 489th Meeting 18, 20-21 (S/P.V. 489) (1950) (remarks of Sir Gladwyn Jebb).

¹⁸¹ *E.g.*, Borisov, "O mezhdunarodnom delikte: Narushenie Anglii i SShA ital'skogo mirnogo dogovora [On International Delict: Violation of the Italian Peace Treaty by England and the U.S.A.]," *Sovetskoe Gosudarstvo i Pravo*, No. 1 (1948), p. 39.

¹⁸² Pp. 367, 372, 380 and 383 above.

¹⁸³ See the impression conveyed by Gildersleeve, *Many a Good Crusade* 347 (1954).

¹⁸⁴ See the tribute paid to Krylov's "great ability and his personal qualities," U.N. General Assembly, 13th Sess., Official Records, 6th Committee 221 (A/C.6/SR.593) (1958).

system had been secured. This is not to say that Krylov acted merely for a private reason—attainment of a high rank. Nor do we imply that his words and deeds always reflected his inner convictions. He was at his worst when Stalin's Russia was at her worst. Still the point is that the record permits the inference of Krylov's high susceptibility to politics. Since the political climate of the Soviet Union has changed since Stalin's death, present Soviet judges and legal scholars may not be exposed to the same pressures. It appears that Krylov himself was more moderate and flexible in the middle and late 1950's. When, however, a political point had to be made, he made it. As an example, the prestige of his name was behind the verbal assault on the research project on Soviet treaties undertaken by the Hoover Institution of Stanford University.¹⁸⁵ Krylov's exposure of this "stop the thief" operation, as he called it, was published again in *Izvestiia* and broadcast over the Moscow radio:

It is just this unsophisticated ruse to which the Stanford lackeys with degrees have resorted in order to whitewash the unseemly deeds of their masters—the ruling circles of the United States—who are following a policy of negotiating "from positions of strength" in international relations.¹⁸⁶

Finally, Krylov's independence and impartiality could be called into question by his membership in the Communist Party of the Soviet Union. As pointed out previously,¹⁸⁷ his admission to the Party and election to the International Court of Justice were two almost simultaneous events. As a member of the Communist Party, Krylov undertook "to carry into practice the policy of the Party and the country."¹⁸⁸ The Party was described in its Statutes (Rules) in force at that time as a "united militant organization" guided by the theory of Marxism-Leninism and prohibiting "any deviation from its program or rules."¹⁸⁹ While committed to "active and self-sacrificing work in carrying out . . . [this] program and rules [of the party],"¹⁹⁰ Krylov, as a member of the International Court of Justice, was, at the same time, obligated not to "exercise any political or administrative function"¹⁹¹ and was committed to independence and impartiality. Whereas, ordinarily, affiliation with a political party might not be regarded as any such function, it is elementary that the Communist Party and the Government of the Soviet Union have been blended into a single policy-making and managing apparatus. This fact finds constant expression in the Soviet legal system, including the Constitution of the Soviet Union.¹⁹² Most, if not all, Soviet judges are Party members, and it seems that to the Soviet legal mind there is no incompatibility between

¹⁸⁵ Now published as Triska and Slusser, *The Theory, Law and Policy of Soviet Treaties* (1962).

¹⁸⁶ Quoted in "Shifting the Blame," 51 A.J.I.L. 771 (1957).

¹⁸⁷ P. 364 above.

¹⁸⁸ Art. 2(b), Statutes (Rules) of the Communist Party of the Soviet Union, Approved at the Eighteenth Party Congress (1939).

¹⁸⁹ Preamble.

¹⁹⁰ *Ibid.*

¹⁹¹ Art. 16, par. 1, Statute of the I.C.J.

¹⁹² Art. 126, Constitution of the U.S.S.R.

the constitutional provision guaranteeing independence of judges¹⁹³ and the Party Statutes imposing a single discipline upon each and every member. That the question of Party membership has not been raised for consideration by the International Court of Justice under Article 16, paragraph 2, of the Statute of the Court testifies to the reluctance to underscore the reality of the ideological rift and the hopelessness of representing irreconcilable philosophies of world order in a single institution which is supposed to work for commonly cherished ends.

In concluding, we turn once again to Lauterpacht's wisdom:

... [T]he securing of the personal integrity and independence of the judges of the Court solves only one part of the problem. The perfecting of their political impartiality and the securing of their independence of purely national considerations and sympathies is of even greater importance because of the impossibility of achieving this end through formal safeguards. This is a problem of the creation in the minds of judges of a sense of international solidarity resulting in a clear individual consciousness of citizenship of the *civitas maxima*.¹⁹⁴

¹⁹³ Art. 112, Constitution of the U.S.S.R.

¹⁹⁴ Lauterpacht, *op. cit.* note 165 above, at 232-233.

THE CONTENT OF THE DUTY TO EXHAUST LOCAL JUDICIAL REMEDIES

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The purpose of this paper¹ is to examine certain aspects of the nature and content of the duty, arising in the law of international claims, to exhaust local remedies. The general rule of exhaustion of local remedies, as set forth in familiar terms in the award of the Commission of Arbitration in the *Ambatielos* case² is as follows:

[The rule] means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State. The defendant State has the right to demand that full advantage shall have been taken of all local remedies . . .³

While this statement refers to remedies in general, this paper will confine itself to the question of judicial, as distinct from administrative and legislative remedies.⁴ Although there is a body of literature on the rule,⁵ there

¹ Grateful acknowledgment is expressed to the Department of External Affairs, Wellington, New Zealand, for leave, and to the United States Educational Foundation in New Zealand and the Law School of Harvard University for assistance, which enabled this paper to be prepared; and to Professor R. R. Baxter for his valued comments and encouragement. The responsibility for the contents is the writer's alone.

² *Ambatielos* (Greece v. United Kingdom), Award of the Commission of Arbitration established by the Agreement concluded on Feb. 24, 1955, for the arbitration of the *Ambatielos* Claim (H.M. Stationery Office, 1956) (hereinafter referred to as "Award"). For other references, see note 85 below.

³ Award 27. This statement was cited with approval by the nine-member Arbitral Tribunal for the Agreement on German External Debts, in *Swiss Confederation v. Federal Republic of Germany*, [1958] Reports of Decisions and Advisory Opinions 3, 22. The rule was recognized in U.N. General Assembly Res. No. 1803 (XVII), Permanent Sovereignty over Natural Resources, par. 4, U.N. General Assembly, 17th Sess., Official Records, Supp. No. 17 (A/5217) (1962); 57 A.J.I.L. 710, 712 (1963).

⁴ For an example of a remedy which has legislative elements, see Art. 3 of the Iranian Oil Nationalization Act of May 1, 1951, *Anglo-Iranian Oil Co. Case—Pleadings, Oral Arguments, and Documents* 86 (I.O.J., 1952):

"The Government is bound to examine the rightful claims of the Government as well as the rightful claims of the Company under the supervision of the Mixed Board [comprising 5 Senators, 5 Deputies and the Minister of Finance] and to submit its suggestions to the two Houses of Parliament in order that the same may be implemented after approval by the two Houses."

⁵ See especially Borchard, *The Diplomatic Protection of Citizens Abroad*, *passim* (1915); Eagleton, *The Responsibility of States in International Law*, Ch. V (1928); Freeman, *The International Responsibility of States for Denial of Justice*, Ch. XV (1938); Cheng, *General Principles of Law as Applied by International Courts and*

is room for further analysis of what the rule requires of the local legal process and of the claimant who must use it. While the rule has always been of importance in the law of international claims of the traditional kind, the ambit of the rule has been recently extended through the development of machinery for international protection of human rights in Europe, under which a claimant seeking to proceed against a government must show that he has exhausted all domestic remedies "according to the generally recognised rules of international law."⁶ With the steady increase of international travel and intercourse generally among nations which, conscious as they are of a strong desire to retain their individuality at international law, are nevertheless becoming increasingly interdependent, the occasions for the use of the rule may be expected to multiply.

I. POLICY BASIS OF THE RULE

That the traditional rule of exhaustion of local remedies has had such a wide and unchallenged acceptance is evidence of its utility and of the soundness of its policy foundation, its sociological substratum.⁷ It is a rule conducive to good order in that it demarcates the line between the jurisdiction of the national and the international tribunal.⁸ This it does on the basis of sound considerations. The rule has its roots in the general proposition that an alien entering a country submits himself voluntarily to the legal regime prevailing in that state.⁹ It demands in effect that

Tribunals 177-180, 355 (1953); Wilson, *The International Law Standard in Treaties of the United States* 71-86 (1953); 45 *Annuaire, Institut de Droit International* 5 (1954, I), and 46 *Annuaire* 265 (1956, I); Bagge, "Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders," 34 *Brit. Yr. Bk. Int. Law* 162 (1958); Law, *The Local Remedies Rule in International Law* (1961); Tammes, "The Obligation to Provide Local Remedies," *Volkenrechtelijke Opstellen Aangeboden aan Prof. Dr. Gesina H. J. Van der Molen* 152 (1962); Amerasinghe, "The Exhaustion of Procedural Remedies in the Same Court," 12 *Int. and Comp. Law Q.* 1285 (1963); Bos, "Les Conditions du Procès en Droit International Public," 19 *Bibliotheca Visseriana* 221-237 (1957), and references therein; and other works cited herein.

⁶ [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, Nov. 4, 1950, Art. 26. See further, note 83 below.

⁷ Drawn from a developing literature relevant to the sociological approach to law, including international law, the following have been particularly valued for the purposes of this study: Pound, *Introduction to the Philosophy of Law* (1922); Brierly, *The Outlook for International Law* (1944), *The Basis of Obligation in International Law and Other Papers* (1958); Corbett, *Law and Society in the Relations of States* (1951), *The Study of International Law* (1955); De Visseher, *Theory and Reality in Public International Law* (1953, trans. Corbett, 1957); Stone, "Problems Confronting Sociological Enquiries Concerning International Law," 89 *Hague Academy Recueil des Cours* 61 (1956); McDougal and Associates, *Studies in World Public Order* (1960); Northedge, "Law and Politics between Nations," 1 *International Relations* 291 (1957).

⁸ See, e.g., per Judge Córdova, *Interhandel Case*, [1959] I.C.J. Rep. 6, 45 (separate opinion).

⁹ Borchard, *op. cit.* note 5 above, at 817, first "reason." Borchard's analysis is a useful summary of facets of the rule, but it does not go in any depth into the sociological factors behind it. Cf. comment by Amerasinghe, *loc. cit.* note 5 above, at 1287-1288.

he who brings his physical presence or property within the territorial confines of a foreign state should be regarded as having assimilated himself into the state to the extent that the alien is obliged to present his complaints against that state to its courts, as are its own nationals, rather than take them back to his own government for international adjustment.¹⁰ That the receiving state should demand this is no more than a normal manifestation of a constant human tendency to dislike and resist outside intrusion in private affairs, a tendency felt by groups¹¹ as well as individuals,¹² exemplified in numerous institutions and phenomena of social and political activity,¹³ and often displayed in the political arena beneath the banner of that "elusive conception," sovereignty.¹⁴ If some delinquency has to be accounted for and reparation made, the preference is for investigating and arranging this through private machinery rather than through public channels.¹⁵ Private processes are generally more efficient because the investigation is done by those close to the event; the intervention of outsiders is avoided (it is noteworthy that *any* intervention, no matter how skillful and tactful, is invariably disliked as such); and it is possible to avoid the publication of the dispute to the world at large, which often causes exacerbation.

¹⁰ The "link" which an individual must possess with the receiving state before he can be required to exhaust local remedies is referred to below, p. 394, at note 30.

¹¹ "It is a notorious fact of group psychology that outside interference in a conflict inside a closely knit community is resented . . ." Rudzinski, "Domestic Jurisdiction in United Nations Practice," 9 *India Quarterly* 313, 354 (1953). See also notes 25 and 26 below.

¹² A Christian contribution on this subject is to be found in Matthew 18: 15-17, which provides that, before complaining to third persons and the Church about a brother who has done wrong to him, the complainant should go to him and "have it out with him in private" (Rieu trans., 1952), *i.e.*, "exhaust domestic remedies." Specifically incorporated into the fundamental law of at least one Christian denomination, the precept in Matthew finds interesting counterpart in rules in other areas, *e.g.*, in the University of Virginia Honor System. University of Virginia Honor Committee, "An Explanation of the Honor System" (M-9 Rev. 6-60), "Procedural Features," par. 1. It might well be considered for inclusion in other codes of ethics.

¹³ The desire for local control over policies and actions is seen in such familiar political phenomena as home rule demands, federal systems, and international regional organizations. *Cf.* the domestic jurisdiction provision, Art. 2(7), of the United Nations Charter. It is often said that this provision was designed to ensure respect for member nations' "sovereignty," as to which see the following note.

As to whether the absence of exhaustion of local remedies would be a sufficient ground for applying Art. 2(7), see the discussion on the return of Polish art objects from Canada, General Committee of the General Conference of UNESCO, Gen. Conf. Rec., II, Vol. 1, pp. 258-262, 315-316 (1947). For a further parallel between the local remedies rule and the domestic jurisdiction principle, see note 84 below.

¹⁴ Brierly, *The Basis of Obligation in International Law and Other Papers* 19 (1958). For the use of the term "sovereignty" as a reason for the local remedies rule, see Borchard, *op. cit.* note 5 above, at 817, second "reason." This term merely serves to transfer the discussion of any problem to another plane of abstraction, and it has been the aim in this paper to pierce beyond this expression.

¹⁵ The term "private" here is, of course, being used in the sense of private to the group, *e.g.*, in the context of international relations, private or domestic to the state, as distinct from inter-state.

Neither an individual nor a group—of which the modern state is but a highly complex example¹⁶—can afford to cut itself off from the outside world. One thing a group can do, however, to compensate for the fact that it must participate in a larger society is to demand of those who come within its arena that they adjust themselves to the peculiar needs of the group, “do as the Romans do,” and also to demand of the “sending group” as a unit that it respect the individuality of the receiving group by requiring that the individuals for which the sending group is responsible make these necessary adjustments. In modern sociological parlance, one may say that groups and associations tend to establish internally certain uniformities and patterns of conduct as a type of “defense mechanism” against the outside world, and expect all those coming within the arena of the group to conform to those norms.¹⁷ It is of this tendency that the local remedies rule is a manifestation; yet the degree of conformity expected of the alien under this rule is very mild when compared with some of the other prescriptions which assimilate the alien even more closely to the position of a national and permit him correspondingly less advantages from his foreignness, such as the Calvo clause, the national-standard-of-treatment doctrine and rules for compulsory naturalization.¹⁸

The sending state, too, has good reason not to object to the rule. To begin with the simplest reason, which plays a large part in giving to many international legal norms such efficacy as they have,¹⁹ the sending state, by adopting and practicing the rule, puts itself in a strong position to be able to claim the advantage of the rule when the time comes for it to do so—thus applying something of the letter, if not yet all of the spirit, of “do unto others as you would have them do unto you.” This approach must have been highly significant in classical times when the need for exhaustion of local remedies developed as a condition precedent to the grant from one’s ruling prince of letters of reprisal:²⁰ restraint on the part of the ruler would stand him in good stead. In modern times the rule greatly aids the administration of the sending state in minimizing frictions. It is, says Ralston, “a rule of convenience of foreign offices in determining whether or not they shall interpose to secure special relief for their nationals.”²¹ The sending state has normally little desire to get into the intricate and possibly expensive and embarrassing business of

¹⁶ See Brierly’s illuminating discussion in *The Outlook for International Law* 46 f. (1944), and *op. cit.* note 14 above, *passim*; and see Corbett, *The Study of International Law* 50–51 (1955).

¹⁷ See, *e.g.*, Mannheim, *Systematic Sociology* 111 (1958).

¹⁸ Assimilating the alien to the position of the national is, needless to say, only one of the defense mechanisms employed by receiving states. In many areas of activity the alien is placed in an inferior position to that of a national. For materials and comments on the broad question of alienage, see Katz and Brewster, *International Transactions and Relations, Cases and Materials* 8–298 (1960).

¹⁹ “A State cannot put forward a claim founded on a general rule of law if it is not bound by that same rule.” *International Law: The Collected Papers of Sir Cecil Hurst* 9 (1950).

²⁰ Freeman, *op. cit.* note 5 above, at 63–64.

²¹ *International Arbitration from Athens to Locarno* 60–61 (1929).

sponsoring on the international plane the claims of its nationals which can be or could have been settled by less cumbersome machinery; and the rule thus enables foreign offices to protect themselves against rabid or other demands of their own nationals and so maintain a closer control over relations with the foreign state concerned. In particular, the rule provides a quick, uncomplicated technique for funneling off from the international plane claims which do not already and may not ever exhibit an international delinquency, *e.g.*, claims involving a contract between an individual and a foreign government.²² At times, too, the rule may be the vehicle whereby a potential respondent state is enabled to save face—a constantly valuable ploy in diplomatic maneuver.²³

The rule of local remedies, perhaps more so than any other rule of international law, undoubtedly grew up under the nurturing of professional administrators, and law-trained ones at that. As part of the professional mystique of the legal advisers, it has been allowed to grow up somewhat sheltered from the harsher political winds which have often inhibited the free growth of other portions of the law of nations. And, postulating for the moment that in this area particularly international law is essentially a law regulating or attempting to regulate the practice and relationships *inter se* of national administrations, their officials, agents and protégés, a highly specialized kind of administrative law,²⁴ it is perhaps not surprising that the principle of exhaustion of local remedies should be found to have taken form in an international rule which has definite kinship with rules of exhaustion of remedies and primacy of jurisdiction in other areas of the law of administrative organization, namely, domestic administrative law²⁵ and the law of associations, including trade unions, corporations and private associations.²⁶ It is the practical purpose of the rules in each of

²² Cf. Borchard, *op. cit.* note 5 above, at 817-818.

²³ See, *e.g.*, Herz, "Balance System and Balance Policies in a Nuclear and Bipolar Age," 14 J. Int. Affairs 40-48 (1960), who suggests resort to the International Court of Justice may at times perform this function. See also Janis and Katz, "The Reduction of Intergroup Hostility: Research Problems and Hypotheses," 3 J. Conflict Resolution 84, 85 (1959).

²⁴ See Carlston, *Law and Structures of Social Action* 148 (1956). Cf. Jaffe, *Judicial Aspects of Foreign Relations, in Particular of the Recognition of Foreign Powers* (Harvard Studies in Administrative Law, Vol. 6, 1933); Fisher, "Bringing Law to Bear on Governments," 74 Harvard Law Rev. 1180 (1961); Snyder and Robinson, *National and International Decision-Making, [Proposed Research] Project No. 27, "The Role of Law and Lawyers in Foreign Policy Decision-Making"* (undated); Appleby, *Morality and Administration in Democratic Government* 68-99 (1952).

²⁵ See, *e.g.*, Jaffe and Nathanson, *Administrative Law, Cases and Materials* 880-897 (2d ed., 1961); 3 Davis, *Administrative Law Treatise* §§ 20.01-20.10 (1958).

²⁶ As to, *e.g.*, a trade union member's obligation not to resort to a suit at law until all his domestic remedies have been exhausted, see *White v. Kuzych*, [1951] A.C. 585 (P.C.); and see Summers, "Disciplinary Procedures of Unions," 4 Ind. & Lab. Rel. Rev. 15 (1950). As to corporation law, see *Esocett v. Aldecress Country Club*, 16 N.J. 488, 109 A.2d 277 (1954). As to private associations, see "Developments in the Law—Judicial Control of Actions of Private Associations," Pt. VIII, "Exhaustion of Association Remedies," 76 Harvard Law Rev. 983, 1069-1080 (1963).

these areas to permit the settlement of disputes on the lowest level without invoking the last resort action, for reasons of the kind that have been discussed above.²⁷ To look at it in another way, the international rule of local remedies is actually arranging for the receiving state to be "heard" first, through the instrumentality of its courts, before it is arraigned in the international procedure—in broadly the same way as an individual is required to be heard before a judgment contrary to his interests is given against him. Thus the rule of local remedies has kinship also with the *audi alteram partem* rule of domestic law.²⁸ It fulfills not a mere dry demand of protocol but a very human requirement, a fundamental concept of fair dealing.

The rule of local remedies involves an examination at international law of a situation which existed at domestic law.²⁹ The exhaustion of domestic remedies is best analyzed as a creative process involving the marriage of its two components—the provision of legal facilities by the receiving state, and the activity of the claimant in using them. In applying the local remedies rule, international tribunals will examine both components to see whether the performance was satisfactory and in compliance with the rule.

The policy rationale of the rule elaborated above does not call for a rule which is absolute or unduly strict. As has been seen, the rule applies only to those who have brought their physical presence or property within the arena of the state, and it has been argued that there must have been a genuine link between the individual claimant and the state in order for the rule to operate against him.³⁰ If, for example, a West German citizen is injured in his own country through the negligence of a United States Army truck driver, there should be no need for the West German citizen to pursue domestic remedies in Washington, though it would be sensible to require him to pursue domestic remedies through American military facilities or channels in West Germany; and nationals of Israel injured by anti-aircraft fire while flying in an Israeli commercial aircraft over Bulgaria en route between two other countries should not have to exhaust "local" remedies in Sofia.³¹ On the other hand, the rule becomes relevant only after the claimant has suffered in the receiving state a harm or inconvenience which is generally far from inconsequential, irrespective of whether it be categorized as an inchoate or a completed international delinquency.³²

²⁷ See text, pp. 391-392 above, at notes 11 to 17.

²⁸ See Jaffe and Nathanson, *op. cit.* note 25 above, at 627-663.

²⁹ As can readily be imagined, this will involve making some assumptions. These are discussed at p. 405 below, text at note 84.

³⁰ See Meron, "The Incidence of the Rule of Exhaustion of Local Remedies," 35 Brit. Yr. Bk. Int. Law 83 (1959).

³¹ See Meron, *loc. cit.* above, pp. 94-101, discussing in particular the case of the Aerial Incident of 27th July, 1955 (Israel v. Bulgaria) (Preliminary Objections), [1959] I.C.J. Rep. 127. *Quaere* the position when the claimant is a corporation.

³² The issue of whether the local remedies rule is substantive or procedural, and accordingly whether a denial of justice can technically be held to have taken place before local remedies have been exhausted, has given rise to a controversy which, like most controversies, lost much of its value when the original point at issue became obscured. What is the purpose of such a question; what are the social or policy interests involved?

Thus, while the claimant should fairly be required to make considerable efforts to exhaust local remedies, he should not have to go to unreasonable lengths. A consideration of what is reasonable in this context is the main issue of this paper.

II. RECEIVING STATE'S RÔLE: TO PROVIDE AN EFFECTIVE REMEDY

The first question is to consider the legal structure which the claimant had to work with—his legal “opportunities,” so to speak. The starting point is to determine what local remedies the claimant is or was obligated to resort to. The sharpest analysis of this step has recently been provided by the European Commission on Human Rights³³ as follows:

. . . recourse should be had to all legal remedies available under the local law which are in principle capable of providing an effective and sufficient means of redressing the wrongs for which, on the international plane, the Respondent State is alleged to be responsible . . .³⁴

The individual claimant should thus survey the local remedies in the light of the international claim which might be made if the local redress could

The reasons for needing to know when the cause of action actually arose are to determine (a) the jurisdiction *ratione temporis* of the international tribunal, (b) the date from which interest on damages should be timed to run, and (c) possibly other matters: see, e.g., note 36 below. But these are matters which can be satisfactorily decided in their own right without the need of a general theory about the local remedies rule. On the question of jurisdiction *ratione temporis*, for example, there are cases which go with some care into the intricate question of when the cause of action should be regarded as having arisen, and take into account the issue of local remedies. *Phosphates in Morocco Case* (Preliminary Objections), P.C.I.J., Ser. A/B, No. 74 (1938), and *Electricity Co. of Sofia and Bulgaria Case* (Preliminary Objection), P.C.I.J., Ser. A/B, No. 77 (1939) (the fact that declarations under the optional clause were involved does not diminish the value of these cases for present purposes); and see note 50 below. With or without the help of these cases, the problem of interest reckonings can also be dealt with as an issue in its own right, case to case, according to the circumstances, with principles crystallizing in the course of time; and so with any other issues. Thus it is possible to avoid in this area the “semantic morass” the substance/procedure dichotomy so often involves. Jessup, *Transnational Law* 71 (1956). Cf. Fawcett, “The Exhaustion of Local Remedies: Substance or Procedure?” 31 *Brit. Yr. Bk. Int. Law* 452 (1954), and authorities there cited. As to the relationship of the local remedies rule and the concept of denial of justice, see Part IV below.

³³ This Commission is empowered under the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, Nov. 4, 1950) to receive petitions from persons claiming to have been deprived by a state party of any of the rights set forth in the Convention (Art. 25), and to examine such petitions and place itself at the disposal of the parties concerned with a view to securing a friendly settlement (Art. 28). The Commission may only deal with the matter “after all domestic remedies have been exhausted, according to the generally recognised rules of international law” (Art. 26). Although the standard rule of international law is thus imported, the typical situation with which the Commission has had to deal has been the case of a citizen complaining about a denial to him of human rights in his *own* country. Thus it is important in reading the Commission’s decisions to watch for the entry of policy considerations different from those of the traditional international rule.

³⁴ *Nielsen v. Government of Denmark*, [1958–1959] *Yearbook of the European Convention on Human Rights* 412, 440 (1959) (hereinafter cited as *European Yearbook of Human Rights*) (case noted further below, note 50).

not be obtained. This will involve a search for those local remedies which, on paper, at least,³⁵ cover in whole or in part the area protected by the international law rule which might subsequently be invoked.³⁶ In some cases the area of obligation covered by the international rule will be covered at the domestic level by more than one correlative remedy. In *Lawless v. Republic of Ireland*,³⁷ for example, where the international rule alleged to have been infringed proscribed imprisonment without charge or trial, the European Commission examined whether the claimant ought to have sought redress not only in *habeas corpus* (which he had done) but also in false imprisonment (which he had not done).

The question whether such a remedy which is in principle capable of providing redress is or would have been in the actual circumstances "effective" can conveniently be considered under a number of headings.

1. *Tribunal with Jurisdiction*

The question basic to the whole inquiry must inevitably be whether there is a domestic court or tribunal which will take jurisdiction in the matter. The starting point to a consideration of this problem is provided by the judgment of the Permanent Court of International Justice in the *Pan-evezys-Saldutiskis Railway* case,³⁸ in which Estonia was espousing the claim of an Estonian corporation whose railway line in Lithuania had been seized by the state. On the local remedies point it was argued that it would have been useless to take the matter to the Lithuanian courts because they would not take jurisdiction over an "act of state," an act *jure imperii*,³⁹ since this was an act in performance of the government's public functions and

³⁵ This seems to be the significance of the expression "in principle" appearing in the above quotation. What constitutes "effective and sufficient" means of redress will be discussed in following paragraphs.

³⁶ Including those which derive from the fact that the domestic court may be competent to apply international law in its decisions when necessary. See *Interhandel Case*, [1959] I.C.J. Rep. 6, 28, and, on this general subject, Masters, *International Law in National Courts* (1932); for recent studies, Erades and Gould, *The Relation Between International Law and Municipal Law in The Netherlands and in the United States* (1961); Seidl-Hohenveldern, "Transformation or Adoption of International Law into Municipal Law," 12 *Int. and Comp. Law Q.* 88 (1963). *Quaere* whether domestic courts competent to apply international law should not apply the local remedies rule *itself* in appropriate cases; cf. the cases cited below, note 53 (based on treaty provisions), and *Banco Nacional de Cuba v. Sabbatino*, 307 F. 2d 845 (2d Cir., 1962), where the applicability of the local remedies rule does not seem to have been traversed, probably because of the unlikely availability of such remedies. It is submitted that this question can be decided without need of a general theory of the nature of the local remedies rule: cf. note 32 above.

³⁷ [1958-1959] *European Yearbook of Human Rights* 308 (1958) (application held admissible); Commission reported the detention not contrary to the Convention, due to Ireland's right to derogate from it during a state of emergency, [1960] *ibid.* 476 (1959); report referred by Commission to European Court of Human Rights, *ibid.* 492 (1960) (preliminary objections and questions of procedure); report upheld, [1961] *ibid.* 438; further application to Commission dismissed, *ibid.* 302. See Robertson, "Lawless v. Government of Ireland (Second Phase)," 37 *Brit. Yr. Bk. Int. Law* 536 (1961).

³⁸ P.C.I.J., Ser. A/B, No. 76 (1939).

³⁹ P.C.I.J., Ser. A/B, No. 76, p. 19 (1939); Ser. C, No. 86, p. 45 (1938-1939).

thus not a matter "concerning a civil right" within the meaning of the Lithuanian Code of Civil Procedure.⁴⁰ The World Court held that it could not go into this difficult question. The alleged absence of remedies had to be "substantiated," "clearly shown," and this had not been done.⁴¹ In particular,

It is not for this Court to consider the arguments which have been addressed to it for the purpose either of establishing the jurisdiction of the Lithuanian tribunals by adducing particular provisions of the laws in force in Lithuania, or of denying the jurisdiction of those tribunals by attributing a particular character (*seizure jure imperii*) to the act of the Lithuanian Government. . . .⁴²

This question was one on which the Lithuanian courts alone could produce a final decision; and thus local remedies could not be said to have been exhausted.⁴³ In the circumstances the World Court would have been prepared to accept only the decision of the Lithuanian courts on the actual case at issue or, alternatively, a course of decisions (*jurisprudence constante*) of the Lithuanian courts which would render the company's suit hopeless.⁴⁴

In the case in question the interpretation of the legislation presented a problem of the utmost difficulty: the correct answer might have been in either direction.⁴⁵ The Permanent Court was thus naturally reluctant to involve itself in this question.⁴⁶ But the Court appeared to indicate that it would generally be satisfied if the domestic legislation on the face of it "clearly" deprived the private claimant of a remedy;⁴⁷ an example would be a case in which a domestic appeal court had no power but to apply the same law applied in a lower court, and the validity at domestic law of the lower court's judgment was not challenged in the international

⁴⁰ Lithuanian Code of Civil Procedure, Art. 1. P.C.I.J., Ser. C, No. 86, pp. 42-48, 143-169 (1938-1939). See also Art. 2: "Private persons . . . whose legal rights . . . are infringed by decisions of administrative institutes or persons may bring an action in the courts." *Ibid.* at 154; P.C.I.J., Ser. A/B, No. 76, p. 18 (translation the Court's).

⁴¹ P.C.I.J., Ser. A/B, No. 76, pp. 18, 19.

⁴² *Ibid.* at 19.

⁴³ *Ibid.* at 21.

⁴⁴ For another discussion of the effect of a contrary *jurisprudence constante*, see S.S. Lisman (*United States v. Great Britain*), Award under Exchange of Notes dated May 19, 1927, between the United States and Great Britain for the Disposal of Certain Pecuniary Claims arising out of the Recent War; 8 Int. Arb. Awards 1767 (1937).

⁴⁵ Judge Erich, though dissenting as to the result, made this point forcefully by observing that, had the matter been referred to the Lithuanian courts themselves, they would have been "assez embarrassée." P.C.I.J., Ser. A/B, No. 76, p. 53.

⁴⁶ The difficulties of interpreting domestic legislation *in vacuo*, i.e., without knowing how the legislation has been applied in practice, is stressed as one of the hazards of comparative law by Schlesinger, *Comparative Law* 491-497 (2d ed., 1959). This is also a problem constantly faced by the International Labor Organization in examining member states' compliance with its conventions. Jenks, *The International Protection of Trade Union Freedom* 148 (1957).

⁴⁷ Series A/B, No. 76, p. 19; cf. *Ambatielos Award* 27, and *Norwegian Loans Case*, per Sir Hersch Lauterpacht, [1957] I.O.J. Rep. 9, 89 (separate opinion).

tribunal.⁴⁸ Similarly if an appeal court can consider only questions of law, and the point at issue involves only questions of fact, the pointlessness of seizing the appeal court may be clear on a simple reading of the legislation by the international tribunal.⁴⁹ Ordinarily, however, recourse should be had to all appeal remedies available.⁵⁰

When the application of the domestic legislation is not clear from a simple reading, it is a nice question how deeply the international tribunal will wish to involve itself. In the *Finnish Vessels* arbitration⁵¹ the arbitrator adopted a strict test similar to that in the *Railway* case, and yet was himself prepared to investigate the situation very thoroughly in order to apply that test. British legislation provided that certain claims for compensation should be referred to an Admiralty Transport Arbitration Board, whence an appeal would lie on questions of law to the ordinary courts. Finnish shipowners, confronted with a Board decision that their ships had been requisitioned during the war by or on behalf of Russia and that accordingly no compensation was payable by Britain,⁵² took no appeal to the courts but arranged for their government to proceed against Britain internationally, on the ground that Britain had incurred responsibility at international law by requisitioning the ships without subsequently paying compensation. Britain claimed that there were certain points of law which the shipowners should have taken on appeal in pursuance of their local remedies.

The arbitrator, Judge Bagge of Sweden, held that the local remedies rule required a "certain strictness" of approach, and that before a claimant could be released from the effect of the rule it should be shown that the remedy in question would be "obviously futile"—not merely "futile," he

⁴⁸ *De Becker v. Government of Belgium*, [1958-1959] *European Yearbook of Human Rights* 214, 236 (1958) (application to European Commission held admissible); for details and subsequent developments, see note 78 below.

⁴⁹ *Ambatielos Award* 27.

⁵⁰ The approach adopted in an earlier decision was to draw a distinction between processes which constituted a "regular legal remedy" and those which did not, *i.e.*, which constituted an "extraordinary" remedy. *Salem (United States v. Egypt)*, Award of Arbitral Tribunal under Protocol of Jan. 20, 1931, 2 *Int. Arb. Awards* 1161 (1932) (*recours en requête civile*). This approach has been repudiated in favor of the claimant's being required to have recourse to *all* remedies available "within the framework of . . . [the respondent state's] domestic legal system." *Nielsen v. Government of Denmark*, [1958-1959] *European Yearbook of Human Rights* 412 (1959), citing *Interhandel Case*, [1959] *I.C.J. Rep.* 6, 27 (Danish Special Court of Revision, appointed by King to reconsider certain criminal cases, held local remedy under rule, hence, for purposes of Commission's jurisdiction, time did not run until this remedy was exhausted); see also *Electricity Co. of Sofia and Bulgaria Case* (Preliminary Objection), *P.C.I.J.*, Ser. A/B, No. 77 (1939); and *of. note* 4 above. For further proceedings in *Nielsen case*, see report of Commission, [1961] *European Yearbook of Human Rights* 490 (no violation of Convention); affirmed by Committee of Ministers of Council of Europe, Res. 61 (28), *ibid.* 590.

⁵¹ *Finland v. Great Britain*, Decision under the Agreement dated Sept. 30, 1932, for the submission to Arbitration of a Question connected with a Claim in respect of Certain Finnish Vessels used during the War (H.M. Stationery Office) (hereinafter referred to as "Award"); 3 *Int. Arb. Awards* 1479 (1934).

⁵² For the decision, see League of Nations Doc. C.519.M.218.1931.VII, pp. 16-18 (1931).

said, but obviously so.⁵³ This formulation, subsequently accepted by four out of five commissioners in the *Ambatielos* arbitration,⁵⁴ accords substantially with the strict "clearly shown" test of the *Panevezys-Saldutiskis Railway* case. In the *Finnish Vessels* arbitration, however, the Swedish arbitrator delved deeply into British law in order to reach his own conclusions. A consideration of whether the Admiralty Board's decision actually contained any appealable points of law involved, he said, determining "according to British Authorities" what a point of law was—a question which he allowed to be

... a very doubtful matter and subject to conflicting opinions not only of the parties in the present case but of learned judges and authors in Great Britain and in other countries. . . .⁵⁵

Undeterred, he proceeded to make a fifty-page investigation of the problem, involving a careful survey of a number of British sources of authority,⁵⁶ and reaching the conclusion that there were indeed no points of law which would have been sufficient to reverse the Board's decision, and no other remedies which were open to the shipowners.⁵⁷

Thus, while the arbitrator in the *Finnish Vessels* case adopted a similar test to that of the court in the *Railway* case, his method of applying it was basically different. The essential reason for the difference is to be found in the circumstances in which the two cases were adjudged at the international level. Sir Hersch Lauterpacht has cited the *Railway* case as

⁵³ Finland had contended that the test should be "futile," Britain, "obviously futile." The arbitrator said:

"... a certain strictness . . . appears justified by the opinion expressed by Borchard [*op. cit.* note 5 above] when mentioning the rule applied in the prize cases. Borchard says [pp. 823-824] . . . : 'In a few prize cases, it has been held that in face of a uniform course of decisions in the highest courts a reversal of the condemnation being hopeless, an appeal was excused; but this rule was most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief.'" Award 27-28; 3 Int. Arb. Awards 1479, 1504.

Borchard's authorities for these statements were: (1) Kane's notes on Commission of July 4, 1831, between United States and France (1836), 5 Moore, International Arbitrations to Which the United States Has Been a Party 4472, 4473 (1898); *Bark Jones* (United States v. Great Britain), Commission under the Convention between the United States and Great Britain of Feb. 8, 1853, 3 Moore, *op. cit.* at 3046; (2) *Schooner Peggy*, 1 Cranch 108 (1801) (French ship which had received a "final" condemnation in an inferior American court of admiralty held not to have been "definitively condemned" within the meaning of a French-American treaty, inasmuch as a right of appeal existed and had been claimed); *Ship Tom*, 29 Ct. Cl. 68 (1894) (findings in *Schooner Peggy* discussed obiter), *aff'd.* on rehearing, 39 Ct. Cl. 290 (1904); *Brig Freemason*, 45 Ct. Cl. 555 (1910). Regarding Borchard's reference to a contrary course of decisions, *cf.* note 44 above.

⁵⁴ *Ambatielos* award, *loc. cit.* note 2 above.

⁵⁵ Award 29; 3 Int. Arb. Awards 1479, 1505.

⁵⁶ Including several decided cases, Halsbury's Laws of England, and the Annual County Court Practice.

⁵⁷ Award 29-32; 3 Int. Arb. Awards 1479, 1505-1550. For another example of an arbitrator willing to make a close examination of domestic law foreign to him—again English law, this time to see whether a denial of justice had occurred—see dissenting opinion of Professor Spiropoulos in the *Ambatielos* arbitration, Award 36-42.

"a conspicuous example of judicial caution in the matter of jurisdiction,"⁵⁸ as manifesting "with some persistence" an awareness that "Nothing should be done which creates the impression that the Court, in an excess of zeal, has assumed jurisdiction where none has been conferred upon it."⁵⁹ In the *Finnish Vessels* case, on the other hand, the task of examining the local remedies question was the very *raison d'être* of the international tribunal.⁶⁰ It had been agreed between the two sides at the time of the *compromis* that the problem involved "complicated questions of English law";⁶¹ in other words, the arbitrator's detailed investigation of the domestic law was desired and authorized by the parties.

Under these cases, then, the ineffectiveness or "futility" of the local remedies must be "obvious" or "clearly shown," irrespective of how patient the international tribunal is in investigating this. Though this formula imports a high standard, it does not mean that exceptions are impossible or that the test is merely a rule of thumb, to be applied in rigid, automatic fashion. In the *Railway* case Judge Hudson made this specific point, adding that "In each case account is to be taken of the circumstances surrounding the means of redress . . ."⁶² To similar effect are the remarks of Judge Lauterpacht in the *Norwegian Loans* case:

. . . the requirement of exhaustion of local remedies is not a purely technical or rigid rule. It is a rule which international tribunals have applied with a considerable degree of elasticity. In particular, they have refused to act upon it in cases in which there are, in fact, no effective remedies available owing to the law of the State concerned or the conditions prevailing in it. . . .⁶³

Thus the international tribunal should look not merely at the paper remedy but also at the circumstances surrounding the remedy. If these are instrumental in making an otherwise effective remedy ineffective, and if they are more the outgrowth of the state's activity than that of the claimant, then the remedy must be regarded as ineffective for the purposes of the rule. This flexibility of approach is consonant with the social function of the rule as seen above—to give primacy of jurisdiction to the local courts, not absolutely but in cases where they can reasonably accept it and where the receiving state is reasonably capable of fulfilling its duty of providing a remedy. Thus the result in any particular case will depend on a balance-

⁵⁸ The Development of International Law by the International Court 101 (1958).

⁵⁹ *Ibid.* at 91.

⁶⁰ See Award 10; 3 Int. Arb. Awards 1479, 1489-1490. The arbitration resulted from the recommendations of a Committee of the Council of the League of Nations, Finland having submitted the dispute to the Council under Art. 11(2) of the League Covenant. The Committee recommended that two questions should be examined: the first of these was accordingly submitted to arbitration, *viz.*, "Have the Finnish shipowners, or have they not, exhausted the means of recourse placed at their disposal by British law?"

⁶¹ Award 10; 3 Int. Arb. Awards 1479, 1490. For the specific formulation of the issue, see previous footnote.

⁶² P.C.I.J., Ser. A/B, No. 76, p. 48 (1939) (dissenting opinion):

⁶³ [1957] I.C.J. Rep. 9, 39 (separate opinion). *Cf.* a similar observation in Lauterpacht, *op. cit.* note 58 above, at 350. *Cf.* also Judge Armand-Ugon in the *Interhandel* Case, [1959] I.C.J. Rep. 6, 87 (dissenting opinion).

ing of factors. For example, in a situation in which the best local legal advice suggests that it is "highly unlikely" that further resort to local remedies will result in a disposition favorable to the claimant, the correct conclusion may well be that local remedies have been exhausted if the cost involved in proceeding further considerably outweighs the possibility of any satisfaction resulting; otherwise, if little or no trouble or cost is involved in proceeding further.

It is submitted that the concept used in the *Finnish Vessels* case of remedies being "obviously futile" contributes very little to precision and objectivity of thought, and that a better formulation, according more with the spirit of the rule, would be to consider whether the local remedy in question "may reasonably be regarded as incapable of producing satisfactory reparation."⁶⁴ Asking whether or not a remedy is "obviously futile" is about as unsatisfactory as asking whether a chattel is "inherently dangerous," a primitive test which the English courts eventually found to be so subjective as to be arbitrary, leading to the placing of one case on one side of the line and a similar case on the other side.⁶⁵ A test containing the element of reasonableness would accord with the views of Judges Hudson and Lauterpacht cited above and, as was found in the later negligence cases, would introduce objectivity and be eminently workable.⁶⁶

2. Due Reparation

The terms "ineffective" and "futile" naturally impel the question: Ineffective to accomplish precisely what result? The answer that has been customarily given is a broad one: to "rectify the situation";⁶⁷ to accord "appropriate reparation."⁶⁸ The meaning of the term has not yet been worked out precisely in international jurisprudence.⁶⁹ In the *Finnish Vessels* arbitration the Finnish Government argued that the shipowners' remedy with the Admiralty Board was ineffective because the rates by which the Board was bound in assessing compensation did not represent fair market rates.⁷⁰ The arbitrator held that, even if it were the case that

⁶⁴ The meaning of "satisfactory reparation" will be discussed below, Sec. 2.

⁶⁵ See Levi, *An Introduction to Legal Reasoning* 8-27 (1948).

⁶⁶ The concept of reasonableness was also applied in the *Ambatielos* arbitration: see below, Part III. The importance of considering surrounding circumstances raises the issue of whether and when a plea of non-exhaustion should properly be joined to the merits. See the opinion of Judge Hudson in the *Railway Case*, P.C.I.J., Ser. A/B, No. 76, p. 48 (1939); also *Anglo-Iranian Oil Co. Case* (Preliminary Objection), [1952] I.C.J. Rep. 93; *Ambatielos Case* (Merits: Obligation to Arbitrate), [1958] I.C.J. Rep. 10; *Interhandel Case*, [1959] I.C.J. Rep. 6; Law, *op. cit.* note 5 above, at 45 f.

⁶⁷ *Ambatielos Award* 27.

⁶⁸ García Amador, "International Responsibility: Third Report," [1958] 2 Yearbook of the International Law Commission 55 (Doc. A/CN.4/111).

⁶⁹ The cases dealing specifically with reparation for international delinquencies will presumably be relevant to this aspect of an "effective remedy" within the meaning of the local remedies rule. Cf. text p. 414 below, at note 119.

⁷⁰ That is, in time of war: the rates were deliberately fixed, Finland contended, to exclude the effect of war upon current rates of hire. Britain contended that the rates were the result of agreement between the Admiralty and the shipowners, were consid-

the Board's rates were below the market rates, they nevertheless fulfilled the criterion of effectiveness for the purpose of the local remedies rule.⁷¹ Thus there may be a duty, according to this reasoning, to resort to local remedies even in cases where the maximum of compensation available therefrom would be inferior to that which the claimant government considers just and adequate. The British Government indeed argued that a claimant was bound to have recourse to a domestic tribunal which was merely investigatory, *i.e.*, one without power actually to award compensation, the purpose of the rule being in part to enable the receiving state to appraise its own responsibility. Although the arbitrator appears to have given some general credence to this last contention as a statement of principle, he was inclined to believe that practical considerations could override it: the private claimant should not be required to spend time and money "only to exhaust what to him—at least for the time being—must be only a very unsatisfactory remedy . . ." ⁷² This conclusion accords with the policy foundation of the rule as seen above. The purpose of the rule is to require the claimant to seek a local remedy, not to submit himself to a mere judicial exercise. The rule is not a rule of local investigation, but of local remedies, intended to afford the territorial government an opportunity actually to repair the injury sustained. In this matter, as in other areas that have been examined, the application of the rule will vary according to the circumstances of the case. If an advisory tribunal has a good record of recommendations which have been acted upon by the higher authorities, then it surely constitutes part of a potentially effective remedy; but this would not be true of an advisory tribunal which possessed, so to speak, a *jurisprudence constante* of rejected or lapsed recommendations.

3. *Proper Timing*

A remedy available at the wrong time is no remedy. How ill-timed does it have to be in order to be categorized ineffective? A remedy is ineffective if it is available only in the distant future⁷³ or, at the other extreme, if

ered to be fair market rates, and were increased from time to time as the cost of operating steamships increased. Award 18; 3 Int. Arb. Awards 1479, 1496.

⁷¹ The arbitrator was not entirely specific. He found, "upon the reasons brought forward by the British Government," that the compensation which could have been awarded "does not fall short of what has been meant by the term adequate being used in connection with the term effective remedy." Britain's "reasons" were that the redress available (a) was "substantial," and therefore satisfied the local remedies rule, since the rule merely required substantial redress; or, alternatively, (b) in fact constituted complete redress if the rule required complete redress. Award 18-19; 3 Int. Arb. Awards 1479, 1496-1497. The arbitrator did not indicate on which leg of the argument he based his decision.

⁷² Award 19; 3 Int. Arb. Awards 1479, 1497.

⁷³ In *De Becker v. Government of Belgium*, [1958-1959] European Yearbook of Human Rights 214 (1958), the applicant had been deprived of civil rights and sentenced to death for collaborating with the German authorities during the war. The death sentence was commuted to seventeen years' imprisonment, and he was released in 1951 on condition that he would live abroad. One of the local remedies considered by the European Commission under the local remedies rule (on a complaint that the depriva-

it becomes available once and for all at extremely short notice.⁷⁴ Delay is also vitiating. In the *El Oro Mining and Railway Co.* case⁷⁵ it was held that a court which had given no evidence of having taken any action for nine years was to be regarded as an ineffective remedy. Again, the need to take account of all the circumstances was recognized:

The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter. . . .⁷⁶

Undue delay, the tribunal added, should be found only on the basis of the most convincing evidence; but nine years was to be regarded as too extreme for even the most complicated case and the most congested court.⁷⁷

4. *Absence of Bias*

In the *Robert E. Brown* claim⁷⁸ the international tribunal held local remedies ineffective on the ground that the courts had been

. . . reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions. . . .⁷⁹

This case illustrates the well-established principle that, where the executive branch dominates the courts, judicial remedies against executive action need not be pursued.

tion of civil rights contravened the Convention) was one which would have become available five years after his definitive release, *i.e.*, in 1978; this the Commission held to be ineffective. For subsequent proceedings before the European Court see [1960] *ibid.* 486; [1961] *ibid.* 486. And see note 48 above.

⁷⁴ The *M.S. Perry*, 3 Moore, *op. cit.* note 53 above, at 3158 (1872) (case hurried through court so rapidly that the claimant, residing in another country, had no opportunity to interpose any plea); *cf.* The *Matamoras*, *ibid.* at 3159 (1872).

⁷⁵ *El Oro Mining & Ry. Co. Ltd. (Great Britain v. Mexico)*, Further Decisions and Opinions of the Comm'rs in accordance with the Conventions of Nov. 19, 1926, and Dec. 5, 1930, between Great Britain and the United Mexican States Subsequent to Feb. 15, 1930, p. 141; 5 Int. Arb. Awards 191 (1931).

⁷⁶ *Loc. cit.* at 150; 5 Int. Arb. Awards at 198.

⁷⁷ *Ibid.* *Cf.* the dissenting opinion of the Mexican Commissioner, *ibid.* at 150, 5 Int. Arb. Awards at 199. *Cf.* *Interoceanic Ry. of Mexico (Great Britain v. Mexico)*, *ibid.* at 118, 5 Int. Arb. Awards 178 (1930) (court, dealing with claims to over 77 million pesos Mexican gold, could not be blamed for not rendering decision in nineteen months). In the *Interhandel* Case, [1959] I.C.J. Rep. 6, the Court gave no weight to the fact that in nine years little progress had been made on the merits of *Interhandel's* case in the United States courts; part of the delay, it appears, stemmed from *Interhandel's* inability to produce all of the many documents called for. Judge Armand-Ugon raised the issue, [1959] I.C.J. Rep. 6, 89 (dissenting opinion), citing *Prince von Pless Administration Case*, P.C.I.J., Ser. A/B, No. 52, p. 11 (1933).

⁷⁸ *Robert E. Brown (United States v. Great Britain)*, American and British Claims Arbitration under the Special Agreement concluded between the United States and Great Britain, Aug. 18, 1910, Report of Fred K. Nielsen, p. 187; 6 Int. Arb. Awards 120 (1923).

⁷⁹ *Loc. cit.* at 198; 6 Int. Arb. Awards at 129.

5. *Fair Hearing*

Is the receiving state required by the local remedies rule to give the claimant the opportunity to appear personally before the domestic tribunal? In *X v. Government of Sweden*⁸⁰ the claimant was a resident of the Federal Republic of Germany whose wife and son had left him, gaining illegal entry into Sweden, and he had tried without success to gain permission to follow them there. He had sued in the Swedish courts for right of access to his son, but had been refused permission by the Swedish authorities to enter Sweden even for the purposes of making a personal appearance before the court. Before the European Commission on Human Rights he claimed that this denial of a right to a hearing rendered the domestic remedy futile, and that he was therefore free to proceed before the Commission. The Commission, while finding that the claimant could actually still appeal the matter in the Swedish courts, commented nevertheless that, if this ruling were then sustained, local remedies might well be said to be ineffective and no further attempt to pursue them necessary:

. . . it would be a matter for serious consideration as to whether the generally recognised rules of international law . . . [would] require him to pursue his remedies in the Swedish Courts any further . . .⁸¹

The five headings examined indicate some of the aspects of a local remedy, basic to the very nature of the judicial process, which have been held to be important if not essential to its effectiveness in terms of the local remedies rule. Other facilities might be regarded in other cases as constituting an essential aspect of an effective remedy, *e.g.*, the facility of being represented by counsel, of calling witnesses on one's behalf, of testing the validity of the evidence of the witnesses of the other side. As international jurisprudence develops on this subject, the analysis of cases will call for the best skills of the discipline of comparative law; for the various jurisdictions of the common and civil law have developed differing concepts of what is essential to an effective municipal remedy,⁸² and from these concepts criteria may be extracted for the purposes of the international standard involved in the local remedies rule. Hence it is important to see all the cases in the context of an underlying, unifying principle of reasonableness.⁸³

⁸⁰ [1958-1959] European Yearbook of Human Rights 354 (1959).

⁸¹ *Ibid.* at 374-376 (application declared inadmissible, but to be treated as part of proceedings if new application filed when appeal remedies exhausted); *aff'd.*, [1961] European Yearbook of Human Rights 198 (new application filed after local remedies pursued further, Sweden having granted applicant entrance in order to appear in court in person; held, no violation of Convention). For earlier rejected application, see [1955-1957] *ibid.* 211.

⁸² For a survey of the essential elements in this area in modern civil-law countries, see Schlesinger, *op. cit.* note 46 above, at 201-234.

⁸³ As to the burden of proof in regard to the local remedies rule, see Norwegian Loans Case, [1957] I.C.J. Rep. 9, 39, per Sir Hersch Lauterpacht (separate opinion); Law, *op. cit.* note 5 above, at 64-61.

III. CLAIMANT'S RÔLE: TO USE REMEDY EFFECTIVELY

Just as an international tribunal is entitled under the local remedies rule to examine the receiving state's contribution to an effective local settlement of a problem, so it is entitled to examine the contribution of the claimant to this end. Just as it was noted above that there are certain requirements essential to the *supply* of an effective remedy, so here it must be noted that there are certain steps regarded as essential to the effective *use* of the remedy. When looking above at the receiving state's provision of a remedy, it was seen that the starting point was to find in the local law remedies which were correlative to those which would be available if the matter were taken up at international law. In examining the basic aspects of the claimant's contribution to the local judicial process, *viz.*, his contentions of fact and arguments of law, a similar correlation is made. In the *Finnish Vessels* case it is so stated:

. . . all the contentions of fact and propositions of law which are brought forward by the claimant Government in the international procedure as relevant to their contention that the respondent Government have committed a breach of international law by the act complained of, must have been investigated and adjudicated upon by the municipal Courts . . .⁸⁴

⁸⁴ Award 24; 3 Int. Arb. Awards 1479, 1502. The arbitrator held that, in order to test the effectiveness and exhaustion of local remedies, these contentions and propositions should be *assumed* to be well founded, if they were "reasonably arguable," *i.e.*, not "manifestly absurd." This assumption made, the international tribunal should consider whether the domestic tribunal was competent to give a remedy in a case of this sort. Note that the international tribunal is not thus required to determine what the domestic tribunal would or should have decided in actuality on the merits of the case, but merely whether the tribunal *could* have decided, *i.e.*, was competent, to award a remedy, assuming the case were meritorious. For a discussion, see *Ambatielos* arbitration, United Kingdom Counter-Case 47 (1955).

With the necessary threshold assessment that the claimant's contentions of fact and propositions of law are "reasonably arguable" compare the following similar necessary assessments on threshold questions:

(1) in a case where an international tribunal is said to derive jurisdiction from a treaty: the provisional assessment that the argument for the case being one involving the treaty is "sufficiently plausible," "an arguable construction of the Treaty . . . a construction which can be defended, whether or not it ultimately prevails." *Ambatielos* Case (Merits: Obligation to Arbitrate), [1953] I.C.J. Rep. 10, 18.

(2) in a case where an international tribunal is said to be released from the domestic jurisdiction prohibition by virtue of "engagements of an international character": the provisional assessment that these legal grounds "are of juridical importance for the dispute." *Nationality Decrees in Tunis and Morocco* Case, P.O.L.J., Ser. B, No. 4, p. 26 (1923). *Cf.* note 13 above.

There was some discussion in the *Finnish Vessels* arbitration on whether the propositions of law to be hypothesized as correct ought not to be limited to those which arose "reasonably" out of the facts hypothesized to be correct. Both sides appear to have assented to this view, though Britain contended that, if a party put forward a point of law at the domestic or international level, it could not afterwards contend that that point did not arise reasonably out of the facts. The arbitrator's conclusion was:

" . . . if the alleged facts deemed to be true or the facts which in the decision of the Court of first instance are stated to be true and are not appealable, are in conflict with the facts which, according to the contention of law, equally deemed to be true, are

Does the claimant's failure to call certain evidence in the domestic court mean that he has failed to exhaust local remedies? In the *Ambatielos* arbitration⁸⁵ this was held to be so. A written contract for the sale of ships by the British Government to Ambatielos, a Greek national, contained no specific dates of delivery, but Ambatielos alleged that certain dates which had been given him orally by a British official constituted part of the contract, and that he had suffered considerable loss by reason of the ships being delivered after these dates. In the domestic court proceedings, in which Ambatielos alleged breach of contract, he did not avail himself of an opportunity to call the British official who had negotiated the contract, Major Laing. After judgment had been given against the claimant on the ground that no dates had been proved and that, in any case, parol evidence could not be admitted to contradict or augment the written contract (a basic common-law rule of evidence), Laing disclosed to the claimant certain correspondence which had passed between himself and a superior official discussing the circumstances under which the dates had been mentioned during the negotiations. Claimant had had some previous but vague knowledge of these letters but had not wished to call Laing because, as he told the court on appeal from the judgment at first instance in a belated attempt to have Laing summoned to witness, Laing had refused to make any statement to Ambatielos' solicitors before or during the trial,⁸⁶ and thus to have called him then "would have been taking a leap in the dark."⁸⁷ The Court of Appeal refused to review on the ground, well established in its own practice, that the evidence in question "... was, or might have been obtainable by the use of reasonable diligence . . . in time for the first trial."⁸⁸

In the international proceedings the Greek Government brought forward the Laing correspondence as evidence that there had been a breach of contract, and contended that the British Government, in failing to make this correspondence available to Ambatielos before or at the time of the domestic trial, not calling Laing as a witness nor informing Ambatielos of Laing's availability as a witness, and putting forward a case allegedly inconsistent with the Laing evidence, had caused justice to be withheld from Ambatielos; and that these "manoeuvres," taken either alone or in conjunction with the alleged breach of contract, constituted a denial of justice within the meaning of certain treaty provisions relating to commerce and navigation said

necessary for arriving to [sic] the contended act in the law, then the contention of law must be without relevance to the present case. . . ." Award 19-27; 2 Int. Arb. Awards 1479, 1498-1504.

⁸⁵ *Loc. cit.* note 2 above. For prior proceedings between Greece and Britain, see *Ambatielos Case (Jurisdiction)*, [1952] I.C.J. Rep. 28 (Court held it had jurisdiction to declare whether Britain was obligated to arbitrate); *Ambatielos Case (Merits: Obligation to Arbitrate)*, [1953] I.C.J. Rep. 10 (Britain held obligated). For bibliography on these stages and the arbitral stage, see Syatauw, *Decisions of the International Court of Justice: A Digest* 65 (1962).

⁸⁶ Award 24-25.

⁸⁷ *Board of Trade v. Ambatielos*, 14 Lloyd's List L.R. 387, 388, 389 (1923).

⁸⁸ Per Bankes, L.J., *ibid.* 387, 389.

to apply between Greece and the United Kingdom. In reply, Britain denied any breach of treaty and contended that, in any case, by failing to call Laing as a witness when it was open to him to do so, Ambatielos had failed to exhaust local remedies effectively.

The Commission considered that the correspondence and other documents revealed that dates had been mentioned, not as part of the contract but during the course of negotiations, as an extra-contractual inducement to purchase,⁸⁹ and hence found as a fact that the documents held by the British authorities were not necessarily inconsistent with the case put forward by them in the domestic proceedings. As to the alleged "manoeuvres," they found that there had been no breach of English law and thus no violation of the treaty undertakings, which did no more than guarantee right of free access to the courts in accordance with British law.⁹⁰ Though these findings would have disposed of the matter, the Commission went on to consider the question of local remedies.

On this question it would have been entirely possible for the Commission to have followed the *Finnish Vessels* test given in the extract above and to have simply held that, since it was being sought to use the Laing evidence at the international level, the contentions of fact contained in this evidence should have been specifically investigated and adjudicated upon at the domestic level, and that local remedies had thus not been exhausted.⁹¹ Under the *Finnish Vessels* test the claimant government simply cannot pursue a course at international law which requires substantially more evidence than has already been proved at the domestic level. This is consonant with the approach noted above, *viz.*, that it is necessary for claimant to find a cause of action at international law correlative to his cause of action at domestic law.⁹² He should not be entitled to break new ground at the international level; and so when proceeding at domestic law he should, in producing his evidence, have an eye to the international rule he may have to invoke if justice is not obtained domestically.

Instead of the *Finnish Vessels* test, the Commission in the *Ambatielos* case adopted a more circuitous line of reasoning. Rather than compare the facts produced at the domestic and international levels, the Commission classified the problem by looking not at the facts as such but at the *process* by which the facts were proved within the domestic court.⁹³ The claimant,

⁸⁹ Award 20-26. The Commission's discussion of this crucial point is hardly satisfactory; little is offered in support of their view that this conclusion accorded with the true state of English law.

⁹⁰ Award 26.

⁹¹ It is noteworthy that Judge Bagge, the Arbitrator in the *Finnish Vessels* case, was a member of the Commission in the *Ambatielos* case.

⁹² If it be not found under a specific treaty provision, *e.g.*, as in the European Commission on Human Rights, note 33 above, the general concept of denial of justice at customary international law will be available. *Cf.* note 111 below.

⁹³ The distinction the Commission is creating, albeit unwittingly, appears similar to that posed in conflict of laws cases, *i.e.*, classification as between process (procedure) and facts (substance). It is not surprising that the international tribunal, appraising as it is here the decision of a municipal court, should come up against issues similar to those faced by a *municipal* court engaged in appraising the decisions of another state's municipal court. *Cf.* Inglis, *Conflict of Laws* 44-45 (1959).

they said, must not merely have gone to the domestic court but must also have used the appropriate "procedural facilities" there:

[The rule of local remedies] . . . requires that during the *progress*, and for the purposes of any particular proceedings in one of the local courts, the complainant should have availed himself of all such *procedural* facilities in the way of calling witnesses, procuring documentation, etc., as the local system provides.⁹⁴

Having thus turned away from the *Finnish Vessels* test of correlation, the Commission found it necessary to look for another standard by which to determine the extent to which procedural remedies were to be used, *i.e.*, the extent to which facts were to be probed, at domestic law. It was held that the claimant need only use such procedural facilities as were *essential*—"essential to establish . . . [his] case before the municipal courts."⁹⁵ But for an international tribunal to determine whether the Laing evidence was so essential was virtually impossible: the Commission had not heard the witnesses at first instance and could not form an opinion on this issue solely on the documents available, and, of course, Laing himself had been heard by no one. Conveniently for the Commission, the Greek Government in the international proceedings and on the issue of denial of justice argued, as has been seen, that the Laing evidence had been improperly withheld by the British authorities and this evidence *would have been efficacious* for Ambatielos' case. This assertion, the Commission held, must be regarded as applying also to the question of local remedies, and thus the Greek Government could not be heard to say that Ambatielos had exhausted local remedies.⁹⁶

The facts which should have been brought forward at municipal law are, thus, (a) according to the *Finnish Vessels* test, all those which are subsequently brought forward at international law, and (b), according to the *Ambatielos* test, all those facts which were essential to the municipal law case. Noticeably, the *Ambatielos* test does not preclude the bringing forth at the international level of new facts, *i.e.*, facts which were unessential for the prosecution of the domestic case, and thus does not guard against the possibility of the action at international law going substantially beyond the scope of the domestic proceedings, overriding the principle noted above

⁹⁴ Award 28. This section of the award is adopted verbatim from the United Kingdom Counter-Case, at 37 (1955).

⁹⁵ Award 28.

⁹⁶ Award 29-30. It would not, of course, have been appropriate for the Commission to have regarded the actual *argument about essentiality* as a contention of fact or a proposition of law for the purpose of the rule enunciated in the *Finnish Vessels* case, note 84 above. This rule, Judge Bagge had indicated, applied only to the respondent government's alleged "initial breach of international law," *i.e.*, not to contentions relating to the nature of the remedies available under the law of the respondent state (he avoided drawing a distinction between substance and procedure: *cf.* notes 32 and 93 above). Otherwise the claimant government's contentions that local remedies were ineffective would have to be accepted without scrutiny, which is absurd. See Fachiri, "The Local Remedies Rule in the Light of the Finnish Ships Arbitration," 17 *Brit. Yr. Bk. Int. Law* 19, 35 (note 1) (1936). As to estoppel in international law, see Bowett, "Estoppel before International Tribunals and Its Relation to Acquiescence," 33 *ibid.* 176 (1957).

that the international action should be correlative with that pursued at domestic law. In addition, as has been seen, the *Ambatielos* test poses almost insurmountable problems for the international tribunal in determining what would have been essential to establish the claimant's case at domestic law. This specific test of essentiality was made necessary by the Commission's preoccupation with the "procedural facilities" approach; for, as they said, without some qualification a claimant could be held to have failed to exhaust local remedies by omitting to make use of some unimportant means of procedure.

One member of the Commission, dissenting in favor of Greece, would have carried the qualification even further. Even the essentiality test, said Professor Spiropoulos, was too rigid when used alone, and "practical considerations must soften the rigidity of the rule":⁹⁷ local remedies must be exhausted "in a reasonable manner."⁹⁸ To this extent his formulation is consonant with the observations of Judges Hudson and Lauterpacht, cited in the previous section, and the conclusions there reached about the value of a general standard of reasonableness.⁹⁹ M. Spiropoulos further indicated, however, that, when examining the use of facilities available within the domestic court,

The rule . . . becomes one of determining, having regard to the particular circumstances of the case, what Counsel would have done in the interests of his client. . . .¹⁰⁰

In this case, he said, it was reasonable for counsel to have decided not to call Laing, since Laing's evidence might have been ultimately detrimental to the claimant and, "[a]ccording to English practice, Counsel are rarely prepared, in ordinary circumstances, to call a witness who has refused to give a statement to the solicitor."¹⁰¹

M. Spiropoulos' conclusion¹⁰² surely carries the reasonableness approach too far.¹⁰³ As was seen at the outset, the local remedies rule has its roots in the general proposition that an alien entering a country voluntarily submits himself to the legal regime prevailing in that state; this includes, of course, the local legal counsel available. Thus the visitor should be prepared to take legal counsel as he finds him, provided there is no inadequacy or undue inhibition of counsel due to the restrictive action of the receiving state. It has been specifically held that, where an effective

⁹⁷ Award 37.

⁹⁸ Award 41.

⁹⁹ Notes 62 and 63 above. M. Spiropoulos appears to have been unaware of Judge Hudson's observations, and to have considered himself as breaking new ground with regard to the reasonableness approach. Award 37.

¹⁰⁰ Award 37.

¹⁰¹ Award 37-38.

¹⁰² For the other extreme, see the individual opinion of Dr. Alfaro, Award 33-35. He arrived at the same conclusion as the majority by holding that the concept of essentiality applied only to procedural facilities *generically*; i.e., it was enough that a claimant should have called *some* evidence, it being at his discretion to decide specifically what evidence. But this approach could result in claimant's making a mere formality out of the process of exhaustion of local remedies.

¹⁰³ Cf. Amerasinghe, *loc. cit.* note 5 above, at 1302-1304.

remedy is open, the failure to resort to it cannot be excused on the ground that the claimant was badly advised by counsel,¹⁰⁴ and this, it is submitted, is the correct approach.¹⁰⁵ That the onus should be on the claimant to get sound counsel and an efficacious plan of action from his legal advisers is further emphasized by a British Government recommendation to one of its nationals to get the advice of *three* of "the most eminent Portuguese Lawyers" in a case in which it was apparent that there was only "a bare possibility of ultimate legal success."¹⁰⁶

In the *Ambatielos* case the issue, though involving the question of evidence, actually turned on counsel's exercise of judgment: whether or not to call Laing. In regard to the handling of the case both in and out of court and the marshaling of legal arguments, claimant's case will depend directly on counsel's personal skill, taste and judgment. However capable, counsel is in the nature of things liable to make an error which will cost claimant his case. This is a risk that claimant must take; as in the *Ambatielos* case, the result may have been different if counsel had decided the other way.¹⁰⁷ The local remedies rule should not operate to give claimant the opportunity to have the case reopened at the international level.

On the other hand, there are matters which do not hinge as intimately upon counsel's skill and judgment but which depend very much on circumstances. The clearest example is that of gathering, as distinct from evaluating, evidence. Evidence by its nature is not necessarily discoverable on the surface of things; it often has to be unearthed, an uncertain operation which may in some cases permit of no definitely predictable result. However astute counsel may be, the most vital piece of evidence may well come to light only after the domestic case has been decided. In most cases the loss should fall on the claimant in the normal way. If, however, the failure to produce an essential piece of evidence were attributable to abnormal circumstances prevailing in the receiving state, *e.g.*, some form of civil or military disturbance or a breakdown in vital services, or the inhibition or inadequacy of counsel due, say, to pressure on the Bar by the government, then the test of reasonableness would need consideration. To this extent M. Spiropoulos' test may at times provide a valuable, legitimate extension of the Hudson-Lauterpacht approach: the arbitrator's test approaches from the standpoint of the effective *use* of the remedy the same position as these judges reached from the standpoint of the *supply* of an effective remedy.¹⁰⁸ It is perhaps best stated by saying, subject to the considerations already mentioned, that the receiving state may in some

¹⁰⁴ Haycock, *The Argonaut* (Great Britain v. United States), 3 Moore, *op. cit.* note 58 above, at 8157 (1871).

¹⁰⁵ In other words, counsel is not part of the local "remedy" and subject to the test of effectiveness in the same way as is the process supplied by the state; this, however, might be the case if the only counsel available were those supplied by the state.

¹⁰⁶ Opinion of J. D. Harding to Earl of Clarendon, dated June 16, 1853. 2 McNair, *International Law Opinions* 317 (1956).

¹⁰⁷ It may not have been different, however: see Award 24-25.

¹⁰⁸ Text, p. 400 above, at notes 62 and 63.

cases be deemed to have failed in its duty to provide an effective remedy if justice is impeded by reason of the surrounding circumstances or context within which the remedy is made available; in such cases the claimant need only act as well as he reasonably can. On the other hand, to lay down an overriding test for counsel's conduct, as M. Spiropoulos did, is to perpetuate the very evil which he himself deplored, namely, rigidity. A reasonableness test requires an objective view which takes account of all the circumstances, of which the character of counsel's work is only one.

To conclude on this point, then: It is submitted that the most satisfactory test on the question of the material that should be produced in the domestic proceedings is that laid down in the *Finnish Vessels* case, namely, that all the contentions of fact and propositions of law which are brought forward by the claimant government in the international proceedings as relevant to the contention that there has been a breach of international law must have been investigated and adjudicated upon by the municipal courts.¹⁰⁹ At the same time, in line with the observations of Judges Hudson and Lauterpacht noted in the previous section, and to a degree with the comments of M. Spiropoulos in the *Ambatielos* case, it is necessary that account be taken of all the circumstances, and that, in certain circumstances, it is enough that claimant should have acted reasonably in attempting to fulfill the rule just stated. In particular, if the failure to turn up an essential piece of evidence were attributable to abnormal circumstances prevailing in the receiving state, or if counsel proved to be inhibited or inadequate, due to improper restrictive action by the receiving state, these circumstances could operate to mitigate the effect of the *Finnish Vessels* rule. Apart from these special circumstances, the inadequacy of counsel is no ground for excusing the failure properly to exhaust local remedies.

IV. LOCAL REMEDIES RULE AND DENIAL OF JUSTICE

International law is a law between states, if not above them; and states are centers of legal systems which tend to draw to themselves and assimilate to their domestic patterns those aliens who come within the context of the state. The state's desire to have aliens exhaust its local remedies before interposing an international claim, a mild manifestation of this assimilation process, is a demand which can readily be justified in sociological terms; and it has its outgrowth in a rule which international law recognizes indisputably and which, applied with due flexibility, undoubtedly contributes considerably to the keeping down of tensions between states.

The rules relating to denial of justice, with which the local remedies rule is often confused, spring from different roots. A denial of justice is "the fundamental basis of an international claim," connoting "some unlawful

¹⁰⁹ It is to be noted that, in providing also for "propositions of law" as well as contentions of fact, the *Finnish Vessels* test (note 84 above) is more broadly phrased than the *Ambatielos* test, which on the face of it appears not to provide for the problem of arguments of law.

violation of the rights of an alien."¹¹⁰ In its broadest sense¹¹¹ it is the generic term for most, if not all, forms of a government's liability to a national of another state,¹¹² contract liability excepted.

That the denial of justice rule-complex and the local remedies rule may become closely intertwined in a given fact situation is evident from what has been seen of the *Ambattelos* case. This phenomenon and the confusion often resulting from it stem basically from the fact that these norms operate over the same areas of activity, namely, in the broadest sense of the rules, the activities of the receiving state's governmental institutions, judicial, executive and legislative, and that the rules attach themselves to similar characteristics of these activities.¹¹³ The confusion is greatest in the area of judicial institutions, when the denial of justice concept is used in the limited sense of a claim resting solely on the failure of the state to afford an adequate judicial remedy for an injury which may have been inflicted by a private party. Here the denial of justice concept and the local remedies rule are each being used to examine essentially the same issue, *viz.*, the availability and nature of the domestic judicial remedy. This examination takes place from two different standpoints: under denial of justice, the basic issue is what the respondent state, through the instrumentality of these institutions, did or failed to do to the detriment of the claimant; under the local remedies rule, as seen in this paper, the basic issue is what the claimant did or failed to do to his own detriment in making use of these institutions.¹¹⁴ Thus each of the two areas of law grew up to satisfy

¹¹⁰ Borchard, *op. cit.* note 5 above, at 330.

¹¹¹ *I.e.*, that which refers not merely to the judicial branch of government but to the executive and legislative branches as well. See Borchard, *ibid.* As to the breadth of the local remedies rule across the three main branches of government, see p. 389 above, text at note 4.

¹¹² The area of international law entitled "state responsibility" is thus broadly correlative to that area of domestic law variously entitled governmental liability, Crown proceedings, *droit administratif*, etc., areas which are linked with both public law (*e.g.*, administrative law) and private law (*e.g.*, the law of tort liability), an important distinction in the latter case being that, whereas for example the common law possesses a law of *torts*, rather than a law of *tort*, "international tort law," as it is sometimes called, possesses only one cause of action, one tort, *i.e.*, the all-embracing concept of denial of justice which has to do duty over a wide range of conditions and circumstances. At the same time, as has been suggested above, p. 393, text at note 24, "international tort law" may justly be regarded as an aspect of what may be called international administrative law. For a recognition of the ever-increasing interrelation between public and private law concepts in international as well as domestic law, and the use of administrative law concepts in international law, see Friedmann, "The Uses of 'General Principles' in the Development of International Law," 57 A.J.I.L. 279, 281-283, 290-295 (1963). *Cf.* note 119 below.

¹¹³ It is not meant to imply here that there will not continue to be considerable difficulty in distinguishing and relating the two rules, so closely are they intertwined in many situations. Says Eagleton, *op. cit.* note 5 above, at 113: "The two rules are interlocking and inseparable." *Cf.* Freeman, *op. cit.* note 5 above, at 410: "The rule [of local remedies], in sum, is an imperative which *interacts with* the concept of denial of justice to form the basis of most international claims." (Emphasis added.) This, it is submitted, is the more accurate analysis. See note 117 below.

¹¹⁴ Each rule is also naturally concerned in a secondary way with the opposite, counter-vailing aspect: the denial of justice rule, with what the claimant did or failed to do,

a different demand; but the two rules differ also in the standards they import. As seen above, the local remedies rule requires merely that the claimant should have exhausted all local remedies that were effective. That it is possible to push local remedies to the point of ineffectiveness without a denial of justice being established was demonstrated clearly in the *Finnish Vessels* case; there the arbitrator, in deciding that the shipowners' further recourse to local remedies would have been futile, was evidently relieved to be able to do so without approaching any conclusion that Britain had denied justice.¹¹⁵ It was simply a finding that the claimant's effective local remedies had come to an end, with no value judgments on the quality of the judicial process provided by Britain save those involved in applying the word "effective."¹¹⁶ It is thus not generally correct to say, as do Eagleton and others, that international law requires that "local remedies must be sought until a denial of justice appears."¹¹⁷ This may be an accurate observation of what actually happens in cases where the exhaustion of local remedies serves to confirm or complete the respondent state's liability for a denial of justice; but, while it may thus be true as a description, it is not generally true as a prescription. Let us say there is a treaty provision indicating that the alien contracting with the receiving state may seek a government-to-government remedy by international arbitration for breach of contract by the state, provided that local remedies are first exhausted in accordance with the generally recognized rules of international law. The claimant must then seek these remedies and push them to the point of ineffectiveness, but he does not thereby have to establish a denial of justice as that term is understood in customary international law. Denial of justice involves measuring the respondent state's system of justice against an international standard, whether its basic ingredient be fault (*culpa* or *dolus*) or merely sheer "wrong."¹¹⁸ Ineffectiveness of remedies

to his own detriment, thus contributing to the damage; the local remedies rule, as has been seen, with what the respondent state did or failed to do, *i.e.*, provided or failed to provide, to the detriment of the claimant, thus failing to give an effective remedy.

¹¹⁵ Award 23-24; 3 Int. Arb. Awards 1479, 1501.

¹¹⁶ "[R]ejection of a meritorious claim by a British Court does not in itself under international law create any liability for the British Government." Award 24; 3 Int. Arb. Awards 1479, 1501. Of course, exhaustion of local remedies without a technical denial of justice may serve the valuable function of confirming the territorial government's liability for a denial of justice in the larger sense, *i.e.*, by establishing that there is to be no redress for an act or omission which has already taken place. In the *Finnish Vessels* case, however, the arbitrator was not authorized to examine whether there existed the ingredients of an injury. The local remedies rule was thus in this arbitration isolated in an unusual way from the elements that normally accompany it, enabling the arbitrator to give particularly close scrutiny to the rule and to the assumptions which it involves.

¹¹⁷ Eagleton, *op. cit.* note 5 above, at 113; *cf.* Briggs, *The Law of Nations* 648 (2d ed., 1952): "international law . . . ordinarily requires the exhaustion of local remedies with a consequent denial of justice"; cited in Shea, *The Calvo Clause* 116 (1955). Borchard, *op. cit.* note 5 above, at 832, 818, also appears to be saying this. *Cf.* to the contrary, Freeman, *op. cit.* note 5 above, at 406.

¹¹⁸ For a useful survey of references to the theoretical discussion of this question, see Briggs, *op. cit.* at 617-618. *Cf.* Dunn, *The Protection of Nationals* 191 (1932).

LIMITATIONS UPON THE JUDICIAL FUNCTION

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I. INTRODUCTION

The case of the *Cameroons v. The United Kingdom* concerning the Northern Cameroons, described, in a typical understatement, as "almost unique in the annals of international litigation,"¹ has been terminated by a judgment of the International Court of Justice which appears as well to be "almost unique." In fact, neither the Court nor any of the separate opinions referred to any precedent.

What makes the case unusual is that the Cameroons' application of May 30, 1961, requested the Court to adjudicate upon certain violations alleged to have been committed by the United Kingdom as Administering Authority for the Cameroons under a Trusteeship Agreement which expired on June 1, 1961, but failed to formulate any specific claim for reparation. What makes the judgment unusual is that the Court declined to adjudicate upon the merits and, additionally, that it did so at that stage of the proceedings devoted to preliminary objections raised by the United Kingdom, without finding it necessary "to pass expressly upon the several submissions of the Respondent, in the form in which they have been cast."² This statement is itself rather unusual, since the Court considered two of these submissions and found them to be without substance; moreover, in the operative clause of the judgment the Court almost textually incorporated another of these submissions.

II. THE JUDGMENT

The history of the complaint submitted by the Republic of Cameroon is without relevance here. Suffice it to underscore the fact that, following a plebiscite held on February 11 and 12, 1961, in the Northern Cameroons at that time administered by the United Kingdom as part of the Northern Region of Nigeria, the General Assembly of the United Nations, by Resolution 1608(XV) adopted on April 21, 1961, endorsed its results and decided that the United Kingdom Administration should be terminated on June 1, 1961, upon the joining of the Federation of Nigeria as a separate province. This fact was admitted by both parties.³ After Cameroon attained independence on January 11, 1960, and was admitted to membership of the United Nations on September 20, 1960, it objected to certain features

¹ Case concerning the Northern Cameroons (*Cameroon v. United Kingdom*) Preliminary Objections. Judgment of Dec. 2, 1963, [1963] I.C.J. Rep. 15. Separate opinion of Judge Sir Gerald Fitzmaurice at 98. For a digest of the judgment see p. 488 below.

² *Ibid.* at 38.

³ *Ibid.* at 24.

of the United Kingdom administration both in notes addressed to the United Kingdom and in the forums of the United Nations. It may be assumed that Cameroon was of the opinion that, had the Trust Territory been administered differently and had the United Kingdom heeded General Assembly Resolution 1473 (XIV) adopted on December 12, 1959, recommending the separation of the administration of the Northern Cameroons from that of Nigeria, the result of the plebiscite might or would have been different, that is, it would have been in favor of joining the Cameroon.

An attempt by Cameroon to bring its complaints before the Court by means of a special agreement failed, as the United Kingdom felt itself unable to accede to Cameroon's request. Thereupon Cameroon brought proceedings before the Court by application dated May 30, 1961, basing itself on Article 19 of the then still valid Trusteeship Agreement.⁴ The United Kingdom raised preliminary objections on August 14, 1962, and under Article 62 of the Rules of Procedure, the Court suspended proceedings upon the merits by order of September 3, 1962. As finally formulated at the hearing on October 1, 1963, the United Kingdom objections were as follows:

1. That there has not at any time been a dispute as alleged in the Application in this case;
2. That there has not been or was not on May 30, 1961, as alleged in the Application, a dispute falling within Article 19 of the Trusteeship Agreement for the Territory of the Cameroons under United Kingdom Administration;
3. That, in any event, there is no dispute before the Court upon which the Court is entitled to adjudicate.⁵

In addition, the preliminary objections included the point that the application was inadmissible because it did not conform to Article 40, paragraph 1, of the Statute and Article 32, paragraph 2, of the Rules of the Court. This position was not pressed during the oral hearings⁶ and was not included in the final submissions of the United Kingdom. Nevertheless, the Court, acting presumably *proprio motu*,⁷ took up the point and said that in its view:

the Applicant has sufficiently complied with the provisions of Article 32(2) of the Rules and the preliminary objection based upon non-compliance therewith is accordingly without substance.⁸

⁴ The text of Art. 19 is as follows: "If any dispute whatever should arise between the Administering Authority and another Member of the United Nations relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation or other means, shall be submitted to the International Court of Justice, provided for in Chapter XIV of the United Nations Charter."

⁵ [1963] I.C.J. Rep. at 20.

⁶ Dissenting opinion of Judge Bustamante, *ibid.* at 173, and separate opinion of Judge Wellington Koo, *ibid.* at 42-43.

⁷ With reference to the examination of jurisdictional questions *proprio motu*, see Lauterpacht, *The Development of International Law by the International Court* 347 (1958), and Rosenne, *The International Court of Justice* 359 (1967).

⁸ [1963] I.C.J. Rep. at 28.

The Court found it convenient to take up only the first of the United Kingdom final objections. In one short paragraph it determined that the facts of the case and the opposing views of the parties as to the interpretation and application of the Trusteeship Agreement, expressed both in the forums of the United Nations and in direct communications between the two governments,

reveal the existence of a dispute in the sense recognized by the jurisprudence of the Court and of its predecessor, between the Republic of Cameroon and the United Kingdom at the date of the Application.⁹

A reference to the jurisprudence of the Court and its predecessor would have been useful. The Court quite recently dealt with a similar point in the *South West Africa* cases.¹⁰

Normally, after the disposing of the preliminary objections to its jurisdiction found relevant by the Court, the interlocutory phase of the proceedings would have come to an end. This, however, is an unusual case and, without disposing explicitly of all the objections, the Court proceeded to discuss the propriety of exercising any jurisdiction at all. By way of introducing this part of its reasoning, the Court found that it had been properly seised of the Cameroon application but that, even though it may in consequence have jurisdiction, it was not bound to exercise it, for

There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.¹¹

It may be noted in passing that the adjective "inherent" harks back to an earlier phase in the development of international law and tends to foreclose rather than open up the path to a fruitful analysis of the limitations upon the judicial function. Whatever one may think of the use of this term in the Charter of the United Nations, Article 38 of the Court's Statute is explicit that this function is to be exercised in accordance with international law.

After referring to some considerations which would lead it to decline to give judgment, and noting that in previous cases such matters had been raised *proprio motu*,¹² the Court proceeded to examine what Cameroon asked it to do and at some length what Cameroon had not asked the Court to do. Cameroon had requested the Court on the merits to

adjudge and declare that the United Kingdom has, in the interpretation and application of the Trusteeship Agreement for the Territory of the Cameroons under British Administration, failed to respect certain

⁹ *Ibid.* at 27.

¹⁰ Judgment of Dec. 21, 1962, [1962] I.C.J. Rep. 319, at 342-344; digested in 57 A.J.I.L. 640 (1963).

¹¹ [1963] I.C.J. Rep. at 29.

¹² *Ibid.* at 29-30. On this matter see also Hudson, *The Permanent Court of International Justice 1920-42*, p. 588, and Rosenne, *op. cit.* 360.

obligations directly or indirectly flowing from the said Agreement, and in particular from Articles 3, 5, 6 and 7 thereof.¹³

The matters with respect to which Cameroon desired no adjudication are many: it did not ask the Court "to redress the alleged injustice"; it did not ask "to restore to the Republic of Cameroon peoples or territories claimed to have been lost"; it did not ask for an award of "reparation of any kind"; it did not ask the Court, with respect to General Assembly Resolution 1608(XV) "to revise or to reverse those conclusions of the General Assembly or those decisions as such";¹⁴ it did not ask the Court "to criticize the United Nations" or to declare that it "was wrong in terminating the Trusteeship" or "to pronounce the annulment of resolution 1608"; it did not ask the Court "to find any causal connection between the alleged maladministration and the result of the vote favouring union with the Federation of Nigeria." "As a result" of all the things Cameroon did not ask for, said the Court, "the Court is relegated to an issue remote from reality."¹⁵ Consequently, a judgment in favor of Cameroon would not revive the Trusteeship Agreement; it would not invalidate the union with the Northern Region of Nigeria; it would not cause the former Northern Cameroons to be joined to Cameroon; the United Kingdom would have no authority to give satisfaction to "the underlying desires of the Republic of Cameroon"; and it would not be binding on either the United Nations or Nigeria. The Court concluded this listing of negatives, stating:

The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists *at the time of the adjudication* an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function.¹⁶

This is on its face an important statement on the Court's judicial function and its limitations, but in substance it concerns the type or nature of disputes on which the Court may adjudicate. Seen in this perspective it is a significant factor in the understanding of Article 36(1) of the Statute and inevitably also of the jurisdictional clause in the Trusteeship Agreement. However, it will be recalled that, insofar as the latter is concerned, the Court had already dealt with this point in connection with the first United Kingdom preliminary objection. In that context it considered the dispute well within its jurisdiction by virtue of that clause as well as presumably of Article 36(1), to which jurisdictional clauses must be deemed to be subordinated. The Court perhaps had this relationship in mind when, after referring to the arguments of both parties relating to the Court's judgment in the *South West Africa* cases and the applicability *vel non* of its conclusions with respect to Article 7 of the Mandate for South West Africa to the interpretation of Article 19 of the Trusteeship Agree-

¹³ [1963] I.C.J. Rep. at 20 and 26.

¹⁴ *Ibid.* at 32.

¹⁵ *Ibid.* at 38.

¹⁶ *Ibid.* at 38-34. Italics supplied.

ment for the Cameroons, it declined to pronounce an opinion on the ground that such an opinion

can have only an academic interest since that Trusteeship is no longer in existence, and no determination reached by the Court could be given effect by the former Administering Authority.¹⁷

Apart from the fact that Cameroon did not ask and did not expect the Court to hand down a judgment which could be given effect by the United Kingdom in the defunct Trust Territory, it is clear that, by a subtle application of the *rebus sic stantibus* doctrine, the Court substituted in the two statements just quoted one critical date for another: whereas, earlier in its reasoning in dealing with the first United Kingdom preliminary objection, it considered the dispute to be within the range of its adjudicative function, the critical date being the date of the application, it now considered as the critical date the date of its judgment. The Court made this quite clear, speaking as follows:

The Court must discharge the duty to which it has already called attention—the duty to safeguard the judicial function. Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties.

The answer to the question whether the judicial function is engaged may, in certain cases where the issue is raised, need to wait upon an examination of the merits. In the present case, however, it is already evident that it cannot be engaged. No purpose accordingly would be served by undertaking an examination of the merits of the case for the purpose of reaching a decision which, in the light of the circumstances to which the Court has already called attention, ineluctably must be made.¹⁸

The Court accordingly, after stressing once more that any judgment which it might pronounce “would be without object,” by ten votes to five “finds that it cannot adjudicate upon the merits of the claim of the Federal Republic of Cameroon.”¹⁹

III. ON DECLARATORY JUDGMENTS

In the course of its reasoning the Court made some significant observations on the nature and object of declaratory judgments which, though they also illustrate the Court's conception of propriety and limitation of the judicial function, may more conveniently be treated separately. The Court devoted an unusual degree of attention to the things Cameroon did not seek, before it finally came to state that all Cameroon ever wanted was a declaratory judgment with respect to the claim formulated in its application while the Trusteeship was still alive.

¹⁷ *Ibid.* at 35.

¹⁸ *Ibid.* at 38.

¹⁹ *Ibid.* The dissenting judges were: Spiropoulos, Koretsky, Badawi, Bustamante y Rivero, and Beb a Don (*ad hoc*).

There is no doubt that the Court may make declaratory judgments.²⁰ The only question was whether in the circumstances of the instant case the Court would regard it as proper to do so. The Court decided that it would be inconsistent with its judicial function, on the ground that

if in a declaratory judgment it expounds a rule of customary international law or interprets a treaty which remains in force, its judgment has a continuing applicability. But in this case there is a dispute about the interpretation and application of a treaty—the Trusteeship Agreement—which has now been terminated, is no longer in force, and there can be no opportunity for a future act of interpretation or application of that treaty in accordance with any judgment the Court might render.²¹

The Court, rebutting arguments advanced by counsel, said that he “seeks to minimize the forward reach of a judgment of the Court.” The Court also rejected the plea that, following its judgment in the *Haya de la Torre* case,²² it should not concern itself “with the aftermath of its judgment,” saying:

But there is a difference between the Court’s considering the manner of compliance with its judgment, or the likelihood of compliance, and, on the other hand, considering whether the judgment, if rendered, would be susceptible of any compliance or execution whatever, at any time in the future.²³

Agreeing with the applicant’s contention that “the use which the successful party makes of the judgment is a matter which lies on the political and not on the judicial plane,” the Court nevertheless declared, here again elucidating another aspect of the judicial function and its limitation:

But it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved. Whenever the Court adjudicates on the merits of a dispute, one or the other party, or both parties, as a factual matter, are in a position to take some retroactive²⁴ or prospective action or avoidance of action, which would constitute a compliance with the Court’s judgment or a defiance thereof. That is not the situation here.²⁵

²⁰ *Ibid.* at 37. See also Hudson, *op. cit.* at 588; Rosenne, *op. cit.* at 82-83; De Visscher, *Théories et Réalités en Droit International Public* 361 (1960); 1 Schwarzenberger, *International Law* 654 (8d ed., 1957); Witenberg, *L’Organisation Judiciaire, la Procédure et la Sentence Internationales* 321-322 (1937); 2 Guggenheim, *Traité de Droit International Public* 103 (1954).

²¹ [1963] I.C.J. Rep. 87. The Court quoted at this point the following statement from Judgment No. 11 (Interpretation of Judgments Nos. 7 and 8, The Chorzów Factory) given by the Permanent Court of International Justice on Dec. 10, 1927, which is the *sedes materiae* for declaratory judgments: “The Court’s Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question insofar as the legal effects ensuing therefrom are concerned.” P.C.I.J., Series A, No. 13, p. 20.

²² [1951] I.C.J. Rep. 78-79, quoted in this judgment at p. 30.

²³ [1963] I.C.J. Rep. 37.

²⁴ The French translation, “mesures visant le passé,” is perhaps a clearer expression of the Court’s meaning.

²⁵ *Ibid.* at 37-38.

There is no doubt that a distinction between declaratory and executory judgments exists, although this distinction is not consistently maintained by the Court when it speaks of "likelihood of compliance," "any compliance," and "execution" in the future. The effect of a declaratory judgment may well be to provide the basis for political action, that is, the termination or a revision of the treaty in question or the negotiation of some settlement acceptable to the parties. It may be that, having clarified the legal situation, no action is called for by either party. That would have been so in the instant case as it was in other cases decided by this Court, if, for instance, the judgment had rejected the claim of the applicant state.

In the individual opinions, the concept and application of declaratory judgments both in domestic and international forums was discussed at some length and the views expressed therein deserve close study.²⁶ No attempt will be made here to analyze these opinions. One instance of a declaratory judgment, mentioned more often than others, on which the applicant placed much reliance, may be briefly referred to here. This is that part of the *Corfu Channel* case which related to the "Operation Retail." The question put to the Court was as follows:

Has the United Kingdom under international law violated the sovereignty of the Albanian People's Republic by reason of the acts of the Royal Navy in Albanian waters on the 22nd October and on the 12th and 13th November 1946 and is there any duty to give satisfaction?

The Court held with reference to the acts performed on November 12 and 13, 1946, that

the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction.²⁷

The full significance of this holding and its bearing upon the instant case become clear when it is read in the context of the Court's reasoning:

This declaration is in accordance with the request made by Albania through her Counsel, and is in itself appropriate satisfaction.²⁸

Did Counsel for Cameroon ask for more?

This judgment, which has been considered as "an example of a purely declaratory judgment, not executory,"²⁹ has, in the opinion of Judge *ad hoc* Beb a Don, all the characteristics of a declaratory judgment:

the Court confined itself to stating legal truth, to finding a breach of the law; there was no claim for material reparation; there was no practical application.³⁰

²⁶ See separate opinion of Judge Wellington Koo, *ibid.* at 61-64; separate opinion of Judge Morelli, *ibid.* at 132, 140-141; dissenting opinion of Judge Badawi, *ibid.* at 150-153; dissenting opinion of Judge Bustamante, *ibid.* at 170-172, 182-183; and dissenting opinion of Judge *ad hoc* Beb a Don, at 193-196.

²⁷ [1949] I.C.J. Rep. 4 at 26, 36.

²⁸ *Ibid.* at 35.

²⁹ Rosenne, *op. cit.* at 83, note 3.

³⁰ [1968] I.C.J. Rep. at 195.

In the opinions of several dissenting judges, the *Corfu Channel* case was a case in point and should have been followed in the instant case.³¹ Judge Morelli in his separate opinion agreed in substance with their view and hypothesized as follows:

. . . the question arises as to what would have happened if Albania had from the beginning adopted in the matter of reparation an attitude corresponding to that which was subsequently to be taken by the Court, and had refrained from asking for any satisfaction other than that constituted by the declaration of the violation itself. It would seem difficult to suppose that in such a case the Court would have declined to do what it did do, namely declare the violation, on the grounds that in the absence of any claim for reparation there was no dispute to settle.³²

The Court itself did not find it necessary to deal with the *Corfu Channel* case, but it may not be far-fetched to suggest that the Court had it in mind when, in the passage quoted above, it referred to a declaratory judgment in which "it expounds a rule of customary international law or interprets a treaty which remains in force" and which for that reason "has a continuing applicability."³³ In the instant case the Court was asked to interpret a treaty. To be sure, insofar as that particular treaty is concerned, the judgment would not have had "continuing applicability." However, it may be observed that treaties of a similar kind are still in force, and it cannot be excluded that what the Court might have said about that particular Trusteeship Agreement might have had relevance for other Trusteeship Agreements which are still in force. In that sense, like a judgment on a rule of customary international law, the Court's judgment might have had "continuing applicability." Secondly, even the interpretation of a treaty might well have led the Court into the realm of customary international law, since every treaty is embedded in that law.³⁴ And thirdly, in view of the arguments advanced by both parties, the Court might have been led to elucidate the relationship of the judicial function to the political or other function of the General Assembly.³⁵ If the Court had done so over and beyond its observations on this point in the present judgment, it would no doubt have given a judgment of "continuing applicability."

These considerations are speculative, of course, but so are the Court's. There is also a degree of speculation in Judge Fitzmaurice's distinction between the *Corfu Channel* case and the case at bar. The declaration in the former case,

though it related to a past and irreversible *event*, was also relevant to a *still continuing situation* in which a repetition of the violation of sov-

³¹ See dissenting opinions of Judges Badawi, *ibid.* at 150-151, Bustamante, *ibid.* at 170 and 180, and Judge *ad hoc* Bebb Don, *ibid.* at 196.

³² *Ibid.* at 141.

³³ See above, at p. 420.

³⁴ Lauterpacht, *op. cit.* at 27: "In fact, it would be a mistake to assume that the function of interpretation of treaties, consisting as it does in ascertaining what was the intention of the parties, is a process divorced from the application and development of customary international law."

³⁵ See, on this subject, the interesting observations of Judge Bustamante, [1963] I.C.J. Rep. at 176-182.

ereignty could occur, and it had operative legal effect as a prohibition or interdiction on any such repetition. This was quite a different case from the present one.³⁶

It is suggested that a judgment regarding violation of a treaty has as much relevance as a judgment regarding a violation of territorial sovereignty. In both situations the Court would be dealing with fundamental principles of the international legal order: in one case with the principle of territorial integrity and in the other with the principle of *pacta sunt servanda*. In the circumstances of the *Corfu Channel* case, there was little chance of the judgment of the Court having the effect of "interdiction on any such repetition" between the same parties, though undoubtedly it might be wholly relevant in other circumstances involving other states. It is difficult to see why such an effect should *a priori* be denied to a judgment dealing with the interpretation of a treaty, even though the treaty was of a special kind, namely, a Trusteeship Agreement.

It is, according to Professor Guggenheim, a characteristic feature of a declaratory judgment that "it only authorizes the parties to draw themselves the legal consequences flowing from the judgment, unless the injured party succeeds in obtaining another judgment involving performance."³⁷ This is precisely one of the advantages of declaratory judgments³⁸ and this is what Cameroon seems to have argued, at least alternatively. At any rate, it is the impression one derives from the Court's judgment,³⁹ the pleadings being unavailable at this writing. To be sure, this might not have been easy for Cameroon, and further proceedings before this Court or another tribunal would have required, as Judge Fitzmaurice pointed out, the consent of the United Kingdom.⁴⁰ However, one wonders how far the Court should or whether it should not concern itself with such matters. Predictions about contingencies are hazardous in the extreme in a state of rapidly changing diplomatic and political relations. Should the Court have refrained in the *Corfu Channel* case from awarding monetary damages to the United Kingdom on the ground that, given the attitude of the respondent and the veto power of the Soviet Union in the Security Council, the likelihood of the judgment being productive was extremely marginal?

IV. LIMITATIONS UPON THE JUDICIAL FUNCTION

As to the judgment itself, one or two preliminary remarks may be in order. First, the operative part of the judgment declining to adjudicate upon Cameroon's claim, cannot be regarded as being in the nature of a *non liquet*; it is a *non possumus* rather than a *non liquet*.⁴¹ The Court declined to give judgment, not on the ground of a gap in or an insufficiency

³⁶ *Ibid.* at 98, note 2. Italics in the original.

³⁷ *Op. cit.* at 163. The French text is as follows: "La décision autorise seulement les parties à tirer elles-mêmes les conséquences juridiques découlant du jugement, à moins que la partie lésée n'obtienne un autre jugement comportant cette fois une obligation de prestation."

³⁸ Guggenheim, *ibid.* at 164.

³⁹ And from the separate opinion of Judge Fitzmaurice, [1963] L.C.J. Rep. at 107.

⁴⁰ *Ibid.*

⁴¹ See Schwarzenberger, *op. cit.* at 270.

of the law, which is the classic view of *non liquet*,⁴² but on other grounds. Secondly, the Court did not invoke "inherent" limitations upon its judicial function on the ground that Cameroon had merely used the form of a contentious procedure in order to obtain in fact only an advisory opinion. This intention seems indeed to have been attributed by the respondent to the applicant.⁴³ Had the Court been persuaded that such was the case, it would have been justified in declining to adjudicate.⁴⁴ Thirdly, this case cannot be subsumed under any of the earlier precedents in which the Court declined to adjudicate on the ground that it would not be drawn into making recommendations, as in the *Free Zones* case, or making choices between alternative courses of action, as in the *Haya de la Torre* case.⁴⁵ Fourthly, it does not seem to be a case—but this proposition is advanced with all necessary reservation, as the pleadings are unavailable at this writing—where the parties have made it impossible for the Court to settle the matter. The attitude of the parties and defects in the pleadings may make it impossible for the Court to settle all aspects of a dispute brought before it,⁴⁶ but this does not appear to have been so in the instant case. The Court did not decline to adjudicate on this or that aspect of the Cameroon claim; it declined to adjudicate on any of its aspects. And fifthly, the Court did not encounter the situation which it faced in the *Monetary Gold* case, when a state directly involved, i.e., Albania, neither participated in the proceedings nor consented to them. In the case at bar, Nigeria did not participate in the proceedings, but the Court did not decline to adjudicate on that ground. It may well be, as has been suggested, that absence of a state directly involved raises a question of propriety,⁴⁷ but in the *Monetary Gold* case the Court dealt with the absence of Albania as a question of jurisdiction and not as a question of propriety.⁴⁸

From the procedural point of view it must be observed that when a question of propriety arises, involving the function of the Court as a court of law, this question has priority over all preliminary objections to the jurisdiction or to the admissibility of the claim. Questions of propriety "are of a wholly antecedent or, as it were, 'pre-preliminary' character."⁴⁹ They are independent of objections to jurisdiction submitted by the respondent, they can and have been raised *proprio motu*, and even if the Court were competent to go into the merits of the case, the Court will not do so if it

⁴² For recent restatements of the doctrine, see Lauterpacht, "Some Observations on the Problem of 'Non-Liquet' and the Completeness of International Law," in *Symbolae Verzijl* 196-222 (1958); and Stone, "Non Liquet and the Function of Law in the International Community," 35 *British Year Book of International Law* 124-161 (1959).

⁴³ See dissenting opinion of Judge Bustamante, [1968] I.C.J. Rep. at 170.

⁴⁴ Lauterpacht, *The Development of International Law by the International Court* 146 (1958). But see Rosenne, *op. cit.* at 82.

⁴⁵ De Visscher, *Théories et Réalités en Droit International Public* (1960); Rosenne, *op. cit.* at 269-271.

⁴⁶ See Rosenne, *op. cit.* at 63-64.

⁴⁷ See Rosenne, *op. cit.* at 65.

⁴⁸ See Lauterpacht, *The Development of International Law by the International Court* at 342 (1958). But see separate opinion of Judge Fitzmaurice, [1963] I.C.J. Rep. at 102, note 4.

⁴⁹ Separate opinion of Judge Fitzmaurice, *ibid.* at 108.

considers that it ought not to do so. As Judge Fitzmaurice interpreted the judgment of the Court,

The Court has not, I think, pronounced the claim to be formally inadmissible, but it has in effect (to make use of the French term *recevabilité*) treated it as non-receivable or unexaminable because of the consequences (i.e. strictly the lack of any) which would ensue if it was acceded to.⁵⁰

The Court indeed did not find it necessary to go into the question of admissibility,⁵¹ and stated that, for the reasons developed in the judgment, it has "not felt called upon to pass expressly upon the several submissions of the Respondent in the form in which they have been cast."⁵² It found, nevertheless,

that the proper limits of its judicial function do not permit it to entertain the claims submitted to it in the Application of which it has been seised, with a view to a decision having the authority of *res judicata* between the Republic of Cameroon and the United Kingdom. Any judgment which the Court might pronounce would be without object.⁵³

The basis of the Court's judgment was not an affirmation of jurisdiction which would have required an express ruling by the Court, although the Court did express an opinion on two of the respondent's objections. It was an exercise of incidental jurisdiction.

It is well established that it is the duty and function of the Court, as Articles 36, paragraph 1, and 38, paragraph 1, provide, to decide in accordance with international law such disputes as are submitted to it, whereas in the matter of advisory opinions the Court, by virtue of Article 65, has the discretion whether or not to give an opinion on legal questions. It is also well established that, in giving an opinion or in deciding contested cases, the Court is exercising a judicial function. But, as the Court put it,

That function is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a concrete case.⁵⁴

In the instant case the Court took a most significant step toward the delimitation of that function. Before examining it, it may be useful to recall some cases in which members of the Court or its predecessor urged it to decline adjudication. Thus, in his dissenting opinion in the *Memel* case (Preliminary Objection), Judge Rolin-Jaequemyns felt it useful

to point out that the action of the four Governments is calculated to lead the Court to intervene in a mere divergence of views, without any *legal dispute*, in the proper sense of the term, having as yet arisen therefrom, which would justify the Court in giving a decision in conformity with Articles 13 and 14 of the Covenant of the League of Nations, in accordance with Article 17 of the Convention of 1924 and

⁵⁰ *Ibid.* at 101.

⁵¹ *Ibid.* at 28.

⁵² Judge Koretsky dissented precisely on this ground. In his opinion, the Court should have dealt with the preliminary objections before going into the merits. *Ibid.* at 39-40.

⁵³ *Ibid.* at 38.

⁵⁴ *Ibid.* at 30.

in accordance with that which is expressly laid down in Article 36 of the Court's Statute.⁵⁵

This caution does not apply to the present case because here the Court was satisfied that a dispute existed. In the phase of the *Memel* case dealing with the merits, Judge Anzilotti dissented from the judgment of the Court, and considered the application inadmissible because

this application does not embody the essential features of a claim for legal redress and tends to force the Court to deviate from the fundamental rules governing the activities of a judicial body.

It was his view that

In its judicial capacity, the Court cannot answer questions; it must pass upon claims. . . . The Court could not answer the questions put to it in the application, because by so doing, it would be giving an advisory opinion for which the applicant Powers were not entitled to ask and which the Court was not entitled to give.⁵⁶

Judge Anzilotti's concept of the judicial function was not shared by the majority of the Court. However, the point he made, namely, that the Court should confine itself to deciding claims for legal redress, is one which was made in the *Cameroon* case several times. It may be noted that in replying to the questions put to it in the *Memel* case, the Court showed no concern with the use, if any, to which its replies would be put. In other words, it did not involve itself in considerations or speculations about the aftermath of its judgment. Its effectiveness or lack of it is a matter of history. The two dissenting opinions of Judges Rolin-Jaequemyns and Anzilotti have this in common: that the Court should confine itself to the adjudication of legal disputes rather than giving opinions on divergencies of views, and that a claim for legal redress is an essential feature of a legal dispute. If the case brought before it does not exhibit these characteristics, there is no occasion for the Court to act. The limitation of the judicial function is determined indirectly, that is, by specifying the characteristics of a legal dispute.

In a quite recent case, the *South West Africa* cases (Preliminary Objection), Judges Spender and Fitzmaurice, in their joint dissenting opinions, appear to have taken a similar stand. In their view, the Court was asked "to discharge a task which, in the final analysis, hardly appears to be a judicial one." Although the Court was considering objections to its jurisdiction, it was their view that:

It is nevertheless legitimate for a Court, in considering the jurisdictional aspects of any case, to take into account a factor which is fundamental to the jurisdiction of any tribunal, namely whether the issues arising on the merits are such as to be capable of objective legal determination.

⁵⁵ Judgment (Preliminary Objection) of June 24, 1932. P.C.I.J., Series A/B, No. 47, pp. 243-258, at 258. *Italics in the original.*

⁵⁶ Judgment (Merits) of Aug. 11, 1932. P.C.I.J., Series A/B, No. 49, pp. 294-360, at 349, 350.

After looking at those issues and noting the absence of objective criteria, they concluded that the issues

involve questions of appreciation rather than of objective determination. As at present advised we have serious misgivings as to the legal basis on which necessary objective criteria can be founded.⁵⁷

The majority of the Court, however, thought otherwise, dismissed the objections to its jurisdiction and thus cleared the path for adjudication on the merits. Whatever one may think of the considerations expressed by Judges Spender and Fitzmaurice,⁵⁸ it must be noted that the reasons for suggesting that the Court should decline to adjudicate in the *South West Africa* cases related to the basis, or rather the absence of the legal basis, on which a judgment could be founded. Therefore, as in the *Memel* cases, the Court was seen as faced with a case which lacked an essential characteristic of a legal dispute, namely, the capability of being decided on the basis of law, and therefore was not in the nature of a legal or justiciable dispute. Judges Spender and Fitzmaurice were concerned with the possibility for the Court of giving a judgment at all and not with the aftermath of the judgment.

The limits of its judicial function as variously formulated by the Court in the *Northern Cameroons* case all seem to converge on one point: the judgment or any judgment would have been devoid of purpose; it would have been without object. Any such view is necessarily based on an anticipation of the future conduct of the parties, that is, it is speculative in character, and one may wonder how far a court of law can engage in such a line of thought and still remain within the limits of the judicial function. In the *Right of Passage* case, the situation prevailing in the Portuguese enclaves of Dadra and Nagar-Aveli was not a matter for speculation but of record: the Portuguese authority had been effectively displaced in July, 1954, and there could have been no doubt about the attitude of the Indian Government with respect to continued exercise of Portuguese sovereignty over the enclaves. The door to the exercise of any sovereignty, whether civilian or military, was shut for all practical purposes. The Court nonetheless gave judgment on the legal issues presented to it, although it could harbor no illusions as to its effect or object or purpose. One might even go further and suggest that, by splitting Portugal's right of passage into civilian and military components, by further affirming that the former was subject to Indian control, whereas the latter did not even exist, and by holding that India's conduct effectively barring Portugal from re-establishing its sovereignty in the enclaves was not contrary to its obligations vis-à-vis Portugal, the Court has locked and bolted the door.⁵⁹ The Court expressly declared that "it was no part of the judicial function of the Court to declare in the operative part of its judgment" that certain

⁵⁷ *South West Africa Cases* (*Ethiopia v. South Africa; Liberia v. South Africa*) Preliminary Objections, Judgment of Dec. 21, 1962. [1962] I.C.J. Rep. 319, at 466-467.

⁵⁸ See the separate opinion of Judge Jessup, *ibid.* at 428.

⁵⁹ Case concerning the *Right of Passage over Indian Territory* (Merits), Judgment of April 12, 1960. [1960] I.C.J. Rep. 6, at 45-46.

arguments are or are not well founded, but, in so doing the Court did not include in the operative judgment any statement looking to the restoration of *status juris*. It thus left Portugal without a legal remedy; there was nothing executory about this judgment; it was declaratory on the points with which it dealt. Insofar as some parts of the declaration confirmed Portugal's rights as they existed in July/August, 1954, but which had *de facto* ceased to exist at the time of the judgment, this was all the satisfaction Portugal received. The Court was not concerned whether or not its judgment might have some continuing applicability. Having regard to the factual situation, India's attitude, and the absence of any ruling with respect to a course of action, the judgment was without object.⁶⁰

One may well ask whether the Court was right in abandoning the *Right of Passage* case as a possible precedent and in concerning itself with the factual situation as it existed in the *Northern Cameroons* case at the time of the judgment rather than at the time of the application. Put in another way, one might ask whether it was compatible with the Court's function to give a judgment in a situation where possibility of compliance was remote. There is, however, a difference between these two cases. Portugal's object was certainly to obtain a legal remedy which would be a step in restoring its control over the enclaves in question, even though her submissions may not have been crystal clear or not properly formulated. In other words, Portugal desired an executory judgment and received a declaratory judgment with respect to rights which had been rendered obsolete by the course of events. Cameroon, however, wanted no more than a declaratory judgment, which calls for no compliance, with respect to a situation which she knew could not be undone. The Court did not deem it a proper exercise of its judicial function to give her this satisfaction. To give satisfaction is, it is submitted, a proper exercise of the judicial function.⁶¹ It lends strength to what Judge Jessup has called the legal interest of states "in the general observance of the rules of international law."⁶² It is surely not far-fetched to suggest that states have also a legal interest in the observance of treaties.

Judge Badawi in his dissenting opinion adverted to the legal interest which the applicant has "to clear itself of any charge of defamation which might properly be directed against it," and he also pointed out that the establishment of the truth with regard to the alleged irregularities "could not fail to be of great legal interest both for the applicant and for the General Assembly."⁶³ In a similar line of thought Judge Bustamante stated:

In declaratory suits, the pure and simple definition of the law, in favour of one or other of the parties, constitutes in itself a *judgment* which goes beyond the purely speculative or academic field and gives the successful party a truly objective element, namely the ad-

⁶⁰ For a trenchant critique of this judgment, see Verzijl, in 7 *Netherlands International Law Review* 211-242 (1960).

⁶¹ De Visscher, *op. cit.* at 360; Witenberg, *op. cit.* at 323.

⁶² South West Africa cases, [1962] I.O.J. Rep. at 425.

⁶³ [1963] I.O.J. Rep. at 153.

judication of a right with which what I call his "legal assets" are enriched, that is to say, the whole sum of rights which that party possesses in its capacity as a legal person. . . . If it is the respondent who appears in the judgment as the successful party, his legal position is consolidated and all the matters of complaint in the application become without foundation, the effect of the judgment being a public rehabilitation. . . . All these effects of a declaratory judgment become evident to the outside world in a concrete and perceptible fashion and take their place within the field of social or international life beyond any purely moral or individual confines.⁶⁴

Thus there were strong reasons for adjudicating the issues. Had the Court done so without concerning itself with the motives for appealing to the Court or with the uses which the parties would have made of its judgment,⁶⁵ the Court as well as its judgment might have been criticized. The Court must exercise prudence in assuming jurisdiction and in limiting itself strictly to administering the law.⁶⁶ But this it must do. It will be criticized, whatever it does, but in refusing to adjudicate altogether it may have set an undesirable precedent and selected the least desirable way of escaping the dilemma. It would seem that the real dilemma here was how to draw the fine line between safeguarding and abdicating the judicial function.⁶⁷

Clearly the Court was faced with a policy issue of first magnitude. Had the Court rejected the United Kingdom's preliminary objections as unfounded—and in view of its own finding that a dispute existed at the time of Cameroon's application and its broad interpretation of the adjudication clause in the *South West Africa* cases as comprising disputes relating to the general administration of the Mandate, there may have been no convincing or convenient way to do so—the Court might well have opened the sluice gates to a flood of litigation. If policy considerations, including the requirements of sound administration of justice, made it desirable to discourage cases such as this from being steered in the direction of the Court, some other and more restricted ground might have been found. *Quia non movere* is an old maxim of law and probably has a place in international law. Judge Wellington Koo suggested a decision along this line when he declared that "respect is due from the Court to the situation which now obtains in regard to the former Trusteeship of the Cameroons."⁶⁸

Another way of reaching the same result was developed by the Court itself in the judgment, but merely as an hypothesis. The Court, hypothetically speaking, declared that the decision of the General Assembly to

⁶⁴ *Ibid.* at 172. Italics in the original. In this context note the observation of *ad hoc* Judge Chagla that the judgment of the Court in the Right of Passage case "in the main vindicates the attitude taken up by India in the controversy between herself and Portugal over the question of the right of passage." [1960] I.C.J. Rep. 6, at 118. Italics added.

⁶⁵ See De Visser, *op. cit.* at 462.

⁶⁶ See *ibid.* at 451, 458-459.

⁶⁷ "In one famous case, the judge sought to escape the dilemma by washing his hands, but neither the precedent nor the judge has been deemed worthy of imitation." Jessup, "The Customs Union Advisory Opinion," 26 A.J.I.L. 105-110 at 105 (1932).

⁶⁸ [1963] I.C.J. Rep. at 64.

terminate the Trusteeship Agreement⁶⁹ with the consent of the United Kingdom as the Administering Authority had the legal effect of putting an end to any procedural or substantive rights which Members of the United Nations possessed during the lifetime of the Trusteeship. The application of the Cameroon, even though filed with the Court two days prior to the expiration of the Trusteeship, could not, solely for this reason, survive the comprehensive extinction of the Trusteeship. This would be all the more so as Cameroon's application was exclusively concerned with provisions relating to the general application of the Trusteeship Agreement and not with any specific interest or right acquired under it.

To sum up, in this writer's submission, if the issue of the limitation upon the judicial function had to be faced in this case, it would have been preferable, in conformity with the jurisprudence of the Court, to resolve it by reference to the nature of the dispute rather than to the putative effect of the judgment, that is, by holding that the dispute was moot and not that the judgment would be moot. The submissions of the United Kingdom, particularly the third preliminary objection, pointed in this direction. It has already been suggested⁷⁰ that the Court virtually adopted that objection, namely, that "there is no dispute before the Court upon which the Court is entitled to adjudicate." However, instead of holding that it could not adjudicate the dispute because it was moot and therefore it was not a legal dispute within the meaning of the Statute, the Court held "that it cannot adjudicate upon the merits of the claim of the Federal Republic of Cameroon" because "any judgment which the Court might pronounce would be without object." In upholding the third United Kingdom preliminary objection, which the Court would have been able to do without affecting its judgment in the *South West Africa* cases, the Court would have rested on a reasonable objective conception of "legal disputes," whereas its actual holding rests upon rather subjective and conjectural assumptions about the effect of its judgments or the lack of it. Thus, rather than saying that the dispute was moot and therefore not suitable for the exercise of its judicial function, the Court preferred to say that its judgment would be moot and that for this reason it would be outside its judicial functions. Surely the Court ought not to adjudicate upon disputes that are moot and, as understood by this writer, the dispute between Cameroon and the United Kingdom was moot from its inception, as the application was filed after the General Assembly adopted Resolution 1608 (XV) on April 21, 1961, which provided, in agreement with the United Kingdom as the Administering Authority, for the termination of the Trusteeship on a definite date, namely, June 1, 1961. The fact that the Trusteeship Agreement was still in force when the Court was seised of the dispute could not change or alter the character of the dispute. Alterna-

⁶⁹ It is suggested that the Court may have erred when it said that the General Assembly "decided on the termination of the Trust," for nothing in the Charter or the Trusteeship Agreement confers such a unilateral power on the General Assembly. The termination could only result from the joint action of the General Assembly and the Administering Authority. See *ibid.* at 32, 33, 34 and 36.

⁷⁰ See p. 415 above.

tively, it might have been possible to construe the joint decision of the General Assembly and the United Kingdom of April 21, 1961, to terminate the Trusteeship Agreement as an authentic interpretation of all outstanding issues, binding certainly upon the Members of the United Nations and thus, as of that date, putting an end to any outstanding claims with respect to the administration of the Trust Territory. The Court is not endowed with any sort of appellate jurisdiction from such decisions and would rule accordingly. Reasoning along some such line would have enabled the Court to determine the limits of its judicial function by reference to legal criteria—the Statute, the Charter, the Trusteeship Agreement or general international law—rather than by resorting to meta-juridical sources such as “inherent” limitations. In addition, it would have become unnecessary for the Court to shift the critical date from the time of the Cameroon application, to the unpredictable period of oral argument or the even more unpredictable time of the handing down of the judgment, elements over which the parties have no control and to the hazards of which their legal rights should not, without compelling reasons, be exposed.

EDITORIAL COMMENT

INTERNATIONAL LAW IN NEW NATIONAL CONSTITUTIONS

The continuing practice of making reference to international law in national constitutions has not produced any one form of wording that has found general adoption. More than a decade ago a leading article pointed out that after each World War of the present century there was a wave of effort to include in national constitutions provisions whereby the law of nations would be made a part of municipal law. The author noted that some of the provisions were hortatory rather than incorporative.¹

The seven-year period beginning with 1957 has seen no cessation of effort to relate international law to municipal law, as wording in some twenty-five constitutions coming into force in this period will illustrate. The list of states includes not only new ones, such as those emerging in Asia and Africa, but also some older members of the family of nations (as, for example, France and Turkey) which have adopted new constitutions during the period. Among the more novel types of clauses are those in constitutions of some of the newer members of the Commonwealth,² but these states are by no means the only ones that have introduced innovations. The most obvious examples to be noted consist of express wording in the constitutions, although it is possible that, even where there is not such express mention, there may be implications that are of some significance for those who apply the law.³

¹ David R. Deener, "International Law Provisions in Post-World War II Constitutions," 36 Cornell Law Review 505-533 (1951). See also, for a comparative study of practice, L. Erades and Wesley L. Gould, *The Relation between International Law and Municipal Law in the Netherlands and in the United States* (1961); and for discussion of the "transformation" as compared with the "adoption" method, Ignaz Seidl-Hohenveldern, "Transformation or Adoption of International Law into Municipal Law," 12 International and Comparative Law Quarterly 88-124 (1963).

² In a Commonwealth state such as New Zealand, which does not have a written constitution, there may be application of international law by judges on the same basis as British judges might apply it. See the statement in *In re Heyting*, N.Z.L.R. [1928] 233, to the effect that the New Zealand Court occupied a position in New Zealand similar to that of the High Court of Justice in England and was largely guided by the principles and conventions of that Court; the same view is expressed by J. McGregor in the case of *In re Scholer*, N.Z.L.R. [1955] 1190.

³ Possible illustrations are to be found in provisions for the transition of Jamaica, and of Trinidad and Tobago to the status of independent states and to full membership in the Commonwealth. By the fourth section of the Jamaica (Constitution) Order in Council, 1962, "All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force. . . ." There is a comparable provision in Sec. 4 of the Trinidad and Tobago (Constitution) Order in Council, 1962. The body of law in each case would presumably include the common law applicable before independence.

Some new states in Africa have in their constitutions provisions looking to federation with other states. Some of these mention possible relinquishment of sovereignty. In

Provisions of constitutions to be considered here are (1) those of a type that has become fairly familiar and that is designed to establish a general relationship of the law of nations with municipal law; (2) those having to do with power to carry out decisions of international public organizations; (3) those setting a standard for the treatment of aliens; (4) those giving to treaties an authority greater than that of national statutes—on condition of reciprocity; and (5) a miscellaneous category touching war declaration, extradition and "offenses against the law of nations."

Of the new constitutions adopted since the beginning of 1957, apparently only that of South Korea (1960) contains a clearly "incorporative" clause of the type that with relative frequency appeared in the period between the first and second World Wars and after the second one. By Article 7, the generally recognized rules of international law (as also ratified and promulgated treaties) shall have the same effect as that of the laws of Korea. Some of the new states have constitutions that might perhaps be described as something more than "hortatory," for they set out that the states shall "conform to the rules of international law."⁴ In each case the statement is followed by provisions concerning the conclusion of treaties and the force of the latter in relation to municipal law.

Constitutions of several states in Africa and Asia have provisions concerning relationships of these states, respectively, with international public organizations. One of these states, in the part of its constitution relating to the treaty-making power, mentions the "creation of international organizations"; treaties for this purpose, among others, may be ratified or approved only by means of a law.⁵ Two Commonwealth states, Malaya (now Malaysia) and Pakistan, in their constitutions refer to legislative power to carry out decisions of international organizations in which these states, respectively, are members.⁶ In the case of Malaysia, the power is clearly conferred upon the national legislative body. In the case of Pakistan the same objective is apparently achieved through the statement that the Central Legislature shall have power to make laws concerning, *inter alia*, "international organizations . . . and the implementation of their decisions."

the case of Ghana the wording envisages only an African federation. Preambular language in the Constitution of Guinea indicates support for any policy designed to establish a "United States of Africa," and wording in Art. 34 envisages unity with "any African state." Other constitutions, such as those of Congo (Brazzaville) and Dahomey refer to free co-operation with other states. In still other constitutions (for example, those of Mauritania (Sec. 44), Mali (Sec. 38) and Gabon (Sec. 52), respectively) there are clauses which have as their object to permit cessions or changes of sovereignty only with the consent of the people concerned or by referendum. On the point that the type of clause here noted is not peculiar to African entities, there being similar provisions in constitutions of Arab states, see Egon Schwelb, "The Republican Constitution of Ghana," 9 American Journal of Comparative Law 634-656 (1960).

⁴ Guinea, Constitution of 1958 (Art. 31); Mali, Constitution of 1960 (Art. 38).

⁵ Togo, Constitution of 1961, Art. 56.

⁶ Malaya's Constitution of 1957, Art. 76 (1) (a); Pakistan Constitution of 1962, Art. 132(b) and Third Schedule. Malaysia's Parliament has constitutional power to enforce "any decision taken by an international organization and accepted before Merdeka Day by the Government of the United Kingdom on behalf of the Federation or any part thereof."

Without incorporating international law in its entirety or in general terms in municipal law, some of the new constitutions specifically mention that part of international law that is applicable to aliens. Thus Article 32 of the basic law of Cyprus provides that nothing in its Part I (General Provisions) shall preclude the Republic from regulating "in accordance with international law" any matter relating to aliens.⁷ By Section I, Part II, of Turkey's Constitution of 1961, aliens' rights and duties are to be defined according to the provisions of international law. The Korean Constitution sets out that such rights are to be "*guaranteed* within the scope of international law and treaties."⁸ While the Sierra Leone Constitution does not make specific mention of international law in connection with the measure of treatment to be accorded aliens, paragraphs 1 and 2 of Article 170 (in Part II) refer to fundamental rights and freedoms of individuals in terms that are applicable to "any" person. Some new states of the Commonwealth, notably Sierra Leone and Nigeria, have included in their constitutions detailed provisions concerning British subjects and Commonwealth citizens, but similar wording does not appear in the constitutions of certain other Commonwealth states wherein the concept of a common status in the matter of citizenship (without assurance of complete reciprocity) has found less favor.⁹

The force which treaties should have, as compared with legislative enactments, is basic in constitutional law. Clarification on this point would seem to be a proper task for constitution-makers. In the period under review France has adopted, as have a number of new states in territory that was formerly French, a formula designed to fix the relationship.¹⁰ It provides that duly ratified treaties shall be superior to laws on condition of reciprocity, *i.e.*, if the treaty in any particular case is likewise observed by the other party state. Under France's 1946 Constitution, its treaties were to be superior to statutory law of France, and there was no specifica-

⁷ Cmd. 1093 (July, 1960), Appendix A. Another passage, which refers, not directly to international law, but to a standard frequently employed in treaties, is that part of the Cyprus Constitution which binds the Republic to accord "by agreement on appropriate terms" most-favored-nation treatment to Greece, Turkey and the United Kingdom, respectively, for "all agreements, whatever their nature . . ."; specifically excepted from the rule are the Treaty for the Establishment of the Republic of Cyprus and the treaty with the United Kingdom concerning bases and military facilities. Cmd. 505, pp. 97-103. The provisions concerning most-favored-nation treatment are understandable in light of the history of the period of several years just before the Cypriots gained independence.

⁸ Art. 7, par. 2 (emphasis added).

⁹ Robert B. Wilson and Robert E. Clute, "Commonwealth Citizenship and Common Status," 57 A.J.I.L. 566-587 (1963).

The reference to the Nigerian Constitution is to that of 1960, which has now been replaced by a new Constitution.

¹⁰ Constitutions of Gabon (Art. 54); Central African Republic (Art. 89); Chad (Art. 65); Dahomey (Art. 56); Republic of Cameroun (Art. 40); Malagasy (Art. 18); Mauritania (Art. 46); Niger (Art. 56); Senegal (Art. 58); Togo (Art. 57); Tunisia (Art. 58). The last-mentioned country does not have in its provision a requirement of reciprocity. Cyprus, in Art. 169(3) of its Constitution, specifies reciprocity as a condition on which treaties will have force superior to that of any municipal law.

tion of reciprocity as a condition.¹¹ Wording in the new French Constitution, and in the constitutions of the new states which have contained similar provisions, raises questions as to how reciprocity is to be defined and who is to decide whether it exists "*dans chaque cas*," in the sense of the wording in the constitutions. There is also the question of whether evidence of reciprocity would be adequate if it were based upon executive acts or, if the other party state is one in which the courts interpret and apply treaties, in the form of decisions by municipal courts. There seems to be sound basis for the opinion that the new constitutional formula was not intended to be contrary to what one observer has called "international common law."¹² For the purpose of national law, reciprocity would not necessarily be an *implied* condition in the absence of an express constitutional provision. There is possible precedent in a decision of the United States Supreme Court to the effect that non-performance by a foreign state with which the United States had concluded a treaty (of extradition) would not of itself permit the judiciary in the United States to declare the treaty void, although it might, for the reason indicated, have become voidable so that the Executive could take steps to terminate it.¹³

A provision which would appear to be a novel one is that in the new Turkish Constitution (1961) whereby that country's Grand National Assembly has power to declare a legal state of war in cases considered to be legitimate by international law. Any application of the provision would presumably take into account general commitments in universal or nearly universal form, such as the Kellogg-Briand Pact for the Renunciation of War as an Instrument of National Policy, and the Charter of the United Nations.¹⁴ A provision that is not novel is that in the 1959 Constitution of Tunis whereby, without referring in words to international law, there is a rule that political refugees shall not be extradited.¹⁵ (There is here no implication, of course, that, apart from such a rule as that in the Tunisian Constitution, such extradition might be required under international law; the apparent effect is to emphasize rather than to make a new rule.)

¹¹ The 1946 Constitution of France provided that treaties should have force superior to that of statute law, but did not include provisions concerning reciprocity. The more recent constitution apparently makes a distinction between "treaties" and "international agreements"; while the President negotiates the former, in the case of the latter he is merely informed. On the point that under the 1946 Constitution the President was only informed of the conclusion of international agreements, see A. deLaubadère, "La Constitution Française de 1958," 20 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 506-561, at 549-551 (1960). On the 1958 Constitution generally, see Dorothy Pickles, *The Fifth French Republic* (1960).

¹² Nruen Quoc Dinh, "La constitution française de 1958," 75 *Revue de Droit International Public et de Science Politique* 515-564, at 549-551 and 561 (1959). The writer raises the question of whether the state could denounce the treaty; if not, he submits that the treaty would remain binding in the international sense.

¹³ *Charlton v. Kelly*, 229 U.S. 447 (1913).

¹⁴ Cf. Hamza Eroğlu, "La constitution turque et les relations internationales," 1961 *Turkish Year Book of International Relations* 62-90, at 85.

¹⁵ With this may be compared Art. 15 of the Mexican Constitution of 1917, by which "No treaty shall be authorized for the extradition of political offenders. . . ." 2 *Peaslee, Constitutions of Nations* 418 (1950).

Still another type of reference to the general law is that in the 1962 Constitution of Pakistan authorizing the Central Legislature of that country to make laws concerning "offenses against the law of nations."¹⁶ There is comparable wording in Article I, Section 8, paragraph 10, of the United States Constitution. This clause was utilized to sustain an indictment under a statute in a situation where the power of Congress to enact a criminal law was questioned.¹⁷

International law is of course applicable *between* states even without any express constitutional provisions making it a part of national law. Such provisions may have utility in situations where more than one construction of municipal enactments might reasonably be followed, or where (as in cases affecting aliens) the limits of national legislative power are in question. The device of relating international law in general (or some part of it) to municipal law through express wording obviously does not relieve tribunals or legislatures from the continuing task of determining what the rules of international law are. Direct or indirect references in constitutions to such an international organization as the United Nations underline the increasing prominence which the principal organization has come to have in the international legal system.

In general, the newly emergent states of Asia and Africa whose constitutions have been examined do not therein *explicitly* challenge the body of rules that comprise international law on the ground that these rules are the product of imperialism or colonialism. Much, obviously, depends upon those who interpret the provisions which make reference to international law or some parts of it. A realistic view would seem to be that the "international law habit" will not necessarily be effectively promoted through mere wording in national constitutions. What is accomplished under the types of clauses that have here been noted seems more likely to depend upon the constructive approach, vision and good faith of rulers and judges rather than upon the skill of draftsmen.

ROBERT R. WILSON

LEGAL ASPECTS OF THE PANAMA CASE

On February 4, 1964, the representative of Panama on the Council of the Organization of American States presented a request for a Meeting of Consultation of Foreign Ministers under the Treaty of Reciprocal Assistance. The basis of the invocation of the Rio Treaty was alleged to be "an unprovoked armed attack" on January 9-10 against the territory and civil population of Panama, made by the armed forces of the United States stationed in the Canal Zone, leaving several Panamanians dead and more than a hundred wounded and creating "a situation that endangers peace in America."

¹⁶ Art. 182 and Third Schedule, par. (f). The paragraph immediately following lists foreign and extraterritorial jurisdiction, admiralty jurisdiction, and offenses committed on the high seas and in the air.

¹⁷ *United States v. Arjona*, 120 U. S. 479 (1887).

At an earlier meeting of the Council on January 10 it had been agreed by the parties to have recourse to the services of the Inter-American Peace Committee, and the Council elected Chile to replace the United States. The Committee, now consisting of representatives of Argentina, Colombia, Dominican Republic, Venezuela, and Chile, undertook its task promptly, taking the first available plane for Panama and immediately holding interviews with the President of Panama and other officials. The task of the Peace Committee was not primarily one of investigation of the facts occurring on January 9-10, although the Committee did find that the riots were due to profound sentiments of nationalism in Panama, in which "Castro elements" participated, and that the North American inhabitants of the Zone had not contributed to solving the problem of living together in the region.

But in spite of strenuous efforts to bring the parties together, restore diplomatic relations and start discussion of the various problems created by the Canal, the proposals of the Peace Committee were frustrated by the insistence of the Panamanian Government that the bases of agreement to "negotiate" the issues, in the English text "discuss," must be understood to mean a "revision of the Treaty of 1903."¹ This the representatives of the United States were unwilling to agree to, stating that, while they were ready to discuss everything relating to the Treaty of 1903, they could not pledge themselves in advance to revise it. The result was that the Peace Committee was unable to bring about a solution; and when on February 4 the representative of Panama on the Council asked for a Meeting of Consultation, the Peace Committee considered that its functions had terminated.

At an earlier Meeting of the Council on January 31 the representative of Panama had asked for a Meeting of Consultation under the Rio Treaty, charging an aggression on the part of the United States; and the Council was now meeting on February 4 to decide upon the request. The representative of Panama renewed the charges made at the earlier meeting and the representative of the United States contested them as before. No facts were before the Council to determine responsibility for the events of January 9-10, the charges of the representative of Panama and the denial of the representative of the United States remaining no more than statements for the record.

Could a Meeting of Consultation under the Rio Treaty be called under such circumstances? Article 6 of the Rio Treaty² provides that a meeting of the Organ of Consultation may be called by reason of "an aggression which is not an armed attack" only if "the inviolability or the integrity of the territory or the sovereignty or political independence" of the American state should be affected by it. The condition in Article 6 was clearly intended to prevent summoning the Ministers of Foreign Affairs

¹ Text of 1903 Treaty in 3 A.J.I.L. Supp. 130 (1909). For other treaties pertaining to the Panama Canal, see Appendix to 1918 Proceedings, American Society of International Law 288-309.

² Text in 48 A.J.I.L. Supp. 53 (1949).

unless the situation was sufficiently serious to justify the inconvenience to which they would be put. Did it appear that the alleged aggression had met the conditions of Article 6? It was quite clear that it had not; at any rate no conclusion could be drawn, since the facts asserted by Panama and contested by the United States were not before the Council.

But at this point political motives took precedence over technical interpretations of the Rio Treaty. Here was the powerful United States accused by a small state of aggression! It would never do to deny the small state the protection of the Rio Treaty. The representative of Argentina, among others, made it clear that in voting for the Meeting of Consultation there was no question of a commitment as to where the fault lay, the important thing was to bring about a settlement. The representative of Chile alone protested the application of the Rio Treaty, which he contended was directed towards serious situations involving, as the treaty said, the independence and sovereignty of the state, not a mere temporary riot that had long since terminated. The representative of the United States, although not entitled to vote on the draft resolution, explained that he shared the doubts of the representative of Chile whether the Rio Treaty was the appropriate mechanism, noting that the real issue which divided Panama and the United States was not the alleged act of aggression. While he failed to specify what the "real issue" was, it was obvious to all from the report of the Peace Committee that the revision of the Treaty of 1903 was the actual objective of the Panama claim. But inasmuch as he was anxious for the fullest investigation of the facts, and it had been made clear by those who had spoken in favor of invoking the Rio Treaty that it was not to be "taken in any sense as a judgment on the charges made," he was agreeable to the invocation of the treaty in accordance with the terms of the resolution.

The draft resolution was then adopted by a vote of 16 to 1, and the Council was now competent to act provisionally as Organ of Consultation and to put into effect procedures and practical measures which neither the Peace Committee nor itself as Council could have undertaken. In its provisional capacity the Council then met in closed session as a Committee of the Whole, and authorized the Chairman to appoint five of its members to act as a committee of investigation and conciliation. It should be noted that a larger majority of two-thirds will be required to take decisions under the Rio Treaty, in contrast to the mere majority required to call the Organ of Consultation. The new committee, bearing the ponderous name of Special Delegation of the General Committee of the Organ of Consultation in the Conflict between Panama and the United States, consists of the representatives of Paraguay (Chairman), Brazil, Costa Rica, Mexico, and Uruguay.

Query, was the invocation of the Rio Treaty necessary as the only means by which the Council could be given competence to take the necessary measures to bring the parties together and, if need be, impose a settlement or at least prevent a conflict? The competence of the Council under the Charter is limited; but it can be as broad as required when the Council

is acting provisionally under the Rio Treaty, that is, for the period until the Organ of Consultation meets. The Peace Committee was limited under its Statute to bring about a settlement to which both parties would agree. Beyond that it could not go. Again, there were numerous treaties of arbitration and conciliation available, but they could be put into effect only with the co-operation of the parties in dispute. The Pact of Bogotá, adopted at the Conference of 1948, carried some degree of compulsory character, but it had not been ratified by the United States, and in any case its procedures would have been too complicated for prompt action. It would seem that the Council, when confronted with the dispute, could have appointed on its own initiative a committee to determine the facts of the case as a necessary condition of deciding whether the Organ of Consultation should be called. But conceding this point, which is not in line with the general practice of the Council, the competence of the Council would then have come to an end. In consequence, the invocation of the Rio Treaty on February 4 would appear to have been, if not necessary, the most expedient means of giving to the Council the competence needed to meet the situation.

Has the precedent of invoking the Rio Treaty for a situation less than an act of aggression involving the independence and territorial integrity of a state weakened the treaty as the chief instrument of maintaining law and order in the Hemisphere? That it may lead to other cases of appeal for minor controversies is of little consequence. The Council can readily dispose of them when they arise. On the other hand, the inter-American security system lacks what might be called a procedure of summary jurisdiction. In the formulation of the draft of the Rio Treaty it was clear that the delegates to the Conference at Quitandinha were unwilling to give to the Council in Washington any such powers to maintain the peace as had been given two years earlier to the Security Council of the United Nations. In cases of emergency, where important and urgent problems were at issue, a Meeting of Foreign Ministers, described as the Organ of Consultation, must be called.

But here a curious situation has developed which has made it possible for the Council to waive the restrictions upon its powers which the framers of the Rio Treaty believed it necessary to impose. Article 6 of the Rio Treaty provides that, when the conditions for the invocation of the treaty have been met, "the Organ of Consultation shall meet immediately" to agree upon the measures to be taken. The word "immediately" must now be interpreted to mean "in due time," for the practice of the Council has been, as in the present case, to fix the date and place of the meeting as may appear convenient (*oportunamente*). In a number of cases the Council, given by the invocation of the treaty the competence to act provisionally, has in fact been able to meet the threat to the peace, and then has called off the Meeting of Consultation without so much as apologizing to the Foreign Ministers for keeping them in a state of technical expectation. The explanation is simple: that a situation may appear for the moment to justify invoking the Rio Treaty and then later be brought to

a solution by the provisional measures taken by the Council, thus sparing the Foreign Ministers the long trip confronting them, and, as might be expected, without protest on their part. Convenient as this rule of what might be called customary law has been, it is doubtful whether a formal amendment of the Rio Treaty to that effect would obtain the necessary support.

One more item of interest: The Charter of the Organization of American States provides in Article 39 that a Meeting of Foreign Ministers may also be held to consider "problems of an urgent nature and of common interest to the American States,"³ and a number of such meetings have been held, the last being at Santiago, Chile, in 1959. The Panama situation could clearly have been included under this provision and a strained interpretation of the Rio Treaty avoided. But in cases under Article 39, where the urgency of the problem does not imply an immediate threat to the peace, the Council is not given the power to act provisionally and the Ministers themselves must meet in response to the invocation. Obviously, therefore, the Council will be hesitant to call a Meeting of Consultation under Article 39 unless the circumstances justify an actual assembly of the Foreign Ministers; and obviously also the provision of Article 39 is of no use in meeting situations calling for prompt action.

With respect to the Treaty of 1903, which the Government of Panama insists on revising, the question might be raised whether the treaty has not long since lost in part its bilateral character and become, in respect to the United States, an obligation to all the world. The governments of other states, American and non-American, have come to rely upon the service of the Canal as an essential part of their foreign commerce. To raise the tolls of the Canal for other purposes than the necessary and proper administration of the Canal, as, for example, to pay an unreasonable rental for the use of the Zone, would be a wrong to the nations using the Canal which they might properly resent. Where a treaty confers privileges upon third states, even without the assumption of any obligations on their part, the rule of prescription may well apply. It is in accord with the general principles of international law that prescriptive rights may be acquired after a long period of use during which states have adjusted their commerce to the facilities at first freely offered them.⁴

Whether a particular memorandum of June 15, 1962,⁵ setting forth an agreement between President Kennedy and President Chiari, constitutes an obligation to reconsider the Treaty of 1903 is of little consequence. The treaty has already been revised several times, the latest formal revision being the Treaty of 1955, which increased the rental of the Zone and removed a number of the minor complaints in respect to the employment

³ Text in 46 A.J.I.L. Supp. 43 (1952).

⁴ See Roxburgh, *International Conventions and Third States*, for the views of publicists; also *Harvard Research Draft on Law of Treaties*, Art. 18, 29 A.J.I.L. Supp. 681 (1935).

⁵ See *Washington Post*, Feb. 9, 1964, p. A 14.

of Panamanians and the relations between the Zone and the City.⁶ It would appear that there is still a case for the adjustment of other grievances and irritations resulting from two communities of unequal social standards and different national traditions living side by side, and it may well be a fair criticism of the United States that too little effort has been made to relieve the tensions that made possible the unhappy events of January 9-10. This aspect of the problem is clearly included in the statements of the representative of the United States on the Council.

But the adjustment of these grievances, more or less serious as they may be, is not the question at issue, which is the administration of the Canal as a public service to all the world. Behind the Treaty of 1903 is the Hay-Pauncefote Treaty, by which the United States gave a pledge that the Canal would be "open and free to the vessels of commerce and of war of all nations observing these Rules, on terms of entire equality," implying that the Canal was not to be used as a mere instrument of transit for the benefit of the United States, but was to be administered as a public service for the commerce of all the world. As an international public utility, its administration should only be changed in the presence of clear evidence that some other form of joint or common administration would make the Canal a more efficient public utility, including obviously the security of the Canal. Thus far, no evidence has been brought forward to that effect. Larger interests are at stake in the revision of the Treaty of 1903 than the appeasement of the nationalistic feelings of the people of Panama.

C. G. FENWICK

⁶ See editorial, "The Treaty of 1955 between the United States and Panama," 49 A.J.I.L. 543 (1955).

NOTES AND COMMENTS

DOCUMENTATION ON THE WORKING OF THE EUROPEAN HUMAN RIGHTS MACHINERY

During the first years of the operation of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on November 4, 1950 (European Convention on Human Rights), access to the documentation of the organs it has established "to ensure the observance of the engagements undertaken by the High Contracting Parties" in the Convention (the European Commission of Human Rights, European Court of Human Rights) and of the organ of the Council of Europe, in which it has vested authority to have a share in this task, the Committee of Ministers, was rather difficult. This was due, in part, to the fact that under the Convention the European Commission of Human Rights meets *in camera* (Article 33); that the states concerned are not at liberty to publish the Commission's report on the facts of a case and its opinion whether the facts found disclose a breach by the state concerned of its obligations under the Convention (Article 31 (1) and (2)); and that it is contemplated in the Convention that the Committee of Ministers shall publish the report as a sanction (Article 32(2)) if the state party concerned has not taken satisfactory measures prescribed by the Committee in a case where a violation of the Convention has been established.

In recent years this state of affairs, unsatisfactory for the student, has fundamentally changed and the European human rights authorities now are among the best-documented international organs.

The beginning was made when, by a resolution of February 6, 1958, the Committee of Ministers of the Council of Europe authorized the publication of a *Yearbook of the European Convention on Human Rights* and when the Commission resolved that, when it is deciding on the admissibility or otherwise of applications, it performs a judicial function and its decisions on admissibility as distinct from its report on the substance can therefore be published.¹ So far four volumes of the *Yearbook* have appeared. They cover, respectively, the years 1955, 1956 and 1957 (Volume I), the years 1958 and 1959 (Volume II), the year 1960 (Volume III) and the year 1961 (Volume IV).² In addition, the Secretariat of the Council of Europe publishes, in advance of their publication in the *Yearbook*, selected decisions in mimeographed form under the title *Collection of Decisions of the European Commission of Human Rights*. Volumes 9 (January, 1963) and 10 (September, 1963) contain the texts of selected decisions rendered in 1962 and 1963.

¹ 2 *Yearbook of the European Convention on Human Rights* (to be cited as "Yearbook" hereinafter) (1957-1958): Foreword and p. 174, respectively.

² Reviewed in this JOURNAL, Vols. 55, pp. 200 and 1019 (1961), 57, p. 166 (1963), and 58, p. 543 (1964).

In one of two inter-state disputes between Greece and the United Kingdom Government as the authority then responsible for the international relations of Cyprus, the Commission submitted its report on the facts of the case and on the question whether a violation of the Convention had occurred. While the Committee of Ministers was seized of the question, Greece, Turkey and the United Kingdom succeeded in reaching agreement on the future status of Cyprus and the Committee decided, on the joint proposal of Greece and the United Kingdom, that no further action was called for.³ The Commission's report has not been made public.

In the case of another "Inter-State Application," *Austria v. Italy*, concerning events in the Province of Bolzano (Bozen) it has been made known, so far in a press release only, that in its report the Commission had come to the conclusion that the provisions of the Convention had not been violated by the Italian authorities and that the Committee of Ministers agreed with the reasoning of the Commission.⁴

In one case, *Nielsen v. Denmark*, the publication of an extract from the report of the Commission on the substance (which was to the effect that the facts found disclosed no breach of the Convention) was authorized by the Committee of Ministers in view of the wish expressed to this effect by the Danish Government.⁵ In another case, *De Becker v. Belgium*, the report of the Commission, which was unfavorable to the respondent government, was made public as part of the documentation of the European Court of Human Rights, which will be referred to later in this note.

In two cases relating to Austrian criminal appeals procedure (*Ofner v. Austria* and *Hopfinger v. Austria*), the report of the Commission (excluding the part which describes the attempts at effecting a friendly settlement) has been published, together with the decision of the Committee of Ministers. In these two cases the Commission came to the conclusion that the provisions of the Convention had not been violated and the Committee of Ministers agreed.⁶

In two other cases (*Pataki v. Austria* and *Dunshirn v. Austria*), also relating to Austrian criminal appeals procedure, the Commission had reached the conclusion that the appeals proceedings before an Austrian Court of Appeal in the trial against the two petitioners, conducted on the basis of the Austrian law as it was then in force, were not in conformity with the Convention. However, following negotiations between representatives of the Austrian Government and the President of the Sub-Commission with a view to reaching a friendly settlement within the meaning of Article 28 of the Rome Convention, the Austrian Government proposed, and the Austrian Parliament eventually enacted, new legislation. One statute, enacted in 1962, amended the controversial provisions of the Austrian Code of Criminal Procedure *pro futuro*, and another, enacted in 1963, amended the law retrospectively in favor of the successful petitioners to

³ 2 Yearbook 175 *et seq.* (1958-1959).

⁴ Council of Europe, Directorate of Information, Press Release O (63) 39, Oct. 24, 1963.

⁵ 4 Yearbook 490 *et seq.* (1961).

⁶ Council of Europe. The Cases of *Ofner* and *Hopfinger* (Strasbourg, 1963).

the Commission. The Commission then stated that by the adoption of the new legislation "a new remedy has been made available to the applicants, and they are now entitled to have their cases re-examined by the Austrian tribunals under a procedure which will not give rise to the objections which the Commission has expressed concerning the previous proceedings." The Committee of Ministers agreed, expressed its satisfaction at the legislative measures introduced by the Austrian Government to ensure the full application of the Convention, and decided that no further action was required. The report of the Commission and the Ministers' decision were published in full.⁷

The hearings of the European Court of Human Rights are public, unless the Court in exceptional circumstances decides otherwise.⁸ No difficulty as to accessibility has, therefore, arisen. The Court's judgment in the *Lawless* case (Preliminary Objections and Questions of Procedure) of November 14, 1960, and the judgment in the same case (Merits) of July 1, 1961, were published, *inter alia*, in the *Yearbook of the European Convention*.⁹ A judgment in the same case (Questions of Procedure) of April 7, 1961, was, before the Court started its own publications, available only in mimeographed form.¹⁰

In October, 1962, however, the Court amended its Rules of Court. While the original Rule 52 had been to the effect that "the Registrar shall be responsible for the publication of judgments and of such other decisions and documents whose publication may have been authorised by the Court," under the text of 1962 he shall also publish "documents relating to the proceedings *including the report of the Commission* but excluding any particulars relating to the attempt to reach a friendly settlement; reports of public hearings; any document the publication of which is considered as useful by the President of the Court."¹¹

As a consequence, the Registry has started two series of publications of the Court:

Series A: Judgments and Decisions. In this series the three judgments rendered in the *Lawless* case and the judgment in the *De Becker* case of March 27, 1962 (by which the Court decided to strike the case off its list) have appeared.

Series B: Pleadings, Oral Arguments, Documents. In this series the complete documentation of the *De Becker* case, including the full text of the report of the Commission, has been printed.¹² It is expected that a corresponding volume covering all stages of the *Lawless* case will appear at the beginning of 1964.

⁷ Council of Europe. The Cases of Pataki and Dunshirn (Strasbourg, 1968).

⁸ Rule 18 of the Rules of Court of the European Court of Human Rights, adopted pursuant to Art. 55 of the Convention on Sept. 18, 1959, Strasbourg, 1960; also in 2 *Yearbook* 2 *et seq.* Of. Art. 46 of the Statute of the International Court of Justice.

⁹ 3 *Yearbook* 492 *et seq.* (1960) and 4 *ibid.* 438 *et seq.* (1961); 56 A.J.I.L. 171, 187 (1962).

¹⁰ Verbatim Report of the Hearing held by the Chamber of the Court from April 7 to April 11, 1961 (mimeographed), English version, pp. 24-25.

¹¹ 4 *Yearbook* 10 (1961). *Italics added.* ¹² E.C.H.R., Series B, 1962.

In the course of 1963 the Convention of 1950¹³ as supplemented by a Protocol of 1952¹⁴ has been supplemented or amended by three more additional Protocols: Protocol No. 2 conferring upon the European Court of Human Rights competence to give advisory opinions,¹⁵ Protocol No. 3 amending Articles 29, 30 and 34 of the Convention,¹⁶ and Protocol No. 4 "securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto."¹⁷

EGON SCHWELB

THE CEYLON OIL EXPROPRIATIONS

By the Ceylon Petroleum Corporation Act of May 29, 1961, the Ceylon Petroleum Corporation was created and powers were given to the Minister of Trade and Commerce to vest in the Corporation

any movable or immovable property, other than money, which had been, or is being or is or was intended to be, used for

(a) the importation, exportation, storage, sale, supply, or distribution of petroleum, or

(b) the carrying on of such other business as may be incidental or conducive to the purposes referred to in paragraph (a).¹

In April, May and June, 1962, properties belonging to the oil companies operating in the country, namely, Shell, Esso and Caltex, were so vested. The three companies maintain that the total value of the property so expropriated is in the neighborhood of Rs. 40 million (\$8 million), while of this amount the two American companies claim Rs. 20 million (\$4 million approximately). More recently, Act No. 5 of 1963, passed on August 22, 1963, states that after January 1, 1964, the Corporation will have the exclusive right to import, sell, export or distribute most petroleum products.² The three oil companies estimate that the total losses incurred by them as a result of their being put out of business would amount to Rs. 100 million (about \$20 million).

The Government of Ceylon takes the view unofficially that the property so far taken over is not worth as much as is claimed, and that the compensation due when the oil companies go out of business will not be as much as Rs. 100 million. The amount of compensation to be paid has not been agreed upon by the parties nor has any compensation been paid, to date, although procedure has been set in motion under the Act for the payment of compensation.

¹³ European Treaty Series, No. 5; 1950 U.N. Yearbook on Human Rights 418 *et seq.*; 45 A.J.I.L. Supp. 24 (1951).

¹⁴ European Treaty Series, No. 9; 1952 U.N. Yearbook on Human Rights 411-412; 48 A.J.I.L. 301 (1954).

¹⁵ European Treaty Series, No. 44; 58 A.J.I.L. 331 (1964).

¹⁶ European Treaty Series, No. 45; 58 A.J.I.L. 333 (1964).

¹⁷ European Treaty Series, No. 46; 58 A.J.I.L. 334 (1964). It might be useful to add that, in the *travaux préparatoires*, what eventually became Protocol No. 4 had been called the draft "Second Protocol" to the Convention.

¹ Sec. 34, Act No. 28 of 1961; 1 Int. Legal Materials 126 at 137 (1962).

² Sec. 5B. 2 Int. Legal Materials 951 at 952 (1963).

On February 7, 1963, the United States Government suspended aid to Ceylon under the Hickenlooper Amendment and issued a statement in which it said, *inter alia*:

The Government of the United States did not then and does not now contest the right of Ceylon as a sovereign state to nationalize private property. However, when such property belongs to a citizen or a company of a foreign country the payment of prompt, adequate and effective compensation is required by international law.³

It was also stated that the Government of Ceylon had not taken appropriate steps to pay compensation because it did not ensure the prompt payment of compensation representing the full value of the property as required by international law.

The Ceylon Government replied in a communiqué issued on February 8, 1963, that "it was at all times ready and willing to pay compensation to the oil companies and that, in fact, provision for that purpose already existed in the Ceylon Petroleum Corporation Act."⁴ Chapter IV, sections 44 to 54, of that Act, concedes the *right* to compensation of those whose property had been expropriated.

In spite of the controversy raging between the capital-exporting countries of the West and the Soviet bloc regarding the duty to compensate where property of aliens is nationalized, and the views expressed by certain writers,⁵ it is significant that the Government of Ceylon has accepted the obligation to pay compensation. This is also in keeping with the General Assembly Resolution of December 14, 1962, in which it was said that "appropriate compensation" should be paid in case of expropriation, nationalization or requisitioning.⁶ It is also important as an admission by one of the less developed countries in the light of the statement made in the recent *Sabbatino* case that the court declined "at this time to attempt a resolution of that difficult question" of compensation.⁷

Although compensation has not been paid, though over a year has elapsed, it is proposed to examine the legislation passed by the Ceylon Government in the light of the traditional formulation and understanding by the capital-exporting countries of the international law relating to the payment of compensation. No doubt at the present moment this is an area of the law which is, perhaps, even more controverted than the requirement of compensation itself. The following analysis is offered without prejudice to the answers to the questions that arise in this department of the law.

Traditionally it has been maintained by the capital-exporting countries

³ U. S. Information Service Bulletin of Feb. 8, 1963, as reported in the *Times* of Ceylon of Feb. 9, 1963.

⁴ *Ibid.*

⁵ See, e.g., De Visser, *Théories et Réalités en Droit International Public* 238 (1953); Friedman, *Expropriation in International Law* 206 (1958); Freeman, *Denial of Justice* 577 (1938); and Fischer Williams, "International Law and the Property of Aliens," 9 *Brit. Yr. Bk. Int. Law* 1 *et seq.* (1928).

⁶ Res. A/1803 (XVII), Dec. 14, 1962; 57 A.J.I.L. 710 (1963).

⁷ 807 F. 2d 845; reported in 56 A.J.I.L. 1085 at 1101 (1962).

that compensation must be "adequate, prompt and effective."⁸ This requirement is strictly interpreted by these countries.⁹

As to the amount of compensation which touches on the adequacy of the compensation, Section 47 of the principal Act states:

(1) The amount of compensation to be paid under this Act in respect of any property vested on any date in the Corporation shall be the actual price paid by the owner for the purchase of such property and an additional sum which is equal to the reasonable value of any additions and improvements made to such property by any person who was interested, or if such purchase price is not ascertainable, be an amount equal to the price which such property would have fetched if it had been sold in the open market on the day on which the property was vested in the Corporation:

Provided that where such property consists of movable property or anything attached to the earth or permanently fastened to anything attached to the earth, a reasonable amount for depreciation shall be deducted from the amount which represents the price actually paid for its purchase by the person entitled to the compensation payable in respect of such property, if such compensation is based on such price.

(2) Where any right, interest or benefit in any movable or immovable property derived under the terms of any arrangement, agreement (formal or informal), lease or notarially executed instrument is vested in the Corporation, the amount of compensation to be paid under this Act shall be the actual price paid by the holder for the acquisition of such right, interest or benefit:

Provided that a proportionate amount shall be deducted on account of the period for which the holder has enjoyed such right, interest or benefit.

Priority is given to the *purchase* price of property or rights, with allowance being made for depreciation (except in the case of land), improvement and user as the case may be. It is only where the purchase price is not ascertainable that the *market* value of property on the day of vesting is to be the criterion. The principle based on the purchase price has not been mentioned in international law so far in connection with the "adequacy" of compensation. It has always been maintained that it is the market value of the property that is to be the basis for the calculation of compensation. Further, in the case of "rights, interests and benefits" in movable or immovable property under the above legislation, the market value is not an alternative at all.

Two further points may be made here: (1) The standard given priority in the Act is generally likely to be less advantageous to the oil companies than the market value because property, rights, interests and benefits have appreciated in value to such an extent that that value in a normal market

⁸ See the U.K. Memorial in the Anglo-Iranian Oil Co. Case (U.K. v. Iran), I.C.J. Pleadings, Oral Arguments and Documents 106 (1951).

⁹ In this context the recent statement of Lord McNair, that compensation should be paid either at the time the property is taken or that reasonable steps for the payment of compensation should be taken (see "The Seizure of Property and Enterprises in Indonesia," 6 Neth. Int. Law Rev. 218 at 243 (1959)), is important in this connection as a concession.

would have been greater than the purchase price plus the value of improvements, less depreciation. (2) No provision is made for the artificially depressed market which would have prevailed for the property of the companies on the day of vesting as a result of the impending expropriation.

Further, in regard to the future profits and good will likely to be lost by the expropriation and nationalization of the industry, Section 8 of the amending Act reads:

Save as otherwise expressly provided by this Act no person shall be entitled to compensation from the Government or any Minister or the Corporation or any Director, officer, servant or agent of the Corporation for any loss, damage or injury incurred by him whether directly or indirectly or by way of business or otherwise by reason of the operation of any of the provisions of this Act.

There can be no doubt that the provision was intended to avoid having to pay compensation for loss of future profits or good will. It has not been clearly laid down in any international decision that, where compensation is being paid for property and businesses *lawfully* taken over, loss of good will and future profits should be compensated, although, in certain decisions involving *damages* for *unlawful* interference with property, such elements have been included in the calculation of damages.¹⁰ But it is generally understood that the traditional view requires these elements to be considered in the assessment of compensation. The above provision also eliminates compensation for any indirect losses that might be incurred, which again is contrary to the traditional view of the law. As for the principal Act, since specific provision is made for the calculation of compensation on certain strict bases, it may be concluded that these elements are excluded in the case of investitures made thereunder, except insofar as they may constitute a part of the market value of specific property wherever that may be a relevant consideration. It is an interesting but moot point whether a distinction can be made between loss of business and good will resulting from a complete prohibition of an alien's private enterprise and that which results purely from an expropriation of particular items of property for the purposes of the traditional view of the international law on the matter.

No mention is made specifically in this Act of losses resulting from the expropriating legislation which might accrue because certain properties are rendered valueless or of reduced value because of the prohibition of continued private activity in the oil business. This would apply to both immovable and movable property which is not taken over by the Corporation. But it would appear that Section 8, above quoted, purports to eliminate such losses from the assessment of damages. Although the point has not been specifically discussed in connection with the traditional view, it would seem that such losses were required to be compensated under it, since the idea behind that concept of "adequacy" is that the alien should

¹⁰ See, e.g., The Case Concerning the Factory at Chorzów (Claim for Indemnity—Merits), P.C.I.J., Series A, No. 17 (1928) at 51-52; and The Vinland Case (Admin. Dec. No. 7, U. S.-German Mixed Claims Commission), 7 Int. Arb. Awards 248.

be put in the same position financially as he would have been in, had he been allowed to continue carrying on business in the absence of the legislation.

As to the time of payment and the form of payment, Section 53 of the Act of 1961 states:

The mode and manner of payment of compensation under this Act shall be determined by the Minister in consultation with the Minister of Finance.

According to the English canons of statutory interpretation, which are also applied in Ceylon, there is a presumption that a statute is to be interpreted so as to be consistent with international law, unless there is clear indication to the contrary.¹¹ This provision gives discretion to the Minister of Trade and Commerce both in regard to the form of payment and the time of payment perhaps, if a broad construction can be given to the words "mode and manner of payment." This section would thus govern both the promptness and the effectiveness of the payment. It is submitted, however, that it is not clear that the Act purports to override international law. Hence, this provision can be read subject to the qualification "in accordance with international law." If the traditional view of the law that compensation must be paid in a lump sum and in convertible currency is correct, then it is open to the aliens concerned to question any action of the Minister of Trade and Commerce which violates these rules in a local court of law under the Act and even at an international level before an international tribunal.

The principal Act also sets up a Compensation Tribunal to assess the compensation.¹² It says in Section 65 (4) that "An award of the Tribunal shall be final and shall not be called in question in any court." Consequently the local courts cannot be resorted to in order to question any assessment of the amount of compensation due which is made by the Compensation Tribunal, but it does not take away the jurisdiction of the courts in regard to other matters. Thus, if the Compensation Tribunal or the Chairman of the Petroleum Corporation delays taking action required by the statute to expedite payment of compensation, for instance, the local courts may be resorted to for an order of *mandamus* to compel these officers to act. Similarly, if the Minister of Trade and Commerce defies international law in determining the mode and manner of payment, the local courts have jurisdiction to determine the question. In short, local remedies are available either by reference to the Compensation Tribunal, which is intended to be an impartial body, or the courts, so that the rule of local redress is not excluded. However, on the question of the assessment of compensation, if the oil companies propose to question the validity of the principles set out in the Act according to international law, it would appear that the remedies available are obviously futile and the rule of exhaustion

¹¹ See *The Cooperative Committee on Japanese Canadians v. Atty.-Gen. for Canada*, [1947] A.C. 87 at 104, where the principle was recognized as valid.

¹² Part V, Secs. 55-65.

will be excluded,¹³ because the Compensation Tribunal is bound by the express words of the Act and there is no resort to the local courts from a finding of the Compensation Tribunal. If, however, it is proposed to question the legality of any other action to the exclusion of the amount of compensation, then the oil companies must refer to the local courts; or it is possible that their actions may be prescribed under the local law, which is not below the international minimum standard, and they might lose their right to an international arbitration because a defense that local remedies had not been exhausted could then succeed.

CHITTHARANJAN AMERASINGHE *

FIFTY-EIGHTH ANNUAL MEETING OF THE SOCIETY, APRIL 23-25, 1964

THE MAYFLOWER HOTEL, WASHINGTON, D. C.

PROGRAM

CAUSING COMPLIANCE WITH INTERNATIONAL LAW

THURSDAY, APRIL 23, 1964

2:15 p.m.

Panel: *What are Appropriate Compliance Objectives?*

Chairman: Herbert W. Briggs, *Cornell University*

Panelists: Richard A. Falk, *Princeton University*: "Compliance as Determined by Us, by Them, or Impartially?"

Saul H. Mendlovitz, *Rutgers University School of Law*: "Breaking Rules and Respecting Decisions."

Julius Stone, *University of Sydney*: "Realistic Compliance Goals."

5:15 p.m.—Informal Reception

8:15 p.m.

Panel: *Enforcing International Law against One Country through Domestic Litigation in Others*

(Jointly sponsored with the American Branch of the International Law Association)

Chairman: Willis L. M. Reese, *Columbia University School of Law*

Panelists: Edward D. Re, *Chairman, Foreign Claims Settlement Commission*: "Domestic Adjudication Plus Lump-Sum Settlement as an Enforcement Technique."

(Second panelist to be announced)

Commentator: Myres S. McDougal, *Yale Law School*

¹³ See the Finnish Ships Arbitration (1934), 3 Int. Arb. Awards 1479.

* Lecturer in Law in the University of Ceylon. Formerly Foundation Law Student of Trinity Hall, Cambridge, and Research Fellow of Harvard University.

Conference on Teaching and Research: *Threats and Law*

Chairman: Wesley L. Gould, *Department of Political Science, Northwestern University*

Panelists: Dean G. Pruitte, *University of Delaware*: "Foreign Policy Decisions, Threats and Sanctions."

Jan F. Triska, *Department of Political Science, Stanford University*: "Different Perceptions of Agreements and Disagreements."

Charles A. McClelland, *Institute for Research on International Behavior, San Francisco State College*: "Teaching the Rôle of Law in the Cold War."

Commentator: Brunson MacChesney, *Northwestern University School of Law*

FRIDAY, APRIL 24, 1964

9:15 a.m.

Panel: *Compliance During Hostilities*

Chairman: Rear Admiral Robert D. Powers, Jr., U.S.N., *Deputy Judge Advocate General of the Navy*

Speaker: Richard R. Baxter, *Harvard Law School*: "Reciprocity, Self-Restraint and the Laws of War—Lessons from Recent Experience."

Commentators: Benjamin Forman, *Assistant General Counsel, International Affairs, Department of Defense*

Gordon B. Baldwin, *Professor of International Law, Naval War College*

Colonel Howard S. Levie, *St. Louis University School of Law*

Panel: *Using a Country's Own Legal System to Cause It to Respect International Rights*

Chairman: Covey T. Oliver, *University of Pennsylvania Law School*

Panelists: Richard B. Lillich, *Syracuse University College of Law*: "The Effectiveness of the Local Remedies Rule Today."

David R. Mummery, *of the New Zealand Bar and the University of Virginia*: "Increasing the Use of Local Remedies by Plaintiff Governments."

2:15 p.m.

Panel: *Persuading Governments to Accept Procedural Solutions*

Panelists: Lawrence F. Ebb, *Stanford University Law School*: "Strengthening the Incentives for Procedural Solutions of Commercial and Economic Disputes."

Soia Mentschikoff, *University of Chicago Law School*: "Disagreement on Substantive Standards, and What to do About It."

Stephen Gorove, *University of Denver College of Law*: "Lessons From the Control of Peaceful Uses of Atomic Energy in Euratom."

Panel: *Public Opinion as a Force toward Compliance*

Chairman: G. W. Haight, *of the New York Bar*

Panelists: E. Whitney Debevoise, *of the New York Bar*: "Lessons from Organizations like the International Commission of Jurists in Focusing Public Opinion."

H. C. L. Merillat, *Vice President and Executive Director of the Society*:
 "The Several Rôles of Professional Opinion."

Krzysztof Skubiszewski, *Docent, University of Poznan, Poland, and Visiting Scholar, Columbia University*: "The General Assembly as an Organizer of Opinion."

Gabriella Lande, *Center of International Studies, Princeton University*:
 "The Changing Effectiveness of United Nations Resolutions."

7:00 p.m.

ANNUAL DINNER

Presidential Address: James Nevins Hyde

Speaker: The Honorable W. Averell Harriman, *Under Secretary of State*

SATURDAY, APRIL 25, 1964

9:30 a.m.

Business Meeting and Election of Officers of the Society

2:15 p.m.

Panel: *Economic Sanctions as a Means of Influencing Governments*

Panelists: Howard J. Taubenfeld, *Southern Methodist University School of Law*: "From Ethiopia, 1935, to the Foreign Assistance Act of 1963—What Have We Learned?"

Cecil J. Olmstead, *New York University*: "Foreign Aid as an Effective Means of Persuasion."

The Honorable Winthrop G. Brown, *Deputy Commandant for Foreign Affairs, National War College, former U. S. Ambassador to Laos*:
 "Problems in Trying to Use Aid as an Instrument of Political Pressure."

Philip C. Jessup Student Moot Competition (Arranged by the Association of Student International Law Societies).

INSTITUTE OF AIR AND SPACE LAW, MCGILL UNIVERSITY

The Institute of Air and Space Law of McGill University will begin its fourteenth session on September 15, 1964. Established in 1951 under the directorship of John Cobb Cooper for the purpose of providing facilities for advanced study and fundamental research in international air law,¹ the Institute now includes space law in its fields of study and research. It provides a one-year course of studies which include international public and private air law, space law, comparative law of carriers' liability, economics of air transport, and government regulation of air transport. A second year is devoted to preparation and submission of a thesis for the Master of Laws degree. Professor Maxwell Cohen, of McGill University Faculty of Law, is Director of the Institute and head of the teaching staff,

¹ See 46 A.J.I.L. 144 (1952).

which includes not only members of the McGill Law Faculty but also representatives of the International Civil Aviation Organization, International Air Transport Association, and legal practitioners in the field.

Applicants for admission must hold a law degree of high standing from an approved law school in any part of the world, or must have an equivalent professional standing. A thorough working knowledge of English is required. Candidates who also have a knowledge of French will be given preference. All candidates must present evidence of the subjects covered by their prior law studies, which should include international law, and of their scholastic or professional standing, together with two suitable references.

Information regarding admission requirements and scholarships which are available through the Institute may be obtained by writing to The Director, Institute of Air and Space Law, 3644 Peel Street, Montreal 2, Quebec, Canada.

ACADEMY OF AMERICAN AND INTERNATIONAL LAW—ADDENDUM

With reference to the note in the January issue of the JOURNAL (p. 160) regarding the Academy, it has been brought to our attention that admission is *not* limited to foreign students. Applicants for fellowships, however, must reside or have domicile outside the United States.

E.H.F.

LEGAL ADVISERS AND FOREIGN AFFAIRS

A book entitled *Legal Advisers and Foreign Affairs* will be published late in May, 1964, for the American Society of International Law by Oceana Publications, Inc. The book describes the organization and procedures, in twelve different countries, for bringing legal advice to bear on decision-making in foreign affairs. It also discusses the relationship of "law" to "policy" in foreign affairs and the varied rôles of legal advisers, including their work in the United Nations and with the International Bank for Reconstruction and Development.

Legal Advisers and Foreign Affairs contains a summary report of a meeting of legal advisers and scholars from twelve countries, the United Nations Secretariat, and the World Bank, held under the auspices of the Society at Princeton, New Jersey, September 20-22, 1963. James Nevins Hyde, President of the Society, was chairman of the conference. The volume also contains background papers, presented by scholars and officials from the countries represented, describing organization and procedures within their governments.

An important addition to the relatively sparse literature on rôles and functions of legal advisers in foreign affairs, and a valuable source of information on practices and organizational problems within various governments, *Legal Advisers and Foreign Affairs* will be available at the end of May for a price of four dollars (\$4). Orders may be placed with book-dealers or directly with Oceana Publications, 40 Cedar Street, Dobbs Ferry, New York.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section has been prepared by a committee consisting of HAROLD S. BURMAN, STANLEY L. COHEN, THOMAS T. F. HUANG, and SYLVIA E. NILSEN, under the chairmanship of RICHARD B. BILDER, all of the Office of the Legal Adviser, Department of State. Mr. ALFRED P. RUBIN, of the Office of the General Counsel, Department of Defense, has provided the committee with material originating in the Department of Defense.

TREATIES

Accession—extended participation in general multilateral treaties concluded under the auspices of the League of Nations—formulas for participation—“States Members of the United Nations or its Specialized Agencies” versus “All States” formula

During the debate in Committee VI (Legal) at the Seventeenth Session of the General Assembly in 1962, a question arose as to the participation of new states in certain technical and non-political multilateral treaties concluded under the auspices of the League of Nations, which contain provisions limiting participation to specific categories of states, notably those which the Council of the League invited to accede. The demise of the League of Nations had resulted in the closing of these treaties. It was decided at the Seventeenth Session of the Assembly that participation in such treaties should be extended to new states, and that the International Law Commission should study the question and report to the Assembly at its Eighteenth Session. The International Law Commission suggested in its report¹ that the General Assembly adopt a resolution designating an organ of the United Nations to fulfill the League Council's functions under the treaties, thus opening the treaties to participation by states invited by the United Nations organ.

In accordance with this recommendation, a resolution was introduced at the Eighteenth Session by nine Powers, under which the Assembly would decide that it was the appropriate organ of the United Nations which should exercise the power conferred by the treaties on the Council of the League to invite states to accede to these treaties, and would request the Secretary General to consult with parties to the treaties and to invite new states to accede to those treaties which were still in force and of interest to states.

A sharp political debate developed, however, over the question of the category of states to be invited. An amendment was tabled by certain states proposing that the Secretary General invite “any state” to accede to the treaties. This formula has commonly been referred to as the “all States” formula. Other states tabled an amendment requesting the Secre-

¹ Reprinted in 58 A.J.I.L. 241 (1964). See pp. 305-318 *ibid.*

tary General to extend invitations to participate in the treaties to "each State Member of the United Nations or of a specialized agency." This latter formula is the traditional United Nations formula for inviting states to accede to treaties and to participate in United Nations conferences. A compromise amendment was eventually suggested by four Powers, under which the Secretary General would be requested to invite "each State which is a Member of the United Nations or of a specialized agency or a Party to the Statute of the International Court of Justice, or has been designated for this purpose by the General Assembly." This amendment embodied the so-called "Vienna Convention" formula, and would include, in addition to all Members of the United Nations and all states designated for invitation by the Assembly, such states as the Federal Republic of Germany, the Holy See, Kuwait, Lichtenstein, Monaco, San Marino, the Republic of Korea, the Republic of Viet-Nam, and Switzerland. At the November 18, 1963, Plenary Session of the General Assembly, a Czechoslovakian amendment embodying the "all States" formula was defeated and a resolution^{*} embodying the four-Power compromise "Vienna Convention" formula was adopted.

Prior to the vote in Plenary Session, the United States position supporting the compromise "Vienna Convention" formula and opposing the Czechoslovakian amendment embodying the "all States" formula was summarized by Mr. Stephen M. Schwebel, representing the United States, in a statement from which the following excerpt is taken:

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The delegation of the United States opposes . . . the amendment proposed by the delegation of Czechoslovakia. . . . That amendment, if adopted, would reverse the decision arrived at in the Sixth Committee and would incorporate in the resolution a direction to the Secretary-General to invite "any State" to become a party to the treaties in question. Thus the resolution, if so amended, would incorporate the "all States" formula.

My delegation opposes adoption of the Czech amendment for eight reasons.

First, the tradition of this Assembly has uniformly been to confine invitations in circumstances like these to States Members of the United Nations and the Specialized Agencies. It has never adopted the "all States" formula. It should not do so today.

Second, this Assembly has never adopted the "all States" formula where invitations are to be extended to States because that formula is unworkable. It would require the Secretary-General to decide what entities not States Members of the United Nations and the Specialized Agencies are States. This is a burden the Secretary-General should not, and will not, assume. The Under-Secretary General for Legal Affairs has told us that. The Secretary-General quite understandably would not venture to pass upon the alleged statehood of East Germany, Estonia, Oman, and so forth. It is not his province to do so; and to request him to do what he has told us he cannot and will not do is hardly a constructive or becoming procedure.

^{*} Resolution 1903 (XVIII).

Third, this Assembly has never adopted the "all States" formula where invitations are to be extended to States because that formula is inappropriate as well as unworkable. It is perfectly natural that the United Nations, in calling a conference on consular relations or in acting as successor to the League of Nations, should limit its invitations to those within the family of the United Nations and the Specialized Agencies.

Fourth, the very great majority of the membership of the United Nations, of this Assembly, does not recognize the Statehood of the entities, not States Members, whose attempted accession would be in question. Not recognizing these entities as States, why should we vote to enter into treaty relations with them? Particularly why should we so vote when failure to enter into these treaty relations with these unrecognized entities would not be prejudicial to the important interests of any of us?

Fifth, were the draft resolution to be amended as Czechoslovakia proposes, it is doubtful that the resolution as a whole would be acceptable to many of the Members of the League who are represented here, and whose assent is necessary, as the draft resolution declares, if it is actually to be operative. Many of these former Members of the League might not be willing to accept this resolution if doing so requires them to enter into treaty relations with entities they do not recognize as States. Thus adoption of the Czech proposal extending an invitation to "any State" would promise to destroy the possibility of implementing the resolution as a whole. It would promise to render the consideration of this item by two sessions of the International Law Commission and two sessions of the General Assembly fruitless.

Sixth, the limited test ban treaty, far from serving as a precedent for adoption of the "all States" formula, is a precedent for *not* adopting the "all States" formula. For, such were the difficulties in the case of the test ban treaty that the original signatories decided that there should be not one but three depositaries with which accession to the treaty might individually be made. Accession by signature of the treaty in one of the three capitals does not necessarily imply treaty relations with other parties. But in the United Nations there are not three depositaries. There is only one, the Secretary-General. And it is the Secretary-General alone who is requested to extend invitations to accede. Thus the limited test ban treaty cannot be correctly cited as a precedent for adoption of the "all States" formula.

Seventh, neither can cases in which the General Assembly has called upon all States to do or refrain from doing certain things—as in the Congo resolutions—be properly viewed as a precedent for adoption of the "all States" formula. Such hortatory and injunctive calls by the General Assembly did not require the Secretary-General to communicate with entities not States Members. They did not require him to accept accessions to legal instruments from entities not States Members. Article 2, paragraph 6 of the Charter has always provided that: "The Organization shall ensure that States which are not Members of the United Nations act in accordance" with the Organization's principles "so far as may be neces-

sary for the maintenance of international peace and security." But that paragraph has never been thought to require or suggest that invitations to participate in treaties concluded under United Nations auspices, or invitations to accede to treaties such as those before us, shall be extended to "any State" or "all States."

Eighth, the "Vienna formula," proposed by Jamaica and other delegations, and incorporated in the draft resolution before us, represents a genuine measure of compromise among the various views in this Assembly. The United States Delegation has accepted it in a spirit of compromise. It was unanimously accepted in Vienna. What persuasive objection can any delegation raise against it now? The text of the draft resolution now incorporates the "reasonable compromise" to which reference was made a moment ago.

Gentlemen, the issue raised by the amendment of the delegation of Czechoslovakia is a serious one. It is to be treated seriously, with full appreciation of the consequences its adoption would entail. For the reasons advanced by my delegation and others, the Czechoslovak amendment should be voted down.

(U. S. Mission to the United Nations, Press Release No. 4307, Nov. 18, 1963.)

UNITED NATIONS

Petitioners—immunity from legal process—relation between the Headquarters Agreement and extradition agreements

In November, 1963, Captain Enrique Galvão, a Portuguese national and former Governor General of Angola and an opponent of the administration of President Salazar of Portugal, requested that the Fourth Committee (Trusteeship) of the United Nations General Assembly grant him a hearing so that he could testify on conditions in Portuguese overseas territories. Mr. Galvão, a leading participant in the seizure of the Portuguese passenger liner S.S. *Santa Maria* in 1961, had been granted asylum in Brazil following that incident, and was residing in Brazil at the time of his request. On November 11, 1963, Ambassador Sidney R. Yates, United States representative, made the following statement in the Fourth Committee with regard to Mr. Galvão's request:

I have asked for the floor briefly at this point to bring to the Committee's attention certain factors in connection with the request for a hearing we are now considering. Let me say first, we do not object to Mr. Galvao's appearance. We desire only to point out possible consequences of Mr. Galvao's appearance before this Committee. This Committee should be fully aware it could raise serious problems because of certain unique aspects of his situation. Granting the request for a hearing could set in motion a sequence of events which could pose most serious consequences for Mr. Galvao. Because it could be later asserted that responsibility for those consequences rested in part with the Committee, I believe the Committee in reaching its decision should give careful thought to certain factors.

I would point out, Mr. Chairman, that the United States has extradition agreements with some 78 countries. Under these agreements, a country has the right to undertake measures to extradite persons accused, in that country, of serious crimes.

First of all, let me make clear at the outset that there is no question that, if Mr. Galvao is invited to appear before this Committee at UN headquarters, the United States will—as in the case of other petitioners—take the necessary steps to enable him to travel to the headquarters district, in accordance with Section 11 of the Headquarters Agreement. However, the members of this Committee will also be aware that Section 11, while entitling invited persons to travel to the headquarters district, and contemplating routine measures of protection while they are in transit, does not grant them immunity from legal process. Such immunity is granted by Section 15 of the Headquarters Agreement, whose benefits are limited by its own terms, to resident representatives of members of the Organization, and to certain members of their staffs. Accordingly, Mr. Galvao, while present in the United States, would not enjoy immunity from legal process.

May I note, in passing, that while the United States is not party to the General Convention on Privileges and Immunities of the United Nations, the situation would in no way be changed if we were party, since the General Convention does not confer any immunity on invitees.

As members of the Committee are aware, the Government of Portugal seeks custody over Mr. Galvao in connection with certain serious charges, alleging criminal acts. It may be that some of these charges, at least by name, might prove to come within terms of the Extradition Convention of May 7, 1908 between Portugal and the United States. Accordingly, it would appear very likely that the Government of Portugal will initiate proceedings in the courts of this country for Mr. Galvao's extradition.

The United States is prepared as I noted earlier to comply fully with its obligations under the Headquarters Agreement. At the same time, however, neither the Government nor the courts of this country have any choice but to comply with whatever legal obligations they may have under the Extradition Convention. In the light of these considerations, we think it incumbent upon the United States Delegation to set forth this situation unequivocally to the Committee in order that its decision regarding the issuance of an invitation or the granting of the request for a hearing to Mr. Galvao may proceed without any possible misunderstanding.

Mr. Chairman, in view of these considerations, we suggest that the Committee, rather than granting Mr. Galvao's request for a hearing, might wish to invite him to submit a statement in writing or make an audiotape recording which could be heard by the Committee. While we recognize that such a procedure is not as satisfactory as having a petitioner present in person, it would, nevertheless, permit Mr. Galvao to submit his views to the Committee and would at the same time eliminate the difficulties I have described.

(U. S. Mission to the United Nations, Press Release No. 4297, Nov. 11, 1963.)

The Fourth Committee subsequently granted the request for a hearing. Mr. Galvão came to the United Nations from Brazil on December 9, gave his testimony on the same day, and returned to Brazil on December 10.

RECOGNITION OF GOVERNMENTS

Recognition of Provisional Government of Viet-Nam

On November 7, 1963, the Department of State issued the following press release relating to recognition by the United States Government of the new Government of the Republic of Viet-Nam:

On Friday morning, November 8, Saigon time, the United States Ambassador to Viet-Nam will deliver to the Vietnamese Foreign Office a note replying to a Vietnamese note dated November 5 which had called attention to the expressed desire of the new Vietnamese Government to maintain and strengthen the friendly relations already existing between the Republic of Viet-Nam and the United States. In its note, the Government of the United States states that it shares with the provisional government of the Republic of Viet-Nam the strong hope that the cordial relations between our two countries will continue as in the past and develop further to our mutual benefit in the future.

The note delivered by the Ambassador is an expression of recognition of the present Government of Viet-Nam by the United States Government.

(Dept. of State Press Release No. 570, Nov. 7, 1963; 49 Dept. of State Bulletin 818 (1963).)

DIPLOMATIC MISSIONS

Travel restrictions—official personnel of certain Eastern European countries

On November 12, 1963, the Department of State issued the following press release headed "United States Establishes Closed Areas For Official Personnel of Bulgarian, Czechoslovak, Hungarian, Polish and Rumanian Missions in U. S.":

In separate notes delivered today to the diplomatic missions in the United States of Bulgaria, Czechoslovakia, Hungary, Poland and Rumania, the United States informed these governments that for reasons of national security, we have been obliged to declare certain areas of the conterminous United States (that is, the United States excluding Alaska and Hawaii) closed to travel by official personnel of those countries' diplomatic, consular and United Nations establishments in this country. These Eastern European countries generally maintain zones closed to travel of official American personnel.

The closed zones take into account the security requirements of United States defense establishments vital to the security not only of the United States but of its Allies.

The establishment of the closed areas will take effect immediately.

(Dept. of State Press Release No. 580, Nov. 12, 1963; 49 Dept. of State Bulletin 860 (1963).)

To indicate the general content of the five United States notes, the text of the note from the Secretary of State to the Minister of the Rumanian People's Republic, dated November 12, follows:

The Secretary of State presents his compliments to the Honorable the Minister of the Rumanian People's Republic and has the honor to refer to the note of May 21, 1963, from the American Legation in Bucharest to the Rumanian Ministry of Foreign Affairs concerning the United States desire to terminate the requirement for notification of travel by official personnel of the Rumanian Missions in the United States and the American Legation in Bucharest. On August 6, 1963, the Rumanian Foreign Ministry, in a note to the American Legation in Bucharest, also indicated its desire to terminate the travel notification requirement.

The Government of the United States, taking account of the above-mentioned exchange of communications, has decided reciprocally to terminate the requirement of notification of travel in the conterminous territory of the United States (that is, the United States excluding Alaska and Hawaii) by official personnel of the Rumanian Legation in Washington and of the Rumanian Permanent Mission to the United Nations in New York. At the same time, the United States Government has been obliged for reasons of national security to declare certain areas of the conterminous United States closed to travel by official personnel of the Rumanian Legation in Washington and of the Rumanian Permanent Mission to the United Nations. These closed zones are approximately proportionate in area to those existing in the Rumanian People's Republic.

A list of counties of the United States which are closed to further travel by the official Rumanian personnel designated above is appended. The establishment of closed zones will take effect immediately. The termination of the requirement of notification of travel for the official Rumanian personnel designated above in the United States shall take effect at such time as the Rumanian Government shall signify its assent to the termination of similar travel notification procedures for official United States Legation personnel in Rumania.

(49 Dept. of State Bulletin 861 (1963).)

BERLIN

Right of access—stoppage of convoys

On November 6, 1963, the United State Government delivered to the Government of the U.S.S.R. a note protesting the stoppage on November 4 of an American convoy on the autobahn to Berlin. The text of the note follows:

The Government of the United States most emphatically protests the continued interference by the Soviet military authorities with the movement of Allied convoys between West Berlin and West Germany on the Berlin-Helmstedt Autobahn.

An eastbound United States Army convoy which reached the Marienborn checkpoint at 0901 Greenwich mean time on November 4, was held up by the Soviet military authorities. They first of all insisted that the personnel of the convoy dismount. When this was not accepted, they demanded that the tailgates of some vehicles be lowered.

When this too was refused, they prevented the convoy from proceeding.

These demands seem to indicate a deliberate intent to interfere with the free movement of Allied convoys on the autobahn to Berlin. They are totally without justification and are in contradiction with the established procedures followed up to the present time by the Allies. The pertinent procedures currently in effect were communicated by the three governments to the Soviet military authorities last October 29. As part of their rights relating to Berlin, the French, American and British Governments possess the right of unrestricted access to Berlin which right has been confirmed by quadripartite agreements. They exercise this right of access in accordance with procedures which have been followed as a means of insuring an orderly flow of traffic on the autobahn. It is not for the Soviet authorities to impose restrictions upon the exercise by the Three Powers of their rights in this domain.

The United States Government wishes to indicate very clearly to the Soviet Government that it considers the action taken against the American convoy at the Marienborn checkpoint as an inadmissible attempt to prejudice the Allied right of free access to Berlin.

The arbitrary nature of this unjustified Soviet action is emphasized by the very different treatment accorded on November 5 to closely similar British and French convoys despite the fact that the procedures followed by these convoys were identical to the procedures followed by the American convoy.

The United States Government requests the Soviet Government immediately to instruct its military representatives in Germany to bring to an end, once and for all, these hindrances. The United States Government will hold the Soviet Government responsible for all consequences of the failure to comply with this request.

(Dept. of State Press Release No. 566, Nov. 6, 1963; 49 Dept. of State Bulletin 818 (1963).)

In a note of November 21, 1963, the Soviet Government rejected the United States protest and asserted that the detention of the American convoy was brought about by an attempt by American military personnel to violate existing procedures for transit of personnel through the Soviet control point. The text of the United States note of December 18, 1963, replying to the Soviet note of November 21, follows:

In connection with the note of November 21 from the Ministry of Foreign Affairs the United States Government wishes to make clear that the convoy procedures now in force, as communicated to Soviet representatives in Germany on October 29, are intended to facilitate the orderly and safe flow of traffic on the autobahn. The United States, British and French convoys of November 4 and 5 followed these procedures, as have subsequent convoys.

The basic Allied right of free and unrestricted access to Berlin is in no way limited by procedures used since the summer of 1945, which have been intended solely to insure orderly and safe autobahn traffic.

(Dept. of State Press Release No. 630, Dec. 18, 1963; 50 Dept. of State Bulletin 8 (1964).)

ANTARCTICA

*Antarctic Treaty—exercise by the United States of right of inspection—
designation of observers*

On November 18, 1963, the Department of State issued the following press release headed "Appointment of United States Observers for the Antarctic Inspection":

The Secretary of State has appointed nine U. S. Antarctic observers, including two alternates, to carry out inspections by the United States in Antarctica during the 1963-1964 austral summer season (November-March). Each of the twelve signatory powers may undertake inspections under the treaty. The United States decision to conduct inspections under the provisions of the Antarctic Treaty, which entered into force on June 23, 1961, was announced on September 13, 1963.¹ It was pointed out at that time that inspections are not based on any anticipation that there have been treaty violations.

* * * * *

In designating each appointee as a U. S. Antarctic observer under Article VII of the Antarctic Treaty, Secretary Rusk stated:

"The purpose of the inspection is to promote the objectives and insure the observance of the provisions of the Antarctic Treaty. You may expect to have complete freedom of access at any time to any or all areas of Antarctica. This includes all stations, installations, and equipment and all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica.

"While performing inspections, you should bear constantly in mind that all states active in Antarctica have been both friendly and co-operative with the United States in matters relating to the continent, and it is the policy of the United States to preserve and enhance this situation. You should conduct your activities in compliance with this policy."

(Dept. of State Press Release No. 591, Nov. 18, 1963; 49 Dept. of State Bulletin 932 (1963).)

FUR SEALS

Conservation—amendment of North Pacific Fur Seal Convention

On November 29, 1963, President Johnson transmitted to the Senate for approval a protocol amending the 1957 interim Convention on Conservation of North Pacific Fur Seals, which protocol was signed at Washington on October 8, 1963, on behalf of Canada, Japan, the Union of Soviet Socialist Republics and the United States.

¹ See Dept. of State Press Release No. 469, Sept. 13, 1963, reprinted in 49 Dept. of State Bulletin 513 (1963) and in "Contemporary Practice," 58 A. J. I. L. 166 (1964).

The report of the Secretary of State, which was transmitted for the information of the Senate, reads in part as follows:

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The provisions of the protocol were formulated by the North Pacific Fur Seal Conference held at Tokyo from February 18 through March 1, 1963. The Conference, which was attended by the representatives of the four parties to the convention, was held for the purpose of considering the recommendations of the North Pacific Fur Seal Commission, adopted in Washington in November 1962, in accordance with article V, paragraph 2(e), of the convention, and of determining what further agreements may be desirable in order to achieve the maximum sustainable productivity of the North Pacific fur seal herds, as provided in article XI of the convention. The draft protocol adopted by the Conference and recommended to the parties to the convention included provisions based on the Commission's recommendations for continuing the prohibition upon pelagic sealing and for amending the convention so as to direct the Commission to make a study of pelagic sealing. With minor editorial changes this draft protocol received the approval of all four Governments involved.

The 1963 protocol extends and modifies the 1957 convention, an interim agreement with a 6-year basic term, and the only multilateral agreement currently in force with respect to the United States for the conservation of fur seals. The extension is for a further basic period of 6 years, which may be further extended.

The dual purpose of the protocol, as of the convention itself, is, first, to continue the prohibition now being observed by the four Governments parties to the convention with respect to pelagic sealing, thus insuring the continuance of land killing at the breeding grounds, which the United States considers to be the best method of sealing, and, second, to provide a joint research program designed to provide, as appropriate, sufficient factual data to prepare the groundwork for a more permanent agreement or arrangements among the parties to conserve the valuable fur seal herds of the North Pacific Ocean and to maintain these herds at the level of maximum sustainable productivity.

Among the modifications provided by the protocol are the following:

(1) The protocol will relax in certain respects the research requirements of the interim convention, relieving the United States from the obligation to carry out certain types of research at a level which is considered as no longer useful. . . .

(2) Article VIII of the protocol will relieve the United States from the obligation to deliver additional fur seal skins to Canada and Japan when certain conditions exist in the western Pacific; concomitantly, it will eliminate the provision which permits the Soviet Union to withhold delivery of skins to Canada and Japan when those conditions exist. The U. S. delegation at the Conference considered that these provisions of the convention were no longer appropriate or reasonable, given (a) the present knowledge that pelagic research in the western Pacific at current levels

does not substantially affect the growth rate of the Asian herds; (b) the present knowledge that any reduction in the commercial kill of males on the Asian breeding grounds caused by pelagic research is much more than compensated for by the contribution to this kill by migrants from the Pribilof herds; (c) the absence of any economic interest in the Asian herds on the part of the United States.

(3) The duties of the North Pacific Fur Seal Commission are expanded, by article V of the protocol, to include a study, followed by recommendations, as appropriate, as to whether or not pelagic sealing in conjunction with land sealing would, if permitted, adversely affect achievement of the objectives of the convention.

(4) Article II, in accordance with a proposal of the Japanese delegation, consists of two additions to the subjects listed for research.

In accordance with article XI, the protocol will enter into force upon the date of the deposit of the fourth instrument of ratification. If the protocol has not entered into force on or before January 31, 1964, the convention will continue to apply with respect to pelagic research for the seventh year, commencing October 14, 1963. If the protocol enters into force during the commercial sealing season of the seventh year, the amendment as provided in article VIII of the protocol, relating to an equitable division of the cost of pelagic research, will, however, apply. . . .

(Senate Executive O, 88th Congress, 1st Session.)

ALIENS

Travel restrictions—revision of areas closed to Soviet citizens

On November 12, 1963, the Department of State issued a press release headed "United States Revises Closed Areas for Soviet Citizens and Proposes Mutual Abolition or Reduction of Restrictions." The press release stated:

In a note delivered today to the Soviet Embassy in Washington, the United States informed the Soviet Government of revisions of the system of closed areas restricted to travel by Soviet citizens in the United States. They do not apply to participants in the exchanges program or to Soviet citizen officials of the United Nations Secretariat.

The revisions do not significantly alter the amount of territory in the United States closed nor the general characteristics of the restrictions which have applied heretofore. The revisions do, however, reflect the continuing review of the system of closed areas which takes account of the security requirements of United States defense establishments as well as restrictions placed on American citizens in connection with travel in the U.S.S.R.

The United States note reiterated the United States desire for complete and mutual abolition of all travel restrictions and renewed the United States proposal that representatives of the two Governments meet to discuss the question.

The closed area system was inaugurated in 1955 in response to Soviet restrictions initiated in 1941.

The press release then set forth the text of the United States note of November 12, 1963, with its enclosures. The text of the note, omitting the enclosures, follows:

The Department of State refers to note No. 8 of January 6, 1961, to the Embassy of the Union of Soviet Socialist Republics which dealt with restrictions applicable to Soviet citizens traveling in the United States. Reference is also made to the notes from the Secretary of State to the Ambassador of the Union of Soviet Socialist Republics of January 3, 1955, and November 11, 1957, which establish regulations concerning travel by Soviet citizens in the United States comparable to those previously imposed by the Soviet Government on the movement of citizens of the United States in the Soviet Union.

The United States Government first instituted a system of closed areas on January 3, 1955, as a result of the absence of any indication that the Soviet Government was willing to relax significantly its long-standing travel restrictions which have been in effect since 1941. The Department's note of that date stated that, if the Soviet Government should liberalize its regulations restricting the travel of the United States citizens in the Soviet Union, the United States Government would be disposed to reconsider its regulations. In the eight years that have passed since that date, the United States has on a number of occasions reiterated its desire for mutual abolition of closed areas. For a short while in 1957, it appeared that the Soviet Government might consider reducing the barriers to travel. In its note of August 28, 1957, to the American Embassy at Moscow, the Ministry of Foreign Affairs of the Union of Soviet Socialist Republics stated that "it is ready to discuss with the Embassy the question of the exclusion from the list of cities and localities in the U.S.S.R. forbidden for visits by foreigners of a number of cities and localities in the U.S.S.R. on the basis of reciprocity." The expectation raised by this note unfortunately was not fulfilled.

In reply to the Ministry's note, the Department on November 11, 1957, reiterated the United States Government's desire for abolition of closed zones and proposed such an abolition. On May 22, 1958, the Department addressed a new note to the Embassy of the Union of Soviet Socialist Republics which offered concrete proposals for a mutual reduction of closed areas in the absence of an agreement to abolish restricted zones completely. This proposal went without reply. On August 19, 1958, the Department once more reminded the Embassy that no response had been received to the United States proposals for easing travel restrictions. No reply was received to this note. On a number of occasions since August 1958 the subject has been raised with Soviet officials by United States representatives. As of the present time, despite its professed willingness to discuss the travel restrictions question, the Soviet Government has still not even acknowledged the proposals of the United States Government.

Not only has the Soviet Government remained unwilling to discuss the abolition or reduction of its impediments to free travel, but the Soviet

authorities have regularly applied travel restrictions in such a way as to close areas that are supposedly open. Parts of Central Asia and the Caucasus are regularly closed "temporarily" each year. On the basis of the official notifications of the Ministry of Foreign Affairs of the Union of Soviet Socialist Republics, over 25 percent of the Soviet Union is formally closed to travel by foreigners. In practice, this percentage is considerably higher.

The Government of the United States reiterates its firm preference for the mutual abolition of closed zones.

The regulations contained in the Department's notes of January 3, 1955, November 11, 1957, and January 6, 1961 are hereby superseded. The Soviet Government will note that the areas closed in the United States continue to be reciprocal to those closed in the Soviet Union.

These regulations will continue until further notice to apply to travel in the United States by Soviet citizens possessing valid passports issued by the Government of the Union of Soviet Socialist Republics, other than Soviet citizen officers and employees of the Secretariat of the United Nations while their conduct is a responsibility of the Secretary General of the United Nations, and other than Soviet citizens who are visiting the United States within the framework of the exchanges program as described in the Department's note of July 6, 1962.

Travel will continue to be permitted throughout the United States, except in the border zones described in enclosure No. 1, and in the states and counties listed in enclosure No. 2. Enclosure No. 3 lists open cities and transit routes in otherwise closed areas.

Transit travel by railroad or commercial airlines through closed areas will continue to be permitted when such travel is necessary to reach open areas or open cities in otherwise closed areas. Soviet citizens engaging in such transit travel are not to leave the immediate vicinity of any air or rail terminal located in a closed area except when necessary to make air or rail connection for continuing the travel. The transit of closed areas by automobile or bus will be permitted only on the routes specified in enclosure 3. As in the past, all resident Soviet citizens to whom these regulations apply with the exception of those temporarily admitted to the United States for some specific purpose which does not involve temporary residence in Washington, District of Columbia, or New York, New York, are required to submit official notification at least forty-eight hours in advance of any travel beyond any point more than twenty-five miles distant from the center of New York or Washington. Such official notification must continue to include the names of all travelers, description of the itinerary, route numbers of all roads traveled by car listed in the order in which the roads are taken, identification of mode or modes of travel, and description of points and approximate duration of all stopovers. Notification will continue to be addressed to the Department of State, the Army, Navy, or Air Force Foreign Liaison Offices, or the United States Mission to the United Nations in New York, New York, as appropriate.

Soviet citizens will not be permitted to hire unchauffeured automobiles

during the course of a trip ; nor are they to use as means of transportation helicopters or charter aircraft.

(Dept. of State Press Release No. 579, Nov. 12, 1963; 49 Dept. of State Bulletin 855 (1963).)

PASSPORTS

Area restrictions—limitations on travel to Cuba

On December 21, 1963, the Department of State issued the following press release relating to limitations on travel by American citizens to Cuba :

Since January 16, 1961, it has been unlawful for Americans to travel to Cuba without a passport specifically validated for such travel. This prohibition should be understood by all Americans.

The limitation on travel to Cuba is based on a number of factors. Primary among them is the joint effort by the United States and other American Republics to check the efforts of the Castro regime to subvert other countries in this Hemisphere.

Since the informal meeting of Foreign Ministers of the American Republics in October 1962 when special consideration was given to the dangers of travel to Cuba for subversive training, the American governments have been cooperating through the Organization of American States to develop and carry out measures for the control of travel to that country. The governments of the Hemisphere have reluctantly taken these steps to limit the travel of their citizens, but they are necessary defensive measures against the continuing attempts by the Castro regime and its agents to subvert and destroy the free institutions of our neighboring American Republics.

Under present conditions the prohibition against unauthorized travel to Cuba is, therefore, an essential part of this country's foreign policy. Any United States citizen who travels to Cuba without a specifically validated passport has both violated the law and directly impaired the conduct of our foreign affairs.

Persons with a legitimate need to travel to Cuba may submit their passports for validation in accordance with the Department's practice.

The Department of State has received information that several groups of American citizens may be planning to travel to Cuba during the Christmas holidays without specifically validated passports. Criminal penalties are provided under existing law to prevent such travel. Indictments are now pending against persons on the charge that they traveled to Cuba last summer without passports specifically validated for that purpose.

Persons who may consider engaging in such travel should be on notice that if they do so, their passports will be withdrawn and they may be subject to criminal prosecution.

(Dept. of State Press Release No. 640, Dec. 21, 1963; 50 Dept. of State Bulletin 10 (1964).)

MANDATES AND TRUSTEESHIP

South West Africa

The agenda of the Eighteenth General Assembly included an item on the question of South West Africa. On October 30, 1963, in the course of the consideration of this item by Committee IV (Trusteeship), Ambassador Sidney R. Yates, United States representative, stated, *inter alia*, the following:

By extending the *apartheid* laws to South-West Africa the mandatory power is, in the view of my Government, clearly delinquent in its obligations to the international community and to the population of South-West Africa. These obligations are set forth explicitly in Article 2 of the mandate, which states that South Africa "shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory."

Mr. Chairman, my delegation believes not only that there is neither legal nor political basis for the *apartheid* laws in South Africa; there is also no moral basis for such laws anywhere in the world, let alone in a territory such as South-West Africa which has a clear international character, which was given to the Government of South Africa as "a sacred trust of civilization."

My delegation believes, further, in the right of the people of South-West Africa to self-determination as promptly as the expression may be freely and responsibly exercised. We would be strongly opposed to any division of the Territory of South-West Africa without the freely expressed consent of its people. We would be strongly opposed to the annexation by any state of all or any part of the territory without such consent.

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Mr. Chairman, I am sure that every member of this committee has watched with careful interest the progress of the case brought in the International Court of Justice against South Africa by Liberia and Ethiopia. As we all know, shortly after the adjournment of this committee's deliberations last year, the International Court of Justice decided that it had jurisdiction to adjudicate upon the merits of the dispute. The Government of South Africa has, quite properly, accepted the Court's decision, inasmuch as it has maintained its participation in the case. This is all to the good.

As we have stated in the past, we believe the General Assembly should take no action which would affect the status of the mandate during the Court's proceedings. My delegation believes that the members of the United Nations should place—and that most members do place—great importance on the rule of law in the conduct of international affairs. It is generally recognized that in this case it is of the highest importance that any action taken by the United Nations rest upon a solid, legal foundation commensurate with the obligations of the world towards the peoples of the mandated territory. Only in this way, we believe, can and should the United Nations hope to mobilize the support needed to carry out its objective.

In this connection I wish to emphasize the importance which the United

States attaches to member states of the United Nations respecting the judgments of the International Court of Justice as the principal judicial organ of the United Nations. Article 94 of the Charter provides that "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." The importance of this concept is further emphasized by subsequent provisions of this article for giving effect to decisions of the Court. We would expect, therefore, compliance with the judgment of the Court.

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(U. S. Mission to the United Nations, Press Release No. 4281, Oct. 30, 1963; 49 Dept. of State Bulletin 946 (1963).)

INTERNATIONAL LAW

Technical assistance to promote the teaching, study, dissemination and wider appreciation of international law—proposed United Nations programs

Resolution 1816 (XVII), adopted during the Seventeenth Session of the General Assembly, *inter alia*, requested the Secretary General, in conjunction with the Member states, to study ways in which Members could be aided, through the United Nations system and other channels, in establishing and developing programs of technical assistance in international law, including in this context the possibility of proclaiming a United Nations Decade of International Law. The results of the study were reported to Committee VI (Legal) at the Eighteenth Session of the General Assembly.

As a result of the consideration of this item, the General Assembly adopted Parts A, B and C of Resolution 1968 (XVIII): Part A establishing a special committee to draw up a practical plan and proposals on technical assistance in international law; Part B requesting the Technical Assistance Committee to consider the matter of technical assistance in international law in relation to the Expanded Program of Technical Assistance and to make recommendations, including views on provision of funds, for a program of technical assistance in international law; and Part C requesting UNESCO periodically to collect information on training in international law, and inviting Member states and interested institutions or individuals to offer fellowships and make voluntary contributions to the United Nations programs of technical assistance in international law.

On December 7, 1963, in the course of debate on this item in the Sixth Committee, the Honorable Edna F. Kelly, United States representative in the Committee, made the following statement of the United States' views:

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Mr. Chairman, in the spirit of resolution 1816, my delegation wishes to make concrete proposals—proposals which are directed primarily toward meeting the needs of developing Member States.

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In the view of my delegation, the principal needs of developing Member States in this sphere which this Organization can help to meet are two: first, trained personnel of professional competence in international law to advise foreign ministries and to cope with problems of international law and transactions generally, and, second, improved United Nations documentation facilities. These needs, in turn, require more, and more highly trained, teachers in international law and relations, education of students so that they may be in a position to benefit from such teaching, and improved library facilities. How can the United Nations assist in meeting such needs?

In our view, the General Assembly should urge *all* Member States to initiate or continue—indeed, to intensify—programs of training, including seminars, grants and exchanges of teachers, students and fellows, as well as exchange of publications in international law.

A principal benefit of resolution 1816 and the Secretary-General's study has been the fact that we are now more fully aware of the requirements of developing Member States. Now is the time for us to marshal our resources in order to help meet those requirements. The Organization has served an extremely valuable function in surveying the needs of developing Member States; now Members and, indeed, non-governmental institutions and foundations should utilize available resources to respond to demonstrated needs.

As I have just indicated, Mr. Chairman, private resources, as well as governmental resources, should be fully employed, as indeed, they traditionally have been and are today. I might add that the very useful survey of the Secretary-General might be renewed and brought up-to-date at some time in the future.

Among other steps which Member States might well consider undertaking is the publication of digests of international law which would, among other things, survey the State practice of the State concerned. The digests of international law which have been successively published by the Department of State of the United States since 1877 represent a pioneer effort whose latest expression is *Whiteman's Digest of International Law*. In the view of my delegation, the publication of digests by other governments would be a signal contribution to making available to international legal scholarship and practice the raw material of international law. In this connection, we might note that there is now in a stage of advanced preparation a *British Digest of International Law*. In a related vein, there is published in the United Kingdom, under the auspices of the *International and Comparative Law Quarterly*, a periodic survey and comment on the "Contemporary Practice of the United Kingdom in the Field of International Law," an example which has been followed by the *American Journal of International Law* in its quarterly publication of "The Contemporary Practice of the United States Relating to International Law." Such surveys of contemporary practice might equally and profitably be published in other countries.

The contribution of States and non-governmental organizations to train-

ing in international law is, and necessarily will continue to be, paramount. But what contribution can the United Nations make?

As other delegations have suggested, there is a need, particularly in developing States, for the training of a cadre of international lawyers who will staff the legal offices, and inform the policies, of the world's foreign ministries. The United Nations program of providing operational and executive personnel constitutes a readily adaptable avenue of technical assistance to developing States in the sphere of international law. United Nations provision of legal advisers, requested and approved by host Member States, for assistance in improving the legal services of their foreign ministries, might well be established as an element of that program. Such on-site training and assistance involves no absence of valuable national officials of developing countries from their governmental duties and, accordingly, is of double benefit to developing States. This, then, is one contribution which the United Nations is especially fitted to make.

A second contribution might be this: a program of advanced training in international law and organization which might be provided by the Office of Legal Affairs at United Nations Headquarters, in which selected foreign ministry personnel would serve temporarily with that office. After a period of work, observation, and training, of an on-the-job, interne character, possibly supplemented by advanced university instruction, or training at an institution like The Hague Academy of International Law, such lawyers from developing countries would return to the service of their governments with increased professional knowledge and skill.

A third sphere in which the United Nations may make a special contribution is in publications. The publications of the United Nations and the Specialized Agencies now make a notable contribution to the literature of international law. These extremely valuable United Nations publications must be sustained, and in some cases, consideration should be given to their development. The *Pleadings, Oral Arguments, and Documents of the International Court of Justice* should, in our view, be published in both English and French, as are its *Reports of Judgments, Advisory Opinions and Orders*. The *Reports of International Arbitral Awards* might well be pushed back to cover earlier awards than those rendered since the First World War. The indices to the *United Nations Treaty Series* should be brought up-to-date. The forthcoming *Juridical Yearbook of the United Nations* should not only cover current years, but all past years of United Nations history, particularly in its index to discussions and decisions on questions of international law in the United Nations and the Specialized Agencies. Schiffer's work on the League of Nations is an example of the kind of thing that might be done in this vein. And the *Repertory of Practice of United Nations Organs* should be kept as current as possible.

At the same time, steps should be taken to ensure that all States which have gained independence since the founding of the Organization have been provided with appropriate official documentation. Every foreign office library should, for example, possess a set of the volumes of

the *Documents of the United Nations Conference on International Organization*, of the San Francisco Conference, as well as selected official publications of the years when each State was not a Member of the Organization.

Mr. Chairman, I have ventured to make some suggestions as to what the United Nations should do. What should the United Nations *not* do? Programs which, in the view of my delegation, the United Nations should avoid, are those which lead to competition in the propagation of particularistic approaches to international law. Moreover, programs of United Nations action should not impinge upon or displace existing activities of national governments and non-governmental institutions and foundations.

Further, the United Nations should not, as a rule, set about endeavoring to finance or financially assist private institutions which have managed so far to work effectively without U. N. funds. This is so for two reasons: first, such institutions would do well to preserve their unofficial, non-governmental status, uncomplicated by the receipt of funds of governmental origin—even of U. N. origin. Second, the United Nations has no money to give away. Indeed, the Organization has large debts, arising from the fact that some Members have not as yet paid the assessments which they are legally bound to pay. In its present financial state, the Organization is hardly in a condition to act as a grantor of funds.

How should the suggested United Nations program be financed? United Nations survey and publishing activities should continue to be financed as they currently are. The provision of legal advisers to foreign ministries, and the training of foreign office officials at United Nations Headquarters, should be financed in accordance with the existing technical assistance arrangements.

I should like to say a word, before closing, about the suggestion for a "Decade of International Law." In our view, the proclamation by the General Assembly of a United Nations Decade of International Law would be unprofitable. There is a danger that such a proclamation would give rise to undue expectations by attaching a rubric such as "Decade of International Law" to a program which will, at least in so far as elements of it may be financed by United Nations sources, be modest, and whose processes will be unspectacular. More than this, the problems of a more effective international law transcend those of a decade. It might be asked whether an apter title would not be a "Century of International Law."

(U. S. Delegation to the General Assembly, Press Release No. 4334,
Dec. 9, 1963.)

OUTER SPACE

United Nations Declaration on Legal Principles for Outer Space.

A major achievement of the recently concluded Eighteenth General Assembly was its adoption on December 13, 1963, of a Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.¹

¹ Resolution 1962 (XVIII).

On November 22, 1963, in the course of discussion of the draft text of this Declaration in the United Nations Committee on the Peaceful Uses of Outer Space, Ambassador Francis T. P. Plimpton, United States representative, made the following statement:

Two years ago the General Assembly made a definite beginning in conscious international efforts to shape and develop law for outer space. The Assembly's resolution 1721 is a United Nations landmark in the history of outer space law. In that resolution the General Assembly commended to States for their guidance legal principles on the freedom of outer space and celestial bodies and on the applicability of international law, including the United Nations Charter, to activities in outer space.

In the same resolution the General Assembly asked this Committee to study legal questions arising in the exploration of space. In the ensuing two years, this Committee and our Legal Subcommittee have held extended and thorough discussions in pursuance of the Assembly's mandate.

From an early stage in those discussions, it was recognized that any attempt at a comprehensive codification of legal rules for outer space would not at this stage be appropriate. The world's experience in exploring outer space has been entirely too brief to make any such codification possible yet. Instead, attention was focused on proposals for a study of specific topics, such as liability for space vehicle accidents, and rescue and return of astronauts and space vehicles. At the same time there were proposals for setting down a statement of broad general principles, on which a consensus might be obtained, designed to govern the activities of States in outer space.

We are now at the point of recording progress in the field of outer space law. We have before us a draft declaration of legal principles. This declaration is the outcome of a long process of international debate and intergovernmental consultation. During previous meetings, drafts of general principles were presented by several delegations. These drafts were extensively debated. Numerous positions were set forth, clarified, and modified. Areas of agreement were identified, and as time went on differences of view on other matters were narrowed.

This fall, in pursuance of recommendations included both in the Report of the Legal Subcommittee and in the Report of this Committee made in September, further consultations were held among delegations in order to produce a text which could be generally agreed and supported. These efforts were, we believe, crowned with success, and the agreed paper which emerged is now before us in the form of a proposed "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space." The United States Delegation would like to offer a few comments on the proposal.

First, it will be seen that the opening operative paragraphs of the Declaration—paragraphs 1 through 4—are drawn from the General Assembly's resolution 1721 of two years ago. They state broad principles which by now have become familiar in the international community. The

first is that the exploration and use of outer space shall be carried on for the benefit and in the interests of all mankind. The second principle states the freedom of outer space and celestial bodies for exploration and use by all States, on the basis of equality and in accordance with international law. The third principle asserts the proposition that outer space and celestial bodies are not subject to national appropriation in any form or by any means. The fourth principle proclaims that the activities of States in outer space shall be carried on in accordance with international law including the Charter of the United Nations.

Paragraph 5 of the Declaration asserts the principle that States are internationally responsible for all national activities in outer space, whether these are carried on by agencies of government or by non-governmental entities. In the case of private enterprise in outer space, government authorization and continuing governmental supervision are required. This part of the Declaration also recognizes that States may sometimes conduct activities in outer space through an international organization. When they do so, both the participating States and the international organization itself bear responsibility for the activities undertaken. The principle of State responsibility applies also where outer space activities are carried on by two or more States cooperatively even if they do not act through a formally established international organization.

The next part of the Declaration—paragraph 6—deals with the use of international consultation to guard against any outer space activities or experiments that would cause potentially harmful interference with the activities of other States in the peaceful exploration and use of outer space. The provisions of paragraph 6 are twofold: First, if a State has reason to believe that one of its *own* outer space activities or experiments would cause potentially harmful interference with the activities of other States, the first State shall undertake appropriate international consultations before proceeding with the activity or experiment. Second, if a State has reason to believe that an activity or experiment planned by *another* State would cause potentially harmful interference, the first State may request consultation. Paragraph 6 is a statement of principle; it does not specify the manner in which consultations are to be held. As the United States has indicated in the past, we regard the Consultative Group of COSPAR as an appropriate forum for consultation. But in a statement of general principles it would be inappropriate to specify one particular mode exclusively and for all time.

Paragraph 7 of the Declaration deals with the status of objects launched into outer space. First the paragraph provides that jurisdiction and control over such objects, and any personnel thereon, are retained by the State of registry while an object is in outer space. This provision parallels some precedents that are familiar in the fields of maritime and aviation law. Paragraph 7 next provides that ownership of objects launched into outer space is not affected by their transit through space or by return to the earth. The paragraph concludes with a statement that space objects, or component parts of such objects, which are found outside the State of

registry shall be returned to that State, upon the furnishing of identifying data prior to return if such data are requested.

I should emphasize here that paragraph 7, like the other parts of the draft, is a broad statement of general principle. It does not seek to cover every conceivable situation, and it does not contain details for precise application. Such matters will need to be given further study, and elaboration will be required in subsequent instruments.

Paragraph 8 states the principle of international liability for damage done in a space vehicle accident. The principle is broadly framed. It covers personal injury, loss of life, and property damage. It covers accidents occurring on the earth, in airspace, or in outer space.

The Declaration recognizes the liability of international organizations, as well as of the States participating in them, for damage caused by space activities in which international organizations engage. This is made clear by the last sentence of paragraph 5, which sets forth the following broad principles, covering liability along with other matters: "When activities are carried on in outer space by an international organization, responsibility for compliance with the principles set forth in this declaration shall be borne by the international organization and by the States participating in it." It is thus clear that both the international organization itself, and the members participating in it, may be called upon to bear liability.

Details of the application of paragraph 8 and the last sentence of paragraph 5, relating to liability, will need to be spelled out in an appropriate international agreement.

The concluding paragraph in the Declaration sets forth the humanitarian principle of assistance to astronauts in the event of accident, distress, or emergency landing—whether on the territory of a foreign State or on the high seas. Astronauts who make such landings are to be safely and promptly returned to the State of registry of their space vehicle.

In our view, by taking favorable action on this draft Declaration we will not be completing, but only beginning our work in the development of law for outer space. The declaration of legal principles is not the last word; it is one of the first. In the future, the United Nations may wish to formulate additional principles, as experience accumulates. We believe also that work should be undertaken in the immediate future to enlarge upon two of the individual principles so that they may be given practical application and effect in the form of detailed international agreements. We think there is wide agreement that the Outer Space Committee should next take up as a matter of first priority in the legal area the task of preparing international agreements on the subjects of (1) liability for space vehicle accidents, and (2) assistance to and return of astronauts and space vehicles.

We believe, moreover, that we should arrange our work program when we next meet in accordance with this priority.

(U. S. Delegation to the General Assembly, Press Release No. 4316,
November 22, 1963.)

On December 2, 1963, in a discussion in the Political Committee of the General Assembly, Ambassador Adlai E. Stevenson, United States representative to the United Nations, *inter alia*, made the following observations respecting the Declaration:

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The structure for this cooperation, and for the activities of all nations in space, must be an international legal order. This need becomes more imperative as the number of nations active in space increases and as the range of their activities grows.

This growth of custom and usage must be present to provide the basis of sound law. Resolution 1721 made a beginning when it declared that freedom to explore and use outer space means freedom to do so "in conformity with international law." And more specifically "international law, including the Charter of the United Nations, applies to outer space and celestial bodies."

This general proposition was not enough. In the same resolution the General Assembly asked the Committee on the Peaceful Uses of Outer Space to study legal problems arising out of the exploration of space. So the Committee established a Legal Subcommittee to begin to put flesh on the bones of outer space law.

From an early stage, members of the Committee realized that any attempts at a comprehensive codification of legal rules for outer space would be premature. The world's experience in the exploration of outer space has been entirely too brief. In conformity with this experience, the Committee finally agreed to try simultaneously to elaborate basic legal principles and to draw up rules for handling two specific legal problems which already pressed for solution: liability for outer space vehicle accidents, and assistance to, and return of, astronauts and their vehicles which might come down on the territory of another state.

After almost two years, a part of this work has now borne fruit. We have before us a draft Declaration of Legal Principles which the Outer Space Committee has unanimously decided to submit to the General Assembly. It is the outcome of a long process of international debate and international consultation, of numerous drafts, of clarifications, compromises and modifications. This fall, at the request of the Outer Space Committee, these consultations were intensified in order to produce a text which could be generally agreed and supported.

I should like to say a few words about the character and status which the United States considers the principles contained in this Declaration will have once the draft resolution has been adopted by the General Assembly, as we hope, without any dissent. In the view of the United States, the operative paragraphs of the resolution contain legal principles which the General Assembly, in adopting the resolution, would declare should guide States in the exploration and use of outer space. We believe these legal principles reflect international law as it is accepted by the Members of the United Nations. The United States, for its part, intends to respect these

principles. We hope that the conduct which the resolution commends to nations in the exploration of outer space will become the practice of all nations.

In adopting the resolution now before us the General Assembly will be only beginning its work on the development of law for outer space. The Declaration is not the last word; it is one of the first. In the future, as experience accumulates, the United Nations may want to formulate additional principles.

In addition—and we believe there is wide agreement on this—the Outer Space Committee should now give first priority to the task of preparing international agreements on the subjects of (1) liability for space vehicle accidents, and (2) assistance to and return of astronauts and space vehicles. We believe that the General Assembly should ask the Outer Space Committee to arrange its work program accordingly.

Moreover, the General Assembly will want to provide for a continuing study of the whole field of outer space law as the activities of States develop in this new environment. We believe the Outer Space Committee and its Legal Subcommittee should continue to survey the whole field of outer space exploration from the legal point of view, so that the United Nations may make an informed and effective contribution in building an international legal order for outer space.

(U. S. Delegation to the United Nations, Press Release No. 4323, Dec. 2, 1963; 49 Dept. of State Bulletin 1005 (1963).)

The text of the Declaration as set forth in Resolution 1962 (XVIII) reads as follows:

DECLARATION OF LEGAL PRINCIPLES GOVERNING ACTIVITIES OF STATES
IN THE EXPLORATION AND USE OF OUTER SPACE

The General Assembly,

Inspired by the great prospects opening up before mankind as a result of man's entry into outer space,

Recognizing the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes,

Believing that the exploration and use of outer space should be for the betterment of mankind and for the benefit of States irrespective of their degree of economic or scientific development,

Desiring to contribute to broad international cooperation in the scientific as well as in the legal aspects of exploration and use of outer space for peaceful purposes,

Believing that such co-operation will contribute to the development of mutual understanding and to the strengthening of friendly relations between nations and peoples,

Recalling General Assembly resolution 110 (II) of 3 November 1947, which condemned propaganda designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression, and considering that the aforementioned resolution is applicable to outer space,

Taking into consideration General Assembly resolution 1721 (XVI) of 20 December 1961 and 1802 (XVII) of 14 December 1962, approved unanimously by the States Members of the United Nations,

Solemnly declares that in the exploration and use of outer space States should be guided by the following principles:

1. The exploration and use of outer space shall be carried on for the benefit and in the interests of all mankind.

2. Outer space and celestial bodies are free for exploration and use by all States on a basis of equality and in accordance with international law.

3. Outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

4. The activities of States in the exploration and use of outer space shall be carried on in accordance with international law including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.

5. States bear international responsibility for national activities in outer space, whether carried on by governmental agencies or by non-governmental entities, and for assuring that national activities are carried on in conformity with the principles set forth in this Declaration. The activities of non-governmental entities in outer space shall require authorization and continuing supervision by the State concerned. When activities are carried on in outer space by an international organization, responsibility for compliance with the principles set forth in this Declaration shall be borne by the international organization and by the States participating in it.

6. In the exploration and use of outer space, States shall be guided by the principle of co-operation and mutual assistance and shall conduct all their activities in outer space with due regard for the corresponding interests of other States. If a State has reason to believe that an outer space activity or experiment planned by it or its nationals would cause potentially harmful interference with activities of other States in the peaceful exploration and use of outer space, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State which has reason to believe that an outer space activity or experiment planned by another State would cause potentially harmful interference with activities in the peaceful exploration and use of outer space may request consultation concerning the activity or experiment.

7. The State on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and any personnel thereon, while in outer space. Ownership of objects launched into outer space, and of their component parts, is not affected by their passage through outer space or by their return to the earth. Such objects or component parts found beyond the limits of the State of registry shall be returned to that State, which shall furnish identifying data upon request prior to return.

8. Each State which launches or procures the launching of an object

into outer space, and each State from whose territory or facility an object is launched, is internationally liable for damage done to a foreign State or to its natural or juridical persons by such object or its component parts on the earth, in air space, or in outer space.

9. States shall regard astronauts as envoys of mankind in outer space, and shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of a foreign State or on the high seas. Astronauts who make such a landing shall be safely and promptly returned to the State of registry of their space vehicle.

(49 Dept. of State Bulletin 1012 (1963).)

INTERNATIONAL TRADE

Commodity sales to U.S.S.R. and Eastern European countries—various U. S. statutes relating to trade with Communist countries

On October 9, 1963, in his regular news conference, President Kennedy announced that United States grain dealers would be allowed to sell wheat to the Soviet Union and Eastern Europe.* The text of a letter from the Attorney General to the Secretary of State concerning legal questions raised by proposals for the sale of wheat to these countries follows:

The Honorable,

October 9, 1963.

The Secretary of State.

My dear Mr. Secretary:

This is in response to Under Secretary Ball's letter of September 23, 1963, requesting my opinion concerning the application of certain federal statutes to sales of United States wheat and other agricultural products to the Soviet Union and Eastern European bloc countries. I understand that the precise form which these sales might take has not been determined but that in any case they would be made for U. S. dollars, gold, or convertible currencies at not less than world market prices, and would not involve extensions of credit except within the range of those commonly encountered in connection with other commercial sales for export of the commodities involved. I have reviewed the relevant statutes and have concluded that they present no legal obstacle to such sales.

I.

The Johnson Act

The Johnson Act, 18 U.S.C. 955, prohibits certain financial transactions by private persons in the United States involving foreign governments which are in default in the payment of their obligations to the United States. The prohibited transactions include the making of "loans" to, and the purchase or sale of "bonds, securities, or other obligations" of, a

* The text of the President's statement appears in 49 Dept. of State Bulletin 660 (1963).

foreign government which is within the statutory category.¹ The Under Secretary's letter states that the Soviet Union is a government in default for the purposes of the Act.

It is, of course, apparent that if the proposed sales of agricultural products to the Soviet Union should be made entirely for cash, no question under the Johnson Act would be presented. Moreover, since the Act is expressly made inapplicable to federal corporations, it would not apply to sales that might be made by the Commodity Credit Corporation. The latter is a corporation created by act of Congress (62 Stat. 1070, as amended, 15 U.S.C. 714), empowered to procure agricultural commodities for sale to foreign governments and to export or cause such commodities to be exported (62 Stat. 1072, 15 U.S.C. 714c). It should also be noted that, as provided by section 11 of the Export-Import Bank Act of 1945 (59 Stat. 529, as amended, 12 U.S.C. 635h), the Johnson Act does not apply to persons acting for or participating with the Export-Import Bank in any transaction engaged in by the Bank. The Bank itself, as a corporation created by act of Congress (12 U.S.C. 635), is exempted from the operation of the Johnson Act. Accordingly, the Act would not interfere with export sales in which the Bank participated by issuing a guarantee of payment of the purchase price or otherwise. Nor would it apply to private insurance companies, acting through the Foreign Credit Insurance Association, which might participate with the Bank in the issuance of such guarantees. The Under Secretary informs me that such guarantees are a common feature of similar export transactions with other foreign governments and their agencies.

There remains for consideration the propriety under the Johnson Act of possible sales by private American firms on a deferred-payment basis. It is my opinion that such sales would not involve the making of "loans" within the meaning of the Act. This view is consistent with the position taken by this Department under Attorney General Cummings (37 Ops. Atty. Gen. 505 (1934)), and more recently in Assistant Attorney General

¹ 18 U.S.C. 955 provides:

"Whoever, within the United States, purchases or sells the bonds, securities, or other obligations of any foreign government or political subdivision thereof or any organization or association acting for or on behalf of a foreign government or political subdivision thereof, issued after April 13, 1934, or makes any loan to such foreign government, political subdivision, organization or association, except a renewal or adjustment of existing indebtedness, while such government, political subdivision, organization or association, is in default in the payment of its obligations, or any part thereof, to the United States, shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

"This section is applicable to individuals, partnerships, corporations, or associations other than public corporations created by or pursuant to special authorizations of Congress, or corporations in which the United States has or exercises a controlling interest through stock ownership or otherwise. While any foreign government is a member both of the International Monetary Fund and of the International Bank for Reconstruction and Development, this section shall not apply to the sale or purchase of bonds, securities, or other obligations of such government or any political subdivision thereof or of any organization or association acting for or on behalf of such government or political subdivision, or to making of any loan to such government, political subdivision, organization, or association."

Katzenbach's letter of January 19, 1962, to the General Counsel of the Department of Agriculture. The term "loan" in ordinary commercial usage denotes a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equal to that borrowed, with or without interest. See *e.g.*, *In re Grand Union Co.*, 219 Fed. 353 (C.A. 2, 1915); *National Bank of Paulding v. Fidelity & Casualty Co.*, 131 F. Supp. 121 (S.D. Ohio 1954). The right to defer payment for goods sold is not a loan but credit. See, *e.g.*, *Dunn v. Midland Loan Finance Corp.*, 206 Minn. 550, 289 N.W. 411 (1939); *Bernhardt v. Atlantic Finance Co.*, 311 Mass. 183, 40 N.E.2d 713 (1942); Whitney, *Modern Commercial Practices* § 12 (1958). And the payment of consideration by a third party for an assignment of the buyer's obligation does not constitute a loan to either the buyer or the seller. See *Oil City Motor Co. v. C.I.T. Corp.*, 76 F.2d 589 (C.A. 10, 1935); *G.M.A.C. v. Mid-West Chevrolet Co.*, 66 F.2d 1 (C.A. 10, 1933); *Dunn v. Midland Loan Finance Corp.*, *supra*; 6A Corbin, *Contracts* § 1500 (Rev. ed. 1962). Accordingly, neither sales transactions by American exporters on a deferred-payment basis, nor payments made to such exporters by third parties in return for an assignment of the right to payment in connection with such sales, are "loans" to the purchaser of the exported goods in the ordinary sense of that term in legal and commercial usage.

Nor would the forms of credit transactions in which private exporters commonly engage in connection with export sales on credit, involving the assignment or negotiation of contract rights or commercial paper, violate the Johnson Act's prohibition against the purchase or sale of the "bonds, securities, or other obligations" of the governments to which the Act refers. Since the right to receive payment in connection with export sales is not normally received by the seller in the form of bonds or securities, the issue presented by such transactions is whether they would involve the purchase or sale of "other obligations" within the meaning of the statute.

Although the assignment or negotiation of a contract right or commercial document resulting from the sale of goods on credit can be broadly termed a "sale" of the buyer's "obligation," it is not, in my opinion, proscribed by the Johnson Act. The Act is a criminal statute, and therefore must be construed strictly, "lest those be brought within its reach who are not clearly included," *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542 (1943); *United States v. Resnick*, 299 U.S. 207 (1936); *Kraus & Bros. v. United States*, 327 U.S. 614, 621-622 (1946). For that reason and the reasons indicated hereafter, it is my view that the Act must be interpreted, in accordance with the rule of *ejusdem generis*, to relate only to sales of bonds and securities and "other obligations" of like nature. The distinction here made is essentially that made in connection with both Federal and State enactments in the field of securities regulation: between obligations which are covered because they are, or are likely to be, widely distributed among members of the public, and obligations which are not covered because they are issued in the ordinary course of trade and normally move exclusively within the relatively restricted channels of banking and commercial

credit. See, *e.g.*, Securities Act of 1933, §§ 3(a)(3), 4(1), discussed in H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933) 14 (exemption for "short-term paper . . . of a type which rarely is bought by private investors"), and 1 Loss, *Securities Regulation* (2d ed.) 566 *et seq.*, 653 *et seq.* (exemptions for short-term paper and for non-public offerings); Cal. Corp. Code § 25102(b)(c) (exemptions for "Bills of exchange, trade acceptances, promissory notes and any guarantee thereof, and other commercial paper issued, given, or acquired in a bona fide way in the ordinary course of legitimate business, trade, or commerce," and for promissory notes "not offered to the public or . . . sold to an underwriter for the purpose of resale").

The foregoing interpretation of the Johnson Act is the necessary result of application of the reasoning employed by Attorney General Cummings in construing the Act shortly after it became law in 1934. 37 Ops. Att'y. Gen. 505, *supra*. That opinion, rendered at the request of the Secretary of State, reads in part as follows (*id.* at 512):

"The Committee Reports (S. Rept. 20 and House Rept. 974, 73d Cong.) recite that the bill was introduced following an investigation by the Senate Committee on Finance and the revelation therein that 'billions of dollars of securities . . . offered for sale to the American people' were overdue and unpaid; that some of these 'foreign bonds and obligations . . . were sold by the American financiers to make outrageously high profits'; and stated a purpose 'to prevent a recurrence of the practices which were shown by the investigation to be little less than a fraud upon the American people . . . to curb the rapacity of those engaged in the sale of foreign obligations. . . .'

"This, I think, is indicative of a purpose to deal with such 'bonds' and 'securities' and with 'other obligations' of like nature, observing the rule of *ejusdem generis*—that is, obligations such as those which had been sold to the American public to raise money for the use of the foreign governments issuing them—not contemplating foreign currency, postal money orders, drafts, checks and other ordinary aids to banking and commercial transactions, which are 'obligations' in a broad sense but not in the sense intended. It was obviously not the purpose of the Congress to discontinue all commercial relations with the defaulting countries."

Direct recourse to the legislative history of the Act confirms that both distinctions here made—that between loans and commercial credit, and between securities and commercial paper—reflect accurately the intention of Congress and the policy it sought to implement. As noted by Attorney General Cummings, it was obviously not the purpose of the Congress to interfere with the ordinary incidents of trade relations with the defaulting nations as distinguished from participation by them in the capital markets of the United States. Moreover, the debates provide numerous indications of Congress' familiarity with the distinction between traffic in "bonds [and] securities" and commercial dealings. A parallel was drawn with the recently-enacted Securities Acts in terms of the need to protect unsophisticated investors. 78 Cong. Rec. 6048, 6052. Reference was also

made to Section 5 of the Reconstruction Finance Corporation Act, 47 Stat. 7 (1932), which expressly prohibited the making by the RFC of "advances . . . upon foreign securities or foreign acceptances," or drafts and bills of exchange secured by goods in transit to Europe. See 78 Cong. Rec. 6051. The contrast in the language of the two Acts, together with the context in which the Johnson Act was passed, makes it clear that the Johnson Act does not apply to the assignment or negotiation by an American seller, in the ordinary course of business, of contract rights or commercial paper resulting from sales of goods on normal commercial terms.

It should be understood that the types of transactions discussed above would violate the Act, regardless of their purely formal characteristics, if used as a subterfuge to evade it. Thus, for example, extensions of credit for an inordinately long period might be used as a device to circumvent the prohibition against loans. This question need not be considered in detail here since you inform me that any extensions of credit that may be involved will be within the range of those commonly encountered in commercial sales of a comparable character. Subject to that qualification I conclude that none of the transactions outlined in your letter would be prohibited by the Johnson Act.

II.

Section 2(c) of the Agricultural Act of 1961

Section 2 of the Agricultural Act of 1961 (75 Stat. 294, 7 U.S.C. (Supp. IV) 1282 note), declares it to be—" . . . the policy of Congress to—

* * * * *

"(c) expand foreign trade in agricultural commodities with friendly nations, as defined in section 107 of Public Law 480, 83rd Congress, as amended (7 U.S.C. 1707), and in no manner either subsidize the export, sell, or make available any subsidized agricultural commodity to any nations other than such friendly nations and thus make full use of our agricultural abundance . . ."

The adoption of this declaration of policy followed the announcement by the Department of Commerce in June 1961 of a change in existing export licensing policy to permit the sale of subsidized surplus agricultural commodities to the Eastern European Soviet bloc. The announcement indicated that consideration would be given to approval of export licenses for shipment of such commodities, including commodities acquired directly or indirectly from Commodity Credit Corporation stocks, to the Soviet Union and other Eastern European countries, provided the commodities were sold for convertible currencies. *Hearings before the House Select Committee to Investigate and Study the Administration, Operation, and Enforcement of the Export Control Act of 1949, and Related Acts* (87th Cong., 1st Sess.), p. 109.

Section 107 of P.L. 480 (Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 457, 7 U.S.C. 1707), referred to in the declaration of

policy, defines the term "friendly nation" to mean "any country other than (1) the U.S.S.R., or (2) any nation or area dominated or controlled by the foreign government or foreign nation controlling the world Communist movement." Public Law 480 authorized, *inter alia*, export sales for soft currencies and for long-term credits. See 7 U.S.C. 1701, 1731. Sales of this character are authorized only with respect to "friendly nations," as defined in the Act, but no restriction is imposed on commercial sales for cash or short-term credits.

During consideration by the House of the bill which became the Agricultural Act of 1961, Representative Latta, referring to the change of policy announced by the Department of Commerce, proposed adding to the declaration of policy already contained in section 2(c) the language: "and in no manner either subsidize the export, sell, or make available any subsidized agricultural commodity to any nations other than such friendly nations." He objected to selling subsidized agricultural commodities to the Soviet bloc—even sales not involving any element of assistance under P.L. 480—because sales at the world market price would, in his view, give bloc countries the benefit of subsidies paid by the Commodity Credit Corporation to American producers and exporters.² He urged that this was objectionable "in view of the world situation." After some debate as to the meaning and desirability of the amendment, it was adopted. 107 Cong. Rec. 13746-13748. The Conference Committee accepted the amendment. H. R. Rep. No. 839, 87th Cong., 1st Sess., p. 28.

It is clear that the policy declaration contained in section 2(c) does not have the legal effect of prohibiting commercial sales of subsidized agricultural commodities to bloc countries at world market prices for U. S. dollars, gold, or convertible currencies. Declarations of policy in legislation, like preambles and other introductory material, do not alter specific operative provisions of law. *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 202 (1962); *Lauf v. E. G. Skinner & Co.*, 303 U.S. 323, 330 (1938); *Price v. Forrest*, 173 U.S. 410, 427 (1899); *Yazoo R. Co. v. Thomas*, 132 U.S. 174, 178 (1889); Sutherland, *Statutory Construction* (3d ed.) § 4820. This rule is particularly relevant where, as here, the declaration of policy was not contemporaneous with the enactment or amendment of any of the basic

² Under section 407 of the Agricultural Act of 1949 (63 Stat. 1055, as amended, 7 U.S.C. 1427), the Commodity Credit Corporation is authorized to sell subsidized agricultural commodities owned or controlled by it for export at less than the domestic price. Representative Latta stated that under the Department of Commerce proposal "the American taxpayer will now [be] picking up the difference between the world price and the domestic price. . . . The exporter would charge this difference to the taxpayer." 107 Cong. Rec. 13746-13748. In fact, as noted by Chairman Cooley of the House Agricultural Committee in debate on the floor of the House, since the commodities in question are surplus, the American taxpayer in each case has already "picked up" not merely the difference between the world price and the domestic price, but the entire amount of the domestic price. Export transactions can be said to involve a "subsidy" only because the losses incurred in maintaining the domestic price support program are not deemed realized until a sale occurs. The net result of export transactions therefore is to reduce the loss to the taxpayer by the amount of the world market price. *Id.* at 13747.

pertinent statutes: the Export Control Act, the Agricultural Act of 1949, and the Commodity Credit Corporation Charter Act.³

I have examined the history of the declaration with care and find no indication that Congress itself viewed the amendment as more than an expression of its policy, to be given consideration by the Executive in making decisions within the framework of authorizations and prohibitions established by prior law. Representative Latta, who sponsored the declaration, himself stated that its purpose was to have the Department of Commerce know "what the sense of this Congress is" with respect to the transactions in question. 107 Cong. Rec. 13746. And Representative Hoeven, one of its supporters, pointed out that the amendment "pertains only to the policy section of this bill." *Id.* at 13747. At no point in the legislative consideration of the declaration was any effort made to revise or to repeal the statutes that would have to be deemed amended if the policy were to be given binding legal effect.

The Congress could, of course, have embodied its policy in a provision of positive law to which the Executive Branch would have been bound to adhere. That it did not choose to do so is significant, not only in establishing that section 2(c) is without legal effect but in determining its proper interpretation and application as policy. Congress evidently contemplated that situations might thereafter arise in which the considerations of policy to which it was directing attention should not be decisive; that it would be necessary for the Executive to consider and appraise the policy thus declared and to determine whether its application would serve the national interest in particular situations. Both Congress and the courts have traditionally sought to avoid restricting the Executive unduly in matters affecting foreign relations because of the need for flexibility in this area and the fact that the Constitution entrusts the external affairs of the Nation primarily to the Executive. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-321 (1936); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111-114 (1948). If, therefore, the Executive Branch should determine that permitting the sales in question would serve the national interest at this time, its action would not only be lawful but consistent with the intention of Congress as to the manner in which section 2(c) was to be interpreted and applied.

III.

The Battle Act

I agree with the Under Secretary that the Mutual Defense Assistance Control Act of 1951 (65 Stat. 644, as amended, 22 U.S.C. 1611 *et seq.*)

³ Export Control Act of 1949 (63 Stat. 7, as amended, 50 U.S.C. App. 2021 *et seq.* (authorizing the President to regulate exports, including their financing, transportation, and other servicing); Agricultural Act of 1949, section 407, *supra* (OCO authorized to sell agricultural commodities for export at less than support prices); Commodity Credit Corporation Charter Act, section 5 *supra* (OCO empowered to procure agricultural commodities for sale to foreign governments, and to export such commodities, or cause them to be exported, and to aid in the development of foreign markets for these commodities).

(the Battle Act) presents no legal obstacle to sales of agricultural commodities to Eastern European bloc countries. The Battle Act was designed to supplement the Export Control Act of 1949 (63 Stat. 7, as amended, 50 U.S.C. App. 2022-32), which authorizes the President to "prohibit or curtail the exportation from the United States . . . of any articles, materials or supplies . . . except under such rules and regulations as he shall prescribe." Pursuant to the Export Control Act, a comprehensive system of export licensing was set up to control the shipment of commodities from the United States to foreign countries. See H.R. Rep. 318, 82d Cong., 1st Sess. (1951). The Battle Act added to this system of regulation a mechanism for inducing other countries to embargo the shipment to the Soviet bloc of "arms, ammunition, and implements of war, atomic energy materials, petroleum, transportation materials of strategic value, and items of primary strategic significance used in [their] production." See S. Rep. No. 98, 82d Cong., 1st Sess. (1951). The Act provides (section 103, 22 U.S.C. 1611b(b) for the termination of all military, economic, or financial assistance to any nation upon the recommendation of the Administrator of the program, subject to review by the President in certain instances, if it "knowingly permits the shipment to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination," of any of the embargoed materials. The Act contains a further declaration of policy regarding the export, by countries receiving assistance, of other commodities "which in the judgment of the Administrator should be controlled." Section 201, 22 U.S.C. 1612. If a country receiving assistance from the United States does not effectively cooperate in controlling exports of such commodities, all military, economic, or financial assistance is to be terminated upon a determination by the President of non-cooperation. Section 203, 22 U.S.C. 1612b.

As indicated by the above summary of its provisions, the Battle Act did not purport to regulate private United States shipments to Soviet bloc countries, which were already subject to regulation under the Export Control Act. The Battle Act relates, rather, to trade with the Soviet bloc by countries receiving aid or assistance from the United States. Moreover, the transactions to which this opinion relates would be purely commercial in nature from the standpoint of the purchasing countries, and would therefore not involve "economic or financial assistance" within the meaning of the Battle Act. The Commodity Credit Corporation assists exports of agricultural products through the payment to United States exporters of subsidies designed to eliminate the impact on such exporters of the domestic price support program and thereby enable them to compete on an equal basis with foreign exporters. However, as the Under Secretary's letter states, the only "assistance" involved in the payment of such subsidies redounds to the benefit exclusively of United States producers and exporters.⁴

⁴ This view is supported by my recent opinion to the Secretary of Agriculture of August 29, 1963, regarding the applicability of the Cargo Preference Act to export sales

As to both points, the following colloquy between Senator Sparkman, the floor manager of the Battle Act in the Senate, and Senator Kem, who advocated a more stringent bill, is instructive (97 Cong. Rec. 10675):

MR. SPARKMAN:

"I should like to say that it does not make any difference what the United States is receiving [from the U.S.S.R.]. That is not the question. The question relates to trade between Soviet countries and countries to which the United States intends to extend help."

MR. KEM:

"Exactly."

MR. SPARKMAN:

"Either economic or military. It has nothing to do with trade between the United States and Russia or any other country."

MR. KEM:

"I did not intend to imply anything else."

Accordingly, it is clear that the Act has no application to the contemplated transactions.

IV.

The Export Control Act

The Under Secretary's letter properly states that in any event the export of agricultural products to the Soviet Union and to bloc countries would require the issuance of licenses in accordance with the export control regulations promulgated pursuant to the Export Control Act of 1949, *supra*.

I am not aware of any other federal statutes relevant to the problems involved. Accordingly, it is my opinion that the transactions described in your letter could be accomplished in conformity with the laws of the United States.

Sincerely,

ROBERT F. KENNEDY
Attorney General

(Dept. of State Press Release No. 520, Oct. 10, 1963; 49 Dept. of State Bulletin 661 (1963).)

on long-term credit negotiated by the Secretary of Agriculture with domestic exporters under Title IV of Public Law 480. While the opinion concludes that the Cargo Preference Act applied because the purpose of the Title IV long-term credit program was in substantial part "to assist" the foreign economy, it was stated that if the Department of Agriculture should sell surplus agricultural commodities to a domestic exporter for export purposes under a program designed to dispose of the goods on the best possible terms and conditions, "the resulting export is a purely commercial transaction . . . and, hence, not subject to the Cargo Preference Act even if the United States advances credit to the exporter and the ultimate purchaser is a foreign government."

JUDICIAL DECISIONS

By JOHN R. STEVENSON*

Of the Board of Editors

Preliminary questions: existence of a dispute between parties; compliance of application with Article 32(2) of Rules of Court—Trusteeship Agreement for Territory of Cameroons under British Administration—seising of Court and administration of justice—judicial function and limitations on its exercise—termination of Trusteeship Agreement by decision of General Assembly and legal effects thereof—alleged breaches of Trusteeship Agreement—nature of claim and relief sought—declaratory judgments—inability of Court in present case to render a judgment capable of effective application.¹

CASE CONCERNING THE NORTHERN CAMEROONS (CAMEROON v. UNITED KINGDOM), PRELIMINARY OBJECTIONS.² I.C.J. Reports, 1963, p. 15.

International Court of Justice.³ Judgment of December 2, 1963.

On 30 May, 1961, the Ambassador of Cameroon to France handed to the Registrar an Application which, referring to a dispute between his Government and the Government of the United Kingdom, prayed the Court to adjudge and declare that, in the application of the Trusteeship Agreement for the Territory of the Cameroons under British Administration, approved by the General Assembly of the United Nations on December 13, 1946,⁴ the United Kingdom failed, with regard to the Northern Cameroons, to respect certain obligations directly or indirectly flowing from that Agreement. To found the jurisdiction of the Court the Application relies on Article 19 of the Trusteeship Agreement.

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* Assisted by Peter S. Paine, Jr., of the New York and English Bars, William J. Williams, Jr., of the New York Bar, and Robert A. R. MacLennan of the English Bar.

¹ Caption by the Court.

² Excerpted text of majority opinion prepared by Wm. W. Bishop, Jr. (English language text is authoritative.)

³ Composed for this case of President Winarski, Vice President Alfaro, Judges Basdevant, Badawi, Moreno Quintana, Wellington Koo, Spiropoulos, Sir Percy Spender, Sir Gerald Fitzmaurice, Korotkiy, Tanaka, Bustamante y Rivero, Jessup and Morelli, and Judge *ad hoc* Beb a Don.

⁴ Art. 19 of the Trusteeship Agreement provides: "If any dispute whatever should arise between the Administering Authority and another Member of the United Nations relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation or other means, shall be submitted to the International Court of Justice, provided for in Chapter XIV of the Charter of the United Nations." 8 U.N. Treaty Series 119, 132.

[The British Government asked the Court to find that it had no jurisdiction of the case; but, in case it found that it did have jurisdiction, then that the allegation of breach of the obligations under the Trusteeship Agreement was unfounded. The British preliminary objection was based on the contention that there was no dispute between Cameroon and the United Kingdom within the meaning of Article 19 of the Agreement, and, "in any event, there is no dispute before the Court upon which the Court is entitled to adjudicate."]

In order to be in a position to pass upon the submissions of the Parties, the Court must take into account certain facts which underlie the Applicant's complaints. Although the Court will subsequently enter into some points in greater detail, it will, at the outset, present in broad outline the facts which it has found to be important to an appreciation of the case.

The historical background of the Application filed by the Republic of Cameroon on 30 May 1961 relates to one of the several important political developments affecting certain territories in the continent of Africa which have taken place in recent years. The territory here in question, known as the Northern Cameroons, formed part of the "oversea possessions" the rights and title to which Germany renounced under Article 119 of the Treaty of Versailles of 28 June 1919, and which were placed under the Mandates System of the League of Nations. In conformity with a decision of the Council of Four at the Peace Conference, the Governments of France and Great Britain recommended that the territory which had been known as the German protectorate of Kamerun should be divided into two Mandates, the one to be administered by France and the other by Great Britain. This recommendation was accepted and the Mandates were established.

After the creation of the United Nations, the French and British Governments proposed to place these mandated territories under the International Trusteeship System. Trusteeship Agreements for the Territory of the Cameroons under British Administration and for the Territory of the Cameroons under French Administration with the approval of the General Assembly of the United Nations entered into force on 13 December 1946.

The Government of the United Kingdom as the Administering Authority maintained in the Trust Territory of the Cameroons the same administrative arrangements which it had first instituted when the Mandate was accepted. Under these arrangements the territory was divided into a northern region and a southern region. The Northern Cameroons was itself not a geographical whole but was in two sections, separated by a narrow strip of the territory of what was then the British Protectorate of Nigeria which bordered the entire western side of the Mandate. The Northern Cameroons was administered as part of the two northern provinces of Nigeria, Bornu and Adamawa. The Southern Cameroons was administered until 1939 as a separate Cameroons Province of Southern Nigeria. Thereafter, the Southern Cameroons was joined for administrative purposes to the eastern provinces of Nigeria as a separate province.

The Trust Territory of the Cameroons under French Administration which formed the entire eastern and most of the northern frontier of the

Trust Territory of the Cameroons under British Administration, attained independence as the Republic of Cameroon on 1 January 1960. On 20 September 1960 the Republic of Cameroon became a Member of the United Nations. On 1 October 1961, pursuant to the results of a plebiscite conducted under the auspices of the United Nations, the Southern Cameroons joined the Republic of Cameroon within which it then became incorporated.

Meanwhile, also consequent upon a plebiscite conducted under the auspices of the United Nations on 11 and 12 February 1961, the Northern Cameroons on 1 June 1961 joined the Federation of Nigeria which had become independent on 1 October 1960 and which was admitted as a Member of the United Nations six days later. The Northern Cameroons became and remains a separate province of the Northern Region of Nigeria.

The situation of the Trust Territories of the Cameroons under French Administration and of the Cameroons under British Administration received much attention from the Trusteeship Council of the United Nations and from the General Assembly itself. Indeed, the General Assembly on 5 December 1958 decided to resume its thirteenth session in February 1959 "to consider exclusively the question of the future of the Trust Territories of the Cameroons under French Administration and the Cameroons under United Kingdom Administration." In addition, the whole question of administrative unions in trust territories was over many years the subject of repeated study within the United Nations.

The reports of visiting missions to the two Trust Territories of the Cameroons under French and British administration respectively, the proceedings of the Trusteeship Council and of the Fourth Committee of the General Assembly as well as the reports of the United Nations Plebiscite Commissioner who supervised plebiscites held in the Trust Territory of the Cameroons under British Administration, afford abundant background for the questions raised by the Republic of Cameroon in its Application of 30 May 1961 instituting proceedings against the United Kingdom. Since proceedings on the merits were suspended as recorded in the Order of 3 September 1962, the Court, as already noted, refers to this body of material only for the purpose of indicating the setting in which it has been called upon to consider the Application and Memorial of the Republic of Cameroon and the Preliminary Objections thereto which have been filed by the United Kingdom. It is necessary, however, by way of clarification of what follows, to refer specifically to three of the resolutions adopted by the General Assembly of the United Nations.

On 13 March 1959, the General Assembly adopted resolution 1350 (XIII). It recommended that the Administering Authority, in consultation with a United Nations Plebiscite Commissioner, organize under the supervision of the United Nations separate plebiscites in the northern and southern parts of the Cameroons under British administration "in order to ascertain the wishes of the inhabitants of the Territory concerning their future." In the Southern Cameroons, the plebiscite was held on 11 February 1961; the vote registered a decision "to achieve independence by joining the independent Republic of Cameroun." In the Northern Cam-

eroons a first plebiscite was held on 7 November 1959; the vote was in favour of deciding their future at a later date. Accordingly, by resolution 1473 (XIV) of 12 December 1959, the General Assembly recommended that a second plebiscite be held in the Northern Cameroons in which the people would be asked whether they wished "to achieve independence" by joining the independent Republic of Cameroon or by joining the independent Federation of Nigeria. By the same resolution, the General Assembly recommended that the United Kingdom should meanwhile take various steps including the initiation without delay of the "separation of the administration of the Northern Cameroons from that of Nigeria and that this process should be completed by 1 October 1960." It is one of the complaints of the Republic of Cameroons as Applicant here, that the United Kingdom as Administering Authority failed to take the necessary steps to comply with this recommendation.

The plebiscite was held on 11 and 12 February 1961, and on 21 April 1961 the General Assembly adopted resolution 1608 (XV) which has special significance in this case. The resolution includes the following three paragraphs:

"2. *Endorses* the results of the plebiscites that:

- (a) The people of the Northern Cameroons have, by a substantial majority, decided to achieve independence by joining the independent Federation of Nigeria;
- (b) The people of the Southern Cameroons have similarly decided to achieve independence by joining the independent Republic of Cameroun;

3. *Considers that*, the people of the two parts of the Trust Territory having freely and secretly expressed their wishes with regard to their respective futures in accordance with General Assembly resolutions 1352 (XIV) and 1473 (XIV), the decisions made by them through democratic processes under the supervision of the United Nations should be immediately implemented;

4. *Decides that*, the plebiscites having been taken separately with differing results, the Trusteeship Agreement of 13 December 1946 concerning the Cameroons under United Kingdom administration shall be terminated, in accordance with Article 76 b of the Charter of the United Nations and in agreement with the Administering Authority, in the following manner:

- (a) With respect to the Northern Cameroons, on 1 June 1961, upon its joining the Federation of Nigeria as a separate province of the Northern Region of Nigeria;
- (b) With respect to the Southern Cameroons, on 1 October 1961, upon its joining the Republic of Cameroun;"

The Republic of Cameroon voted against the adoption of this resolution.

Although in a Memorandum of 1 May 1961 from the Republic of Cameroon Ministry of Foreign Affairs transmitted to the United Kingdom (which hereafter will more particularly be referred to) the position was taken that the Trusteeship could not be terminated without the consent

of the Republic of Cameroon "in its capacity as a State directly concerned," the Applicant did not maintain this position and the fact that the Trusteeship Agreement was terminated by the General Assembly's resolution 1608 (XV), is now admitted by both Parties.

Even before the discussions which led up to resolution 1608 (XV), the Republic of Cameroon expressed its dissatisfaction with the manner in which the separation of the administration of the Northern Cameroons from that of Nigeria was being implemented by the United Kingdom. As early as May 1960, before the Republic of Cameroon became a Member of the United Nations, its point of view was expounded on its behalf by the representative of France in the Trusteeship Council. After its admission to membership of the United Nations, by a communiqué attached to a note verbale of 4 January 1961 to the United Kingdom, the Republic of Cameroon asserted on its own behalf that this administrative separation had not been made effective and that the United Kingdom as Administering Authority had not conducted the peoples of the Northern Cameroons to self-government as provided in Article 76 (b) of the Charter of the United Nations. Thereafter, and after the plebiscite of February 1961, representatives of the Republic of Cameroon through numerous interventions in the Fourth Committee of the General Assembly and in the plenary sessions of the Assembly, made known its objections to certain alleged practices, acts or omissions on the part of the local trusteeship authorities during the period preceding the plebiscite and during the course of the plebiscite itself which it claimed altered the normal course of the consultation with the people and involved consequences in conflict with the Trusteeship Agreement. Throughout, the Republic of Cameroon emphasized its view that the "rule of unity" had been disregarded by the Administering Authority and thereby the political development of the Trust Territory had been altered.

These objections, together with the allegations by the Republic of Cameroon that the Administrative separation recommended in General Assembly resolution 1473 (XIV) had not been effected, and the complaint that the whole Trust Territory had not been administered as a single administrative unit, were developed in a Cameroon White Book distributed by it to all Members of the United Nations in March 1961 when the results of the second plebiscite in the Northern Cameroons were being debated in the Fourth Committee of the General Assembly. In response to this White Book, letters in rebuttal were similarly distributed by the representatives of the United Kingdom and of Nigeria. It was following this exchange and the attendant debates that the General Assembly adopted resolution 1608 (XV) previously referred to.

Following the adoption of the General Assembly's resolution 1608 (XV), the Republic of Cameroon, on 1 May 1961, addressed a communication to the United Kingdom in which it referred to complaints "of a legal character" which had been advanced by it and which it wished to have considered by this Court. The complaints are listed in its communication and they correspond with those which in the Application are stated to be matters

relating to the execution of the Trusteeship Agreement on the part of the Administering Authority and constituting the subject of the dispute between the Republic of Cameroon and the United Kingdom. Its communication referred to a dispute concerning the application of the Trusteeship Agreement and requested the United Kingdom to enter into a special agreement for the purpose of bringing the same before this Court. No reference was made in the communication of the Republic of Cameroon to Article 19 of the Trusteeship Agreement which hereafter will be referred to.

To this communication the United Kingdom replied on 26 May 1961 stating that the dispute did not appear to be between it and the Republic of Cameroon but between the latter and the United Nations General Assembly. The policies or practices with which the Republic of Cameroon found fault, the reply goes on to state, had been endorsed by the United Nations and the United Kingdom did not deem it proper to submit to the International Court a dispute concerning these. To refer the matter to this Court, the letter proceeded to say, would call in question the decision of the General Assembly as set out in its resolution 1608 (XV) and introduce an element of uncertainty into a matter decided by the Assembly. For these stated reasons the United Kingdom declared they were unable to comply with the request of the Republic of Cameroon to refer the matter to this Court.

Four days later, on 30 May 1961, the Republic of Cameroon submitted its Application to the Court, basing the jurisdiction of the Court on Article 19 of the Trusteeship Agreement which reads as follows:

"Article 19. If any dispute whatever should arise between the Administering Authority and another Member of the United Nations relating to the interpretation or application of the provisions of this Agreement, such dispute, if it cannot be settled by negotiation or other means, shall be submitted to the International Court of Justice, provided for in Chapter XIV of the United Nations Charter."

Pursuant to General Assembly resolution 1608 (XV), the Trusteeship Agreement was terminated, with respect to the Northern Cameroons, two days later, on 1 June 1961.

The Application lists the following complaints:

"(a) The Northern Cameroons have not, in spite of the text of Article 5, § B, of the Trusteeship Agreement, been administered as a separate territory within an administrative union, but as an integral part of Nigeria.

(b) Article 6 of the Trusteeship Agreement laid down as objectives the development of free political institutions, a progressively increasing share for the inhabitants of the Territory in the administrative services, their participation in advisory and legislative bodies and in the government of the Territory. These objectives, in the opinion of the Republic of Cameroon, have not been attained.

(c) The Trusteeship Agreement did not authorize the Administering Power to administer the Territory as two separate parts, contrary to the rule of unity, in accordance with two administrative systems and following separate courses of political development.

(d) The provisions of § 7 of Resolution 1473 relating to the separation of the administration of the Northern Cameroons from that of Nigeria have not been followed.

(e) The measures provided for in § 6 of the same Resolution in order to achieve further decentralization of governmental functions and the effective democratization of the system of local government have not been implemented.

(f) The conditions laid down by § 4 of the Resolution for the drawing up of electoral lists were interpreted in a discriminatory manner, by giving an improper interpretation to the qualification of ordinary residence.

(g) Practices, acts or omissions of the local Trusteeship authorities during the period preceding the plebiscite and during the elections themselves altered the normal course of the consultation and involved consequences in conflict with the Trusteeship Agreement."

The formulation of the grievances of the Republic of Cameroon is stated in differing language in the Application, its Memorial, its Written Observations and Submissions and its Final Submissions. It suffices at this point, and in the light of what has already been said, to quote from the Final Submissions the prayer—

"that the Court should adjudge and declare that the United Kingdom has, in the interpretation and application of the Trusteeship Agreement for the Territory of the Cameroons under British Administration, failed to respect certain obligations directly or indirectly flowing from the said Agreement, and in particular from Articles 3, 5, 6 and 7 thereof."

The Counter-Memorial of the United Kingdom, in Part II thereof, dealt with the merits of the case, the stated reason being that the United Kingdom thought assertions of the Republic of Cameroon should not remain unanswered. Part I of the Counter-Memorial raised a number of preliminary objections.

These objections were developed at considerable length during the course of the oral hearing. For reasons which will subsequently appear, the Court does not find it necessary to consider all the objections, nor to determine whether all of them are objections to jurisdiction or to admissibility or based on other grounds. During the course of the oral hearing little distinction if any was made by the Parties themselves between "jurisdiction" and "admissibility." There are however two objections which the Court thinks should be disposed of at this stage.

The first of these objections is the contention of the United Kingdom that there is no "dispute" between itself and the Republic of Cameroon. If any dispute did at the date of the Application exist, it is the United Kingdom's contention that it was between the Republic of Cameroon and the United Nations or its General Assembly.

The Court is not concerned with the question whether or not any dispute in relation to the same subject-matter existed between the Republic of Cameroon and the United Nations or the General Assembly. In the view of the Court it is sufficient to say that, having regard to the facts already stated in this Judgment, the opposing views of the Parties as to the inter-

pretation and application of relevant Articles of the Trusteeship Agreement, reveal the existence of a dispute in the sense recognized by the jurisprudence of the Court and of its predecessor, between the Republic of Cameroon and the United Kingdom at the date of the Application.

The other preliminary objection, that the Court finds it convenient at this stage to deal with, is based on Article 32 (2) of the Rules of Court⁵ which provides that when a case is brought before it by means of an application, the application must not only indicate the subject of the dispute as laid down in Article 40 of the Court's Statute but it must also "as far as possible" specify the provision on which the Applicant founds the jurisdiction of the Court, and state the precise nature of the claim and the grounds on which it is based.

In the Observations and Submissions of the Republic of Cameroon, this objection is treated separately as one to the admissibility of the Application and the Memorial.

The Court cannot be indifferent to any failure, whether by Applicant or Respondent, to comply with its Rules which have been framed in accordance with Article 30 of its Statute. The Permanent Court of International Justice in several cases felt called upon to consider whether the formal requirements of its Rules had been met. In such matters of form it tended to "take a broad view." (*The Société Commerciale de Belgique*, P.C.I.J., Series A/B, No. 78, p. 173.) The Court agrees with the view expressed by the Permanent Court in the *Mavrommatis Palestine Concessions* case (P.C.I.J., Series A, No. 2, p. 34):

"The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law."

The Court is quite conscious of the Applicant's deeply felt concern over events referred to in its pleadings and if there were no other reason which in its opinion would prevent it from examining the case on the merits, it would not refuse to proceed because of the lack of what the Permanent Court in the case of the *Interpretation of the Statute of the Memel Territory*, called a "convenient and appropriate method in which to bring the difference of opinion before the Court" (P.C.I.J., Series A/B, No. 49, p. 311).

The Court notes that whilst under Article 40 of its Statute the subject of a dispute brought before the Court *shall be* indicated, Article 32 (2) of the Rules of Court requires the Applicant "as far as possible" to do certain things. These words apply not only to specifying the provision

⁵ Art. 32 (2) of the Rules of Court provides: "When a case is brought before the Court by means of an application, the application must, as laid down in Article 40, paragraph 1, of the Statute, indicate the party making it, the party against whom the claim is brought and the subject of the dispute. It must also, as far as possible, specify the provision on which the applicant founds the jurisdiction of the Court, state the precise nature of the claim and give a succinct statement of the facts and grounds on which the claim is based, these facts and grounds being developed in the Memorial, to which the evidence will be annexed."

on which the Applicant founds the jurisdiction of the Court, but also to stating the precise nature of the claim and giving a succinct statement of the facts and grounds on which the claim is based. In the view of the Court the Applicant has sufficiently complied with the provisions of Article 32 (2) of the Rules and the preliminary objection based upon non-compliance therewith is accordingly without substance.

The arguments of the Parties have at times been at cross-purposes because of the absence of a common meaning ascribed to such terms as "interest" and "admissibility." The Court recognizes that these words in differing contexts may have varying connotations but it does not find it necessary in the present case to explore the meaning of these terms. For the purposes of the present case, a factual analysis undertaken in the light of certain guiding principles may suffice to conduce to the resolution of the issues to which the Court directs its attention.

The geographical propinquity of the Republic of Cameroon to the former Trust Territory of the Northern Cameroons, and the degree of affinity between the populations of these two regions, led the Republic of Cameroon to view the developments regarding the former Trust Territory with intense concern. The Court cannot blind its eyes to the indisputable fact that if the result of the plebiscite in the Northern Cameroons had not favoured joining the Federation of Nigeria, it would have favoured joining the Republic of Cameroon. No third choice was presented in the questions framed by the General Assembly and no other alternative was contemporaneously discussed.

The Republic of Cameroon, as a Member of the United Nations as from 20 September 1960, had a right to apply to the Court and by the filing of the Application of 30 May 1961 the Court was seised. This procedural right to apply to the Court, where, whatever the outcome, all aspects of a matter can be discussed in the objective atmosphere of a court of justice, is by no means insubstantial. The filing of an application instituting procedures, however, does not prejudice the action which the Court may take to deal with the case.

In its Judgment of 18 November 1953 on the Preliminary Objection in the *Nottebohm* case (*I.C.J. Reports 1953*, p. 122), the Court had occasion to deal at some length with the nature of seisin and the consequences of seising the Court. As this Court said in that Judgment: "the seising of the Court is one thing, the administration of justice is another." It is the act of the Applicant which seises the Court but even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.

In the *Free Zones* case, the Permanent Court referred to three different

considerations which would lead it to decline to give judgment on questions posed by the parties. These were raised by the Court *proprio motu*. In the Order of 19 August 1929 (P.C.I.J., Series A, No. 22, p. 15), the Court in the first place said that—

“the Court cannot as a general rule be compelled to choose between constructions [of a treaty] determined beforehand none of which may correspond to the opinion at which it may arrive . . .”

In the second place, in its Judgment of 7 June 1932 in the same case (P.C.I.J., Series A/B, No. 46, p. 161) the Court said:

“After mature consideration, the Court maintains its opinion that it would be incompatible with the Statute, and with its position as a Court of Justice, to give a judgment which would be dependent for its validity on the subsequent approval of the Parties.”

Finally the Court went on to say (at p. 162), in regard to paragraph 2 of Article 2 of the Special Agreement which would have involved a decision by the Court on questions such as specific tariff exemptions to be established, that the task thus assigned to the Court by the parties was “unsuitable to the role of a Court of Justice.” Moreover, the “interplay of economic interests” posed questions—

“outside the sphere in which a Court of Justice, concerned with the application of rules of law, can help in the solution of disputes between two States.”

The Court may, of course, give advisory opinions—not at the request of a State but at the request of a duly authorized organ or agency of the United Nations. But both the Permanent Court of International Justice and this Court have emphasized the fact that the Court’s authority to give advisory opinions must be exercised as a judicial function. Both Courts have had occasion to make pronouncements concerning requests for advisory opinions, which are equally applicable to the proper role of the Court in disposing of contested cases; in both situations, the Court is exercising a judicial function. That function is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a concrete case. Nevertheless, it is always a matter for the determination of the Court whether its judicial functions are involved. This Court, like the Permanent Court of International Justice, has always been guided by the principle which the latter stated in the case concerning the *Status of Eastern Carelia* on 23 July 1923:

“The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.” (P.C.I.J., Series B, No. 5, p. 29.)

In the *Haya de la Torre* case (*I.C.J. Reports* 1951, pp. 78–79), the Court noted that both parties sought from the Court a decision “as to the manner in which the asylum should be terminated.” It ordered that the asylum

should terminate but refused to indicate means to be employed to give effect to its order. The Court said:

"The interrogative form in which they have formulated their Submissions shows that they desire that the Court should make a choice amongst the various courses by which the asylum may be terminated. But these courses are conditioned by facts and by possibilities which, to a very large extent, the Parties are alone in a position to appreciate. A choice amongst them could not be based on legal considerations, but only on considerations of practicability or of political expediency; it is not part of the Court's judicial function to make such a choice."

To determine whether the adjudication sought by the Applicant is one which the Court's judicial function permits it to give, the Court must take into account certain facts in the present case.

The Applicant's explanations of what it does and does not ask the Court to decide, are variously formulated in its written and oral pleadings. The Court believes that the clearest explanation is to be found in the Applicant's Observations and Submissions as follows:

"When a State brings an action before the Court on the basis of a provision of the nature of Article 19 of the Trusteeship Agreement for the Cameroons under British administration, it may no doubt in certain cases, in addition to seeking a finding that a violation of the Trusteeship Agreement has been committed, ask the Court to declare that the administering Power is under an obligation to put an end to that violation. Thus, in the *South West Africa* cases, Ethiopia and Liberia in their submissions asked the Court both for a finding of certain violations (the policy of apartheid, failure to render annual reports, failure to transmit petitions, etc.) and for a declaration that South Africa is under an obligation to bring these violations to an end. But this can only be so when what is involved is what might be called a 'continuing violation' capable of being stopped pursuant to the Court's Judgment. When, on the other hand, the breach of the agreement has been finally consummated and it is physically impossible to undo the past, the Applicant State is no longer in a position to ask the Court for more than a finding, with force of *res judicata*, that the Trusteeship Agreement has not been respected by the administering Power.

In the case in point the violations referred to have been finally consummated, and the Republic of Cameroon cannot ask for a *restitutio in integrum* having the effect of non-occurrence of the union with Nigeria and non-division of the Territory, or fulfillment of the objectives laid down in Article 6 of the Agreement, or observance of Resolution 1473; it can only ask for a finding by the Court of the breaches of the Trusteeship Agreement committed by the Administering Authority."

In the course of his oral argument, Counsel for the Applicant said:

"The Republic of Cameroon considers in fact that, by administering the Northern Cameroons as it did, the Administering Authority created such conditions that the Trusteeship led to the attachment of the northern part of the Cameroons to a State other than the Republic of Cameroon."

In the Cameroon White Book already mentioned, it is said that "failure to separate the administrations of the two territories destroyed an essential

guarantee of impartiality and effectively sabotaged the plebiscite." The White Book continued by saying: "The only acceptable solution to avoid a monstrous injustice . . . is to declare the plebiscite . . . null and void . . ."

The injustice alleged seems clearly enough to have been "the attachment of the northern part of the Cameroons to a State other than the Republic of Cameroon."

But the Court is not asked to redress the alleged injustice; it is not asked to detach territory from Nigeria; it is not asked to restore to the Republic of Cameroon peoples or territories claimed to have been lost; it is not asked to award reparation of any kind.

It was not to this Court but to the General Assembly of the United Nations that the Republic of Cameroon directed the argument and the pleas for a declaration that the plebiscite was null and void. In paragraphs numbered 2 and 3 of resolution 1608 (XV), the General Assembly rejected the Cameroon plea. Whatever the motivation of the General Assembly in reaching the conclusions contained in those paragraphs, whether or not it was acting wholly on the political plane and without the Court finding it necessary to consider here whether or not the General Assembly based its action on a correct interpretation of the Trusteeship Agreement, there is no doubt—and indeed no controversy—that the resolution had definitive legal effect. The plebiscite was not declared null and void but, on the contrary, its results were endorsed and the General Assembly decided that the Trusteeship Agreement should be terminated with respect to the Northern Cameroons on 1 June 1961. In the event, the termination of the Trusteeship Agreement was a legal effect of the conclusions in paragraphs 2 and 3 of resolution 1608 (XV). The Applicant here has expressly said it does not ask the Court to revise or to reverse those conclusions of the General Assembly or those decisions as such, and it is not therefore necessary to consider whether the Court could exercise such an authority. But the Applicant does ask the Court to appreciate certain facts and to reach conclusions on those facts at variance with the conclusions stated by the General Assembly in resolution 1608 (XV).

If the Court were to decide that it can deal with the case on the merits, and if thereafter, following argument on the merits, the Court decided, *inter alia*, that the establishment and the maintenance of the administrative union between the Northern Cameroons and Nigeria was a violation of the Trusteeship Agreement, it would still remain true that the General Assembly, acting within its acknowledged competence, was not persuaded that either the administrative union, or other alleged factors, invalidated the plebiscite as a free expression of the will of the people. Since the Court has not, in the Applicant's submissions, been asked to review that conclusion of the General Assembly, a decision by the Court, for example that the Administering Authority had violated the Trusteeship Agreement, would not establish a causal connection between that violation and the result of the plebiscite.

Moreover, the termination of the Trusteeship Agreement and the ensuing joinder of the Northern Cameroons to the Federation of Nigeria were

not the acts of the United Kingdom but the result of actions of the General Assembly, actions to which the United Kingdom assented. Counsel for the Republic of Cameroon admitted that it was the United Nations which terminated the Trusteeship. He said:

"Cameroon is not asking the Court to criticize the United Nations; Cameroon is not asking the Court to say that the United Nations was wrong in terminating the Trusteeship; Cameroon is not asking the Court to pronounce the annulment of resolution 1608. The Court, of course, would not be competent to do that . . ."

The administrative union, as established during the Trusteeship, whether legally or illegally, no longer exists. The Republic of Cameroon, however, contends that its interest in knowing whether that union was a violation of the Trusteeship Agreement, is not a merely academic one. It in fact contends that there was a causal connection between the allegedly illegal administrative union and the alleged invalidity of the plebiscite. Counsel for the Republic of Cameroon made this contention clear in a passage already quoted.

But the Applicant has stated that it does not ask the Court to invalidate the plebiscite; indeed as noted, it recognizes the Court could not do so. It has not asked the Court to find any causal connection between the alleged maladministration and the result of the vote favouring union with the Federation of Nigeria. As a result, the Court is relegated to an issue remote from reality.

If the Court were to proceed and were to hold that the Applicant's contentions were all sound on the merits, it would still be impossible for the Court to render a judgment capable of effective application. The role of the Court is not the same as that of the General Assembly. The decisions of the General Assembly would not be reversed by the judgment of the Court. The Trusteeship Agreement would not be revived and given new life by the judgment. The former Trust Territory of the Northern Cameroons would not be joined to the Republic of Cameroon. The union of that territory with the Federation of Nigeria would not be invalidated. The United Kingdom would have no right or authority to take any action with a view to satisfying the underlying desires of the Republic of Cameroon. In accordance with Article 59 of the Statute, the judgment would not be binding on Nigeria, or on any other State, or on any organ of the United Nations. These truths are not controverted by the Applicant.

The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequences in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function.

The Trusteeship Agreement with respect to the Northern Cameroons

having been validly terminated by resolution 1608 (XV), the Trust itself disappeared; the United Kingdom ceased to have the rights and duties of a trustee with respect to the Cameroons; and what was formerly the Trust Territory of the Northern Cameroons has joined the independent Federation of Nigeria and is now a part of that State.

Looking at the situation brought about by the termination of the Trusteeship Agreement from the point of view of a Member of the United Nations, other than the Administering Authority itself, it is clear that any rights which may have been granted by the Articles of the Trusteeship Agreement to other Members of the United Nations or their nationals came to an end. That is not to say that, for example, property rights which might have been obtained in accordance with certain Articles of the Trusteeship Agreement and which might have vested before the termination of the Agreement, would have been divested by the termination. It is the fact, however, that after 1 June 1961 when the Trust over the Northern Cameroons ceased to exist, no other Member of the United Nations could thereafter claim any of the rights or privileges in the Northern Cameroons which might have been originally granted by the Trusteeship Agreement. No such claim could be made on the United Kingdom which as trustee was *functus officio* and divested of all power and authority and responsibility in the area. No such claim could be made on Nigeria, which now has sovereignty over the territory, since Nigeria was not a party to the Trusteeship Agreement and never had any obligations under it. Nor is it apparent how such a claim could be made against the United Nations itself. Moreover, pursuant to Article 59 of the Statute a judgment of the Court in this case would bind only the two Parties.

The claim of the Republic of Cameroon is solely for a finding of a breach of the law. No further action is asked of the Court or can be added. Normally when the Court pronounces a judicial condemnation there is room for the application of Article 94 of the Charter. That is not the case here. Normally under the International Trusteeship System such a finding, if the Court were competent to make it, might lead the General Assembly to do whatever it thought useful or desirable in the light of the judgment pronounced as between a Member of the United Nations and an Administering Authority for the territory in question. In the present case, however, the General Assembly is no longer competent pursuant to the termination of the Trusteeship as a result of resolution 1608 (XV).

Nevertheless, it may be contended that if during the life of the Trusteeship the Trustee was responsible for some act in violation of the terms of the Trusteeship Agreement which resulted in damage to another Member of the United Nations or to one of its nationals, a claim for reparation would not be liquidated by the termination of the Trust. Of course Article 19 of the Agreement which provided for the jurisdiction of the Court in the cases which it covered, was terminated with all other Articles of the Agreement, so that after 1 June 1961 it could not be invoked as a basis for the Court's jurisdiction. The Application in the instant case was filed before

1 June 1961 but it does not include, and the Applicant has expressly stated that it does not make, any claim for reparation.

The Court is aware of the fact that the arguments of both Parties made frequent references to the Judgment of the Court of 21 December 1962 in the *South West Africa* cases. The arguments dealt with the question whether conclusions arrived at in the consideration of the Mandates System under the League of Nations were applicable to the Trusteeship System under the United Nations, and whether, and if so to what extent, Article 19 of the Trusteeship Agreement of 1946 for the Cameroons was to be given in certain respects an interpretation similar to that given to Article 7 of the Mandate for South West Africa.

The Court does not find it necessary to pronounce an opinion on these points which, in so far as concerns the operation or administration of the Trusteeship for the Northern Cameroons, can have only an academic interest since that Trusteeship is no longer in existence, and no determination reached by the Court could be given effect to by the former Administering Authority.

Nevertheless, for the purpose of testing certain contentions in this case, the Court will consider what conclusions would be reached if it were common ground that Article 19 of the Trusteeship Agreement of 13 December 1946 for the Cameroons under British Administration was designed to provide a form of judicial protection in the particular interest of the inhabitants of the territory and in the general interest in the successful functioning of the International Trusteeship System; that this judicial protection was provided and existed side by side with the various provisions for administrative supervision and control through the Trusteeship Council, its visiting missions, hearing of petitioners, and action by the General Assembly; that any Member of the United Nations had a right to invoke this judicial protection and specifically that the Republic of Cameroon had the right to invoke it by filing an application in this Court. It would then follow that in filing its Application on 30 May 1961, the Republic of Cameroon exercised a procedural right which appertained to it—a procedural right which was to be exercised in the general interest, whatever may have been the material individual interest of the Republic of Cameroon. But within two days after the filing of the Application the substantive interest which that procedural right would have protected, disappeared with the termination of the Trusteeship Agreement with respect to the Northern Cameroons. After 1 June 1961 there was no "trust territory" and no inhabitants for whose protection the trust functions could be exercised. It must be assumed that the General Assembly was mindful of the general interest when, acting within its competence, it decided on the termination of the Trust with respect to the Northern Cameroons and the joinder of the Northern Cameroons to the Federation of Nigeria. Thereafter, and as a result of this decision of the General Assembly, the whole system of administrative supervision came to an end. Thereafter the United Nations could not, under the authority of Article 87

of the Charter, send into the Territory a visiting mission to report on prevailing conditions. The Trusteeship Council could no longer examine petitions from inhabitants of the Territory, as indeed it decided at its 1178th meeting on 11 January 1962. The General Assembly could no longer make recommendations based upon its functions under Chapters XII and XIII of the Charter.

The Court cannot agree that under these circumstances the judicial protection claimed by the Applicant to have existed under the Trusteeship System, would have alone survived when all of the concomitant elements to which it was related had disappeared. Accordingly, the Republic of Cameroon would not have had a right after 1 June 1961, when the Trusteeship Agreement was terminated and the Trust itself came to an end, to ask the Court to adjudicate at this stage upon questions affecting the rights of the inhabitants of the former Trust Territory and the general interest in the successful functioning of the Trusteeship System.

Throughout these proceedings the contention of the Republic of Cameroon has been that all it seeks is a declaratory judgment of the Court that prior to the termination of the Trusteeship Agreement with respect to the Northern Cameroons, the United Kingdom had breached the provisions of the Agreement, and that, if its Application were admissible and the Court had jurisdiction to proceed to the merits, such a declaratory judgment is not only one the Court could make but one that it should make.

That the Court may, in an appropriate case, make a declaratory judgment is indisputable. The Court has, however, already indicated that even if, when seised of an Application, the Court finds that it has jurisdiction, it is not obliged to exercise it in all cases. If the Court is satisfied, whatever the nature of the relief claimed, that to adjudicate on the merits of an Application would be inconsistent with its judicial function, it should refuse to do so.

Moreover the Court observes that if in a declaratory judgment it expounds a rule of customary law or interprets a treaty which remains in force, its judgment has a continuing applicability. But in this case there is a dispute about the interpretation and application of a treaty—the Trusteeship Agreement—which has now been terminated, is no longer in force, and there can be no opportunity for a future act of interpretation or application of that treaty in accordance with any judgment the Court might render.

In its *Interpretation of Judgments Nos. 7 and 8 (the Chorzów Factory)* (P.C.I.J., Series A, No. 13, p. 20) the Court said:

“The Court’s Judgment No. 7 is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned.”

The Applicant, however, seeks to minimize the importance of the forward reach of a judgment of the Court. It has maintained that it is seeking merely a statement of the law which would "constitute a vital pronouncement for the people of Cameroon." It has indeed asked the Court not to consider the aftermath of its judgment and in this connection it has cited the judgment of the Court in the *Haya de la Torre* case, quoted above. But there is a difference between the Court's considering the manner of compliance with its Judgment, or the likelihood of compliance, and, on the other hand, considering whether the judgment, if rendered, would be susceptible of any compliance or execution whatever, at any time in the future.

As the Court said in the *Haya de la Torre* case, it cannot concern itself with the choice among various practical steps which a State may take to comply with a judgment. It may also be agreed, as Counsel for the Applicant suggested, that after a judgment is rendered, the use which the successful party makes of the judgment is a matter which lies on the political and not on the judicial plane. But it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved. Whenever the Court adjudicates on the merits of a dispute, one or the other party, or both parties, as a factual matter, are in a position to take some retroactive or prospective action or avoidance of action, which would constitute a compliance with the Court's judgment or a defiance thereof. That is not the situation here.

The Court must discharge the duty to which it has already called attention—the duty to safeguard the judicial function. Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties.

The answer to the question whether the judicial function is engaged may, in certain cases where the issue is raised, need to wait upon an examination of the merits. In the present case, however, it is already evident that it cannot be engaged. No purpose accordingly would be served by undertaking an examination of the merits in the case for the purpose of reaching a decision which, in the light of the circumstances to which the Court has already called attention, ineluctably must be made.

For the reasons which it has given, the Court has not felt called upon to pass expressly upon the several submissions of the Respondent, in the form in which they have been cast. The Court finds that the proper limits of its judicial function do not permit it to entertain the claims submitted to it in the Application of which it has been seised, with a view to a decision having the authority of *res judicata* between the Republic of Cameroon and the United Kingdom. Any judgment which the Court might pronounce would be without object.

For these reasons,

THE COURT,

by ten votes to five,⁶

finds that it cannot adjudicate upon the merits of the claim of the Federal Republic of Cameroon.

Act of state doctrine—inapplicable to Nazi confiscation of property under anti-Semitic laws

IN THE MATTER OF THE CLAIM OF HERBERT BROWER, CLAIM NO. PO-1246. Decision PO-1634.

U. S. Foreign Claims Settlement Commission, Sept. 25, 1963.

Edward D. Re, Chairman; Theodore Jaffe, Commissioner.

Claimant, a national of the United States since naturalization on May 11, 1943, brought his claim for nationalization of extensive real and personal property interests in the city of Wroclaw (formerly Breslau), pursuant to the Claims Agreement of July 16, 1960, between the United States and Poland, T.I.A.S., No. 4545.¹ The Commission found that a large part of the property was either totally destroyed as a result of military action during World War II or otherwise disposed of by action of the German Government. As to this property, the Commission said:

The Polish Claims Agreement of 1960 provides for the payment of compensation for property which was nationalized, appropriated or otherwise taken by the Government of Poland. It does not settle or discharge claims based upon damage to or destruction of property during World War II, or the taking of property by forces occupying Poland during the war. (See *Claim of Przybylinski*, No. PO-1358.) Accordingly, the portion of the claim based upon the business enterprise, the personal property, and the improvements on the land is denied.

As to two other properties in Wroclaw (a city in that part of Poland which was part of Germany prior to the end of World War II), the evidence showed that prior to World War II they were owned by claimant's father; in 1940 these properties were confiscated by the Nazi Government of Germany pursuant to anti-Jewish laws, and transferred to third persons, this confiscation and transfer being for reasons of racial and political discrimination. In 1946 the Polish Government provided for the taking of real property considered as abandoned on the expiration of ten years from the end of the year in which World War II terminated (January 1, 1956). The record showed that claimant's father died in 1942 in a German concentration camp, and that claimant and his sister (not claiming before

⁶ The negative votes were apparently cast by Judges Koretsky and Spiropoulos, each of whom made a short statement of opposition, and by Judges Badawi and Bustamante y Rivero and Judge *ad hoc* Beb a Don, each of whom wrote dissenting opinions.

Judge Jessup made a short declaration agreeing with the reasoning of the majority but calling attention to the validity in the instant case of his separate opinion in the *South West Africa* cases. Judges Wellington Koo, Sir Percy Spender, Sir Gerald Fitzmaurice, and Morelli gave separate opinions concurring in the result.

¹ 55 A.J.I.L. 540 (1961).

this Commission) would have inherited the property in equal shares but for the Nazi decree. "In the absence of evidence to the contrary," the Commission found claimant's property had been taken on January 1, 1956, and that its value at the time of taking was \$3,500. The Commission found claimant entitled to an award of \$1,750 for his half interest in the property, plus 6% interest from the date of the loss to July 16, 1950 (the date of the agreement), or \$476.88.

In arriving at this conclusion, the Commission said in part:

Claimant contends that the prior Nazi decree operating to divest the former record owner of title is in fact invalid, that the property descended to claimant and his sister, and that the property was therefore actually taken pursuant to the subsequent Polish decree on January 1, 1956.

The issue thus presented is whether the Commission shall give effect to the confiscation and transfer of property under duress by the Nazi Government of Germany under the anti-Semitic laws of that time. If such transfer were regarded by the Commission as valid, or if the Commission were precluded from reviewing the decree, the legal effect would be to divest the former owner of title and render his claim (or that of his successors in interest) before the Foreign Claims Settlement Commission not compensable under the Polish Claims Agreement of 1960.

The International Claims Settlement Act of 1949, as amended, specifically provides that "In the decision of claims under this title the Commission shall apply the following in the following order: (1) The provisions of the applicable claims agreement as provided in this subsection; and (2) The applicable principles of international law, justice, and equity." (International Claims Settlement Act of 1949, as amended, 64 Stat. 12 (1950), 22 U.S.C. § 1623(a) (1958).) Since the Polish Claims Agreement of 1960 is silent as to the issue at hand, the Commission is bound to apply the "applicable principles of international law, justice, and equity."

A discussion of these principles may begin with the case of *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246 (2d Cir. 1947),² cert. denied, 332 U. S. 772 (1947), decided by the Circuit Court of Appeals for the Second Circuit in 1947. In the *Bernstein* case, the plaintiff, Bernstein, a German national of Jewish faith, was a victim of Nazi governmental persecution. He was taken forcibly into custody by "Nazi officials in Germany," and while imprisoned, "by means of duress . . ." was compelled to execute documents which purported to transfer all the shares of the "Arnold Bernstein Line" to a German "trustee." Defendant, a Belgian corporation, "acquired" the vessel "Gandia" from the Nazi "trustee." Subsequently, the vessel was sunk and insurance amounting to £100,000 had been paid for the loss. Plaintiff brought action for damages for conversion of the vessel, for money had and received for its earnings, and for the proceeds of the insurance paid for its loss at sea. The action, originally brought in the state court, was removed to the U. S. District Court for the Southern District of New York. From an order quashing the writ of attachment of the insurance fund being

² Digested in 42 A.J.I. L. 217 (1948).

held for defendant's account, and dismissing the complaint, plaintiff appealed to the Circuit Court of Appeals.

Applying the law of New York State, the Circuit Court of Appeals affirmed the holding of the district court in a two-to-one decision. In so doing, that court gave expression to the classic "act of state" doctrine as follows:

We have repeatedly declared, for over a period of at least thirty years, that *a court of the forum will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such.* (*Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246, 249 (2d Cir. 1947) (emphasis added).)

By the application of that doctrine, judicial review of the legality of the acts of the agents of the defunct German government was thereby precluded.

This holding was widely criticized (see, e.g., House, *The Law Gone Awry: Bernstein v. Van Heyghen Freres*, 37 *Calif. L. Rev.* 38 (1949), and discussion in Re, "Confiscation by the Defunct Nazi Regime" in *Foreign Confiscations in Anglo-American Law* 146 (1951)). Nevertheless, the court had made its position clear:

The difficulty lies, not in any defect in the law . . . as to conflict of laws, but because of that other doctrine which we have mentioned; i.e., that *no court will exercise its jurisdiction to adjudicate the validity of the official acts of another state.* (*Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246, 249 (2d Cir. 1947) (emphasis added).)

That decision, adhering strictly to the "act of state" doctrine, forcefully demonstrated the injustice that may result from the application of this doctrine in spite of an overwhelmingly clear public policy demanding its non-application to the acts of the particular government.

The case, however, contained an important element. Although the court accepted the principle of non-review, it was of the opinion that the principle would be inapplicable *if there had been a determination by the Executive to that effect.* (*Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246, 249 (2d Cir. 1947).) That is, the court regarded the principle of non-review as a judicial limitation from which the court might have been freed by a declaration or determination by the Executive that the principle should not apply in a given situation.

However, after a consideration of the Executive policy as gleaned from the materials then available, the court concluded that there was no positive determination by the Executive removing the restraint of non-review. Consequently, the order of the district court was affirmed.

Subsequently, the plaintiff Bernstein, in another action, *Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 76 F. Supp. 335 (S.D.N.Y. 1948),³ *aff'd in part, modified in part*, 173 F. 2d 71 (2d Cir.

³ Digested in 42 A.J.I.L. 726 (1948).

1949), calculated to recover other assets of which he had been despoiled in a similar manner, amended his complaint to omit certain details. This second *Bernstein* case was decided on different grounds and did not discuss the principle of judicial non-review. A subsequent appeal, however, brought the same issue once again before the United States Court of Appeals for the Second Circuit, *Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (2d Cir. 1954).⁴

This time, however, that court noted that a "supervening expression of Executive policy" now existed. The court cited a State Department Press Release (No. 296 of April 27, 1949) entitled "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers." The court went on to quote the substance of the release as follows:

"As a matter of general interest, the Department publishes herewith a copy of a letter of April 13, 1949 from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for the plaintiff in Civil Action No. 31-555 in the United States District Court for the Southern District of New York.

"The letter repeats this Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; states that it is this Government's policy to undo the forced transfers and reconstitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and sets forth *that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.*" (*Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375, 376 (2d Cir. 1954) (emphasis added).)

The court further quoted significant excerpts from that letter:

"1. This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls . . .

"3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." (*Ibid.*)

"In view of this supervening expression of Executive Policy," concluded the court, "we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question. See 173 F. 2d at pages 75-76." (*Ibid.*)

In spite of the ultimate private settlement of the litigation, the *Bernstein* cases nevertheless represent the most significant development in the evolution of the principle that the courts of one country will not sit in judgment

⁴ Digested 48 *ibid.* 499 (1954).

on the acts of government of another. (*Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246 (2d Cir. 1947), *cert. denied*, 332 U. S. 772 (1947); *Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 76 F. Supp. 335 (S.D.N.Y. 1948), *aff'd in part, modified in part*, 173 F. 2d 71 (2d Cir. 1949); *Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 117 F. Supp. 898 (S.D.N.Y. 1953); *Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (2d Cir. 1954).)

The point of these cases is to the effect that the principle normally does apply; however, the presumption of its applicability may be rebutted by a determination by the Executive to that effect. (See materials cited in *Re, Judicial Development in Sovereign Immunity and Foreign Confiscations*, 1 *New York Law Forum*, 160, 197 *et seq.* (1955).) This view, as developed in the *Bernstein* cases, has since been enunciated in several other cases concerning confiscations and related areas, see *Banco Nacional de Cuba v. Sabbatino*, 307 F. 2d 845 (2d Cir. 1962),⁵ *cert. granted*, 372 U. S. 905 (1963); *Rodriguez v. Pan American Life Ins. Co.*, 311 F. 2d 429 (5th Cir. 1962);⁶ *Compania Ron Bacardi, S.A. v. Bank of Nova Scotia*, 193 F. Supp. 814 (S.D.N.Y. 1961); *Ioannou v. New York*, 83 S. Ct. 6 (1962).⁷ But see *Pons v. Republic of Cuba*, 294 F. 2d 925 (D.C. Cir. 1961),⁸ *cert. denied*, 368 U. S. 960 (1962). Cf. *Latvian State Cargo & Pass. S. S. Line v. McGrath*, 188 F. 2d 1000 (D. C. Cir. 1951);⁹ *Wyman v. United States*, 166 F. Supp. 766 (U. S. Ct. Cl. 1958); *Rozenfeld v. Commissioner*, 181 F. 2d 388 (2d Cir. 1950); *Mayer v. United States*, 111 F. Supp. 251 (126 Ct. Cl. 1, 1953).

In *Banco Nacional de Cuba v. Sabbatino*, for instance, the Court of Appeals for the Second Circuit summed up the present state of the law concerning the recognition of Nazi confiscatory decrees as follows:

However, when the executive branch of our Government announces that it does not oppose inquiry by American courts into the legality of foreign acts, an exception to the judicial abnegation required by the act of state doctrine has arisen and has been recognized both in this circuit and elsewhere. In *Bernstein v. N. V. Nederlandsche Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375 (2d Cir. 1954) (*per curiam*), when we received word from the State Department that it was State Department policy to permit American courts to pass on the validity of acts done by Nazi officials, our court rescinded its earlier mandate by which, based upon the act of state doctrine, we had prevented the district court from questioning the validity of the acts of the German Nazi government. See 173 F. 2d 71 (2d Cir. 1949). See also *Bernstein v. Van Heyghen Freres S. A.*, 163 F. 2d 246, 252 (2d Cir.), *cert. denied*, 332 U. S. 772, 68 S. Ct. 88, 92 L. Ed. 357 (1947); Restatement, Foreign Relations Law of the United States § 44 (Proposed Official Draft, 1962); *Kane v. National Institute of Agrarian Reform* (Fla. Cir. Ct.), 18 Fla. Supp. 116 [No. 61 L 730, June 8, 1961]; Association of the Bar of the City of New York,

⁵ 56 A.J.L.L. 1085 (1962).

⁶ 57 *ibid.* 439 (1963).

⁷ Digested *ibid.* 438.

⁸ Digested 56 A.J.L.L. 215 (1962).

⁹ Digested 45 *ibid.* 796 (1951).

Committee on International Law, Report, A Reconsideration of the Act of State Doctrine in United States Courts 13 (May 1959) . . . (*Banco Nacional de Cuba v. Sabbatino*, 307 F. 2d 845, 857-58 (2d Cir. 1962), cert. granted, 372 U. S. 905 (1963). See also *Rodriguez v. Pan American Life Ins. Co.*, 311 F. 2d 429, 435 (5th Cir. 1962).)

In the light of the foregoing, the Foreign Claims Settlement Commission will follow the clear and unequivocal expression of Executive policy with regard to Nazi confiscations. (See Letter of April 13, 1949 from Jack B. Tate, Acting Legal Advisor, Department of State, to the Attorneys for plaintiff in Civil Action No. 31-555, United States District Court for the Southern District of New York; Department of State Press Release No. 296 (April 27, 1949), cited in *Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 375, 376 (2d Cir. 1954).) The Commission further notes that the United States Court of Claims, in a related case, has specifically said that "This executive policy . . . relates to undoing forced transfers of property and restoring identifiable property which has been transferred under such Nazi decrees." (*Wyman v. United States*, 166 F. Supp. 766, 770 (U. S. Ct. Cl. 1958). See also *Mayer v. United States*, 111 F. Supp. 251 (126 Ct. Cl. 1, 1953); *Rozenfeld v. Commissioner*, 181 F. 2d 388 (2d Cir. 1950).)

Thus relieved of the restraint of the so-called "act of state" doctrine, the Commission may proceed to give effect to the governing principles of substantive international law. In so doing, the Commission will apply the international standard of justice to determine if the act of the foreign government constitutes a denial of justice as that standard is understood in international law. (See 5 Hackworth, *International Law* 522, 537-538 (1943); Comment, Harvard Research in International Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Person and Property of Foreigners*, 23 Am. J. Int'l L. Spec. Supp. 154 (1929); Lissitzyn, *The Meaning of the Term Denial of Justice in International Law*, 30 Am. J. Int'l L. 632 (1936).) . . .

This Commission has consistently regarded as settled principles of international law, justice, and equity, that private property may not be taken without the payment of prompt, adequate, and effective compensation, and that no person can be deprived of his property solely on the ground of his nationality, religion, race, or creed. (Cf. *Czechoslovak Confiscatory Decree Case* (American Zone), Court of Appeals of Nuremberg, Germany, 1949, 1949 Ann. Dig. 19 (No. 10); *Confiscation of Property of Sudeten Germans Case*, Germany, Amtsgericht of Dingolfing (1948), 1948 Ann. Dig. 24 (No. 12)). The Commission therefore concurs in the observations set forth in *Anglo-Iranian Oil Co., Ltd., v. S.U.P.O.R. Co., Italy*, Civil Ct. of Rome (1954),¹⁰ 1955 Int'l L. Rep. 23, 40:

. . . discriminatory laws, enacted out of hatred, against aliens or against persons of any particular race or category or against persons belonging to specific social or political groups cannot be applied . . .

¹⁰ Digested 49 A.J.I.L. 259 (1955).

because they run counter to the initially accepted principle of the equality of individuals before the law.

Such principles, developed by international doctrine, are generally accepted by the jurisprudence of the various countries.

The Commission, applying the principles of international law, justice, and equity to the facts of the present claim, therefore finds that the acts of the defunct Nazi regime with regard to this property constituted a denial of justice and a violation of the international standard of justice as that standard is understood in international law. Consequently, the Commission holds that the Nazi decree in question was invalid and ineffective to transfer or divest title from claimant's father; and that after World War II, claimant in fact owned a one-half interest in the property now consisting of two building lots in Wroclaw . . .

UNITED STATES FEDERAL AND STATE COURTS
PUBLIC INTERNATIONAL LAW CASES

*Cuban claims—refusal to give extraterritorial effect to Cuban decrees
—no Cuban legislative jurisdiction over Cuban refugees or their
insurance policies with U. S. companies*

BLANCO ET AL. v. PAN AMERICAN LIFE INSURANCE COMPANY ET AL.
221 F. Supp. 219.

U. S. Dist. Ct., S.D., Florida, July 15, 1963.

Plaintiffs, former nationals of Cuba and at the time of suit refugees resident in Florida, brought actions for damages for breaches of certain insurance policies and for declaratory judgments that such policies purchased by them through the defendants' branches in Cuba were valid and binding. All of the various applications for the policies were made in Cuba in Spanish and sent to the American home offices of the respective defendants in Texas and Louisiana, where the policies were issued, although they were later notarized in Cuba prior to delivery to the plaintiffs.

Some policies provided for payments in dollars, others for payments in pesos, but all contained stipulations that the places of payments by or to the plaintiffs were to be the U. S. home offices of the respective companies, except for one policy where the place of such payments was to be Havana. The total assets of the insurance companies, not just their assets in Cuba, were pledged to the payment of the policies.

The insurance companies defended on the grounds that they were excused from performance under the policies by virtue of Cuban decrees: (1) prohibiting payments to Cuban nationals outside of Cuba or in Cuba in any currency other than the peso; and (2) expropriating the insurance companies' assets in Cuba and substituting the Cuban state as the obligor under the insurance policies.¹

The court held that the defense posed was grounded on Federal statutes and treaty, international law and Cuban law. Although the court was sitting in diversity jurisdiction, it was interpreting Federal questions and,

¹ For earlier decision in U. S. Ct. of App., 5th Cir., see 57 A.J.I.L. 669 (1963).

accordingly, was not bound, under the rule of *Erie R. Co. v. Tompkins*, 304 U. S. 64 (U. S. Sup. Ct., 1938), by either other State decisions to which the Florida choice-of-law rules would direct it (see *Theye y Ajuria v. Pan American Life Insurance Company*, 154 So. 2d 450 (La. Ct. of App., 4th Cir., June 14, 1963)),² or by Florida decisions themselves (see *Pan American Life Insurance Co. v. Recio*, 154 So. 2d 197 (Fla. Ct. App., 3d Dist., May 7, 1963), digested below, p. 516).

The court held that the Cuban decrees of expropriation and nationalization were not only confiscatory but also discriminatory and were therefore in violation of international law and, as a result, the court was not required to give effect to them under the act of state doctrine and that they had no extraterritorial effect.

The court also concluded that neither the parties nor the subject matter of the action was subject to Cuban legislative jurisdiction. As to the insurance companies, the Cuban assets expropriated bore no necessary relationship to the policies in question and the companies themselves were domiciled in the United States, not in Cuba. As to the individuals, since they were refugees from the present government of Cuba, the fact of their Cuban nationality of origin did not give that government any *in personam* jurisdiction over them. On this latter point the court stated:

. . . The political refugee is a notable twentieth century contribution to the category of the *res nullius*. . . . As far back as Blackstone it has been recognized that citizenship is not comprised of birth or by naturalization alone. There must also be "leageance" to the sovereign Allegiance is the obligation of fidelity and obedience which the individual owes his government in return for the protection which he receives. It may be renounced by an open and distinct act. . . . Certainly, the flight of Miami's Cuban refugees from Castro's Cuba, their acceptance by the United States and our encouragement and support through the agencies of our executive and legislative branches is evidence of their renunciation of the present sovereignty of Cuba. . . . These former political citizens of a Cuba that has ceased to be (with some inchoate allegiance to a Cuba they hope may come into existence sometime in the future) are at present political citizens of nowhere. They are, however, civil citizens of Florida based on their domicile here. . . .

Though the defense raised by the insurance companies for non-performance was a matter of Federal and international law, the question of whether there had been a breach of the policies involved and, if so, what remedies were available, was governed by State law, including State choice-of-law rules. Accordingly, the court, citing the *Restatement* and applying the principle of protecting the insured "from the greater power of insurers by means of the choice-of-law rule," held that, as to this issue, the policies were governed by the laws of Texas and Louisiana, respectively, where the issuing companies were domiciled and the policies were to be performed, a result consistent with that reached by the Florida State Court in the *Recio* case by applying a place of performance test.

² 58 A.J.I.L. 190 (1964).

The court further held that the choice-of-law question was not necessarily determinative of the result since, under both common and civil law, there was a breach of contract unless excused by the Cuban decree of expropriation and nationalization. This decree could not be deemed to apply to a Cuban refugee enforcing an executory contract in the forum of another jurisdiction according to the terms of an obligation existing prior to the passage of the decree.

The court granted the relief sought by the respective plaintiffs (relying in part, in the case of the one policy providing for payments in Havana, on the fact that no tender of payment had been made there).

NOTES

Diplomatic immunity—Russian U.N. employee accused of espionage not entitled to immunity or Supreme Court's original jurisdiction

A Russian national, First Secretary of the Ministry of Foreign Affairs of the U.S.S.R., entered the United States to work as an employee of the United Nations Secretariat. On his arrest on grounds of espionage, he claimed that he was entitled to diplomatic immunity and, in the alternative, that the United States Supreme Court had exclusive jurisdiction over his case.

The court held that since he was not an ambassador or public minister "authorized and received as such by the President" within the meaning of Section 252 of Title 22 U.S.C.A., he was not entitled to diplomatic immunity. Since he was merely an employee of the United Nations and not a representative of a Member thereof, the court further held that he was not entitled to the immunity provided by Article 105 of the United Nations Charter. Since, under Section 288d(b) of Title 22 U.S.C.A., the immunity granted to employees of the United Nations was limited to "acts performed by them in their official capacity and falling within their functions as such . . . employees . . .," the provisions of that subsection were of no avail to the defendant, having regard to the nature of the charge against him.

Since he did not possess diplomatic status, he could not come within the purview of Article 3, Section 2, Clause 2 of the United States Constitution giving the Supreme Court original and exclusive jurisdiction of cases affecting ambassadors, other public ministers and consuls. *United States v. Egorov*, 222 F. Supp. 106 (U. S. Dist. Ct., E.D.N.Y., Oct. 7, 1963).

Treaties of friendship, commerce and navigation—national treatment applicable only in like situations

On appeal from a judgment that the taxpayer was liable for the excise tax imposed by Section 4061 of the Internal Revenue Code of 1954 (26 U.S.C.A.) on sales of used cars manufactured in Germany and imported by the appellant taxpayer from Germany, the court rejected the argument that the imposition of the tax was a failure to accord "national treatment" to the products of Germany as required by Article XVI of the 1954 Treaty

of Friendship, Commerce and Navigation with Germany, 7 U. S. Treaties 1839, T.I.A.S., No. 3593.

The criterion of taxability is not the origin of the goods but whether they have been previously sold in the United States. Products of German origin and those of American origin are both taxed on the first sale in the United States. Since Article XVI of the treaty only requires equality of treatment for products that are "in like situations," it could not be invoked to preclude taxation of the vehicles. *Smith v. United States*, 319 F. 2d 776 (U. S. Ct. App., 5th Cir., July 3, 1963).

Status of Forces Agreements—double jeopardy—proceeding in Japanese Family Court no bar to subsequent prosecution under Uniform Code of Military Justice

Article XVII, paragraph 8, of the Status of Forces Agreement between Japan and the United States provides:

Where an accused has been tried in accordance with the provisions of this Article . . . by the . . . authorities of Japan and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offense within the territory of Japan by the authorities of the other State. . . .

The Court of Military Appeals held that juvenile proceedings in the Japanese Family Court did not constitute a "trial" within the meaning of Article XVII, paragraph 8, and, accordingly, subsequent prosecution under the Uniform Code of Military Justice for the same offense was not barred. Article XVII contemplates a proceeding directly to vindicate the penal law, whereas the juvenile proceeding as established in Japan is fundamentally civil, not criminal, in nature, its objective being the care and guidance of the juvenile, not punishment within the limits prescribed by the penal code. *United States v. Cadenhead*, 14 U.S.C.M.A. 271, 34 C.M.R. 51 (U. S. Ct. Mil. App., 1963).

International Claims Settlement Act—executive discretion

The Attorney General, who had vested the assets of the National Bank of Hungary, disallowed the debt claims of two New York banks brought under the International Claims Settlement Act, 69 Stat. 562, 22 U.S.C. § 1631g. The claimants, seeking judicial review of the determination, were granted summary judgment by the District Court. On appeal, vacating the lower court's decision and remanding the case for further proceedings, the court held that judicial review could only follow a determination by the Attorney General that Section 208(a) of the Act (which provides that "no debt claim shall be allowed under this Section—(1) if it is asserted against . . . Hungary . . . (including the government or any political subdivisions, agencies, or instrumentalities thereof) . . .") did not apply, and that consequently the Attorney General must be allowed to make this determination. *Kennedy v. Chemical Bank New York Trust*

Company, 319 F.2d 720 (U. S. Ct. App., D. C. Cir., July 16, 1963); cert. denied, 375 U. S. 965 (Jan. 6, 1964).

Walsh Act—inapplicable to grand jury investigation

An American citizen resident in the Philippines appealed from the judgment of the District Court holding him in contempt for failure to comply with a grand jury subpoena issued under the provisions of the Walsh Act, 28 U.S.C.A. § 1783 *et seq.* Reversing the judgment of the court below, the court found that, although as a matter of international law or Constitutional limitations the United States possesses the power inherent in sovereignty to require the return to the United States of a citizen who is abroad, whenever the public interest requires it, and to penalize him in case of refusal, that power must be exercised by Congress, and the District Court has no such power or jurisdiction unless it is expressly conferred by statute. Since the Walsh Act conferred power upon the District Courts to issue subpoenas to witnesses outside the United States only for the purpose of obtaining their testimony in a *criminal proceeding*, and a grand jury investigation is not such a proceeding within the meaning of the Walsh Act, the appellant could not be held in contempt. *United States v. Thompson*, 319 F.2d 665 (U. S. Ct. App., 2d Cir., June 10, 1963).

Judge Kaufman dissented on the ground that a grand jury investigation should be regarded as a "criminal proceeding." He regarded the majority's "restricted and unwarranted holding" as having dealt a "heavy blow" to the Federal grand jury. "Those citizens who seek to avoid the searching eye of the grand jury need simply seek a safe haven beyond our territorial limits."

Legislation denying passports to Communists upheld

In proceedings to determine the Constitutional validity of Section 6 of the Subversive Activities Control Act of 1950, 50 U.S.C.A. § 781 *et seq.*, which prohibits the issuance of passports to members of the Communist Party, it was held that, in view of the Congressional findings as to the nature of the world Communist movement, the disqualification imposed was a valid exercise of the power of Congress to protect and preserve our Government against the threat posed by the world Communist movement and that the regulatory scheme bears a reasonable relationship thereto. *Flynn v. Rusk*, 219 F. Supp. 709 (U. S. Dist. Ct., D. C. July 12, 1963).

Deportation—possible incarceration for jumping ship not a bar to deportation of alien

In a suit for judicial review of the Attorney General's order denying an alien seaman's application for withholding of deportation, the court held that the Attorney General's discretion was not exercised arbitrarily or capriciously in finding that the appellant would not be subject to physical persecution on his return to Yugoslavia. Possible incarceration for one or two years resulting from illegally deserting a vessel is not "physical

persecution" within the meaning of Section 243(h) of the 1952 Immigration and Nationality Act (8 U.S.C.A. § 1253(h)). *Zupicich v. Esperdy*, 319 F. 2d 773 (U. S. Ct. App., 2d Cir., June 28, 1963).

Iron Curtain Act—Pennsylvania Supreme Court overruled

The decision of the Supreme Court of Pennsylvania in *In Re Belemecich's Estate*, 192 At. 2d 740 (July 2, 1963),¹ that the so-called Pennsylvania Iron Curtain Act, providing for payment without escheat into the State Treasury of property due distributees who would not have actual enjoyment of the funds, was not in violation of the 1887 Treaty between the United States and Serbia, was reversed, *per curiam*, by the United States Supreme Court, citing *Kolovrat v. Oregon*, 366 U. S. 187 (U. S. Sup. Ct., 1961).² *Consul General of Yugoslavia v. Pennsylvania*, 375 U. S. 395 (U. S. Sup. Ct., Jan. 6, 1964).

Iron Curtain Acts—distribution to resident of Soviet Union ordered

Relying on (1) a letter from an officer of the American Express Company to the effect that remittances to the Soviet Union are readily made through the Bank of Foreign Trade in Moscow, and proof of payment in the nature of a receipt is obtained without difficulty, (2) a letter from the American Embassy in Moscow stating that it was the Embassy's understanding that in law and practice Soviet heirs may receive and dispose of inheritances they receive from abroad, and (3) letters from the distributees stating that they will have "great use and benefit of the money received and will use it personally at our discretion," indicating the use to which they intended to put the money and offering to submit receipts executed in their own hand and such other proofs as the court might require, the Surrogate ordered that estate funds be transmitted to the distributees, who were residents and apparently citizens of the Soviet Union, and that notarized receipts from the distributees, properly authenticated and translated, be filed with the court. In reaching this result, the court noted that the legislature had placed the authority and responsibility in the Surrogate to withhold payment, and the United States Department of State had never expressly endorsed the use of United States Treasury regulations (relied upon by other Surrogates) in arriving at a determination that an alien distributee would not have the benefit or use or control of money on deposit, but had stated that "the distribution of estates to heirs in Communist countries is not restricted by Federal Law." *In Re Saniuk's Estate*, 243 N.Y.S. 2d 47 (N.Y. Surr. Ct., Sept. 18, 1963).

PRIVATE INTERNATIONAL LAW CASE NOTES

Cuban claims—insurance policies governed by United States law—act of state doctrine and Bretton Woods Agreement not applicable

A Cuban policyholder sued Pan American Life Insurance Company, a Louisiana corporation having its principal office in New Orleans, Louisiana,

¹ 58 A.J.I.L. 192 (1964).

² 55 A.J.I.L. 983 (1961).

for the cash surrender value of his policy. In defense, the insurer pleaded that the Republic of Cuba had expropriated its Cuban assets and substituted the Cuban state as the obligor on the policies. The insurer contended that this excused it from further performance. Looking to the fact that the policy was the contract of a United States corporation payable in the United States in United States dollars, the court held that United States law—the law of the place of payment—applied, the act of state doctrine did not apply and, therefore, the expropriation decrees did not constitute a bar to the action upon the policy. *Pan American Life Ins. Co. v. Recio*, 154 So. 2d 197 (Fla. Dist. Ct. App., 1963).

In another case involving a similar policy, the court held that the contract was in full force and effect in accordance with its terms and that the insurer was required to accept premiums in United States currency and to pay amounts due under the contract in United States currency. It rejected the argument that the Bretton Woods Agreement and Federal legislation pertaining thereto required a different result, on the ground that a United States contract, upon which payments are to be made to or by a United States corporation in United States currency, is not an unenforceable contract within the meaning of Article VIII, § 2(b) of the Bretton Woods Agreement (relating to "Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member . . ."). *Pan American Life Ins. Co. v. Raij*, 156 So. 2d 785 (Fla. Dist. Ct. App., 1963).

Insurance—accident on United States-flag vessel in Spanish waters not within United States

On the question whether an accident on an American-flag ship berthed in Spain was covered by an insurance policy which by its terms applied only to accidents "within the United States of America, its territories or possessions," it was held that the law of the flag concept developed in choice of law and statutory areas did not necessarily extend beyond those areas to the interpretation of a territorial restriction clause in an insurance policy. Even though an American-flag ship may, for some purposes, be deemed juridically a part of the United States, it did not follow, in the court's view, that such a ship was territorially a part of the United States. There being no clear intention of the parties that an accident in Spain should be governed by the policy in question, the court ruled that the accident was not within the terms of the policy. *United States Lines Co. v. Eastburn Marine Chemical Co.*, 221 F. Supp. 881 (U.S. Dist. Ct., S.D.N.Y., Sept. 27, 1963).

Choice-of-law—law of Italy governs ticket contract made in Italy for voyage from Italy on Italian vessel

The plaintiff, a United States citizen resident in Florida, sued for personal injuries sustained while a passenger aboard the defendant's vessel, *Vulcania*, on the high seas en route from Naples to New York. The defendant Italian Line moved for summary judgment upon the ground that

the action was time-barred by a clause in the passage ticket contract which barred institution of suit more than one year after the happening of an injury. The passage ticket contained a condition making it "subject to the Italian Law."

The court held that, while a condition of a passage ticket that it was subject to Italian law was not conclusive for choice-of-law purposes, where the passage contract was made in Italy, the voyage commenced there and the vessel sailed under the Italian flag, the center of gravity of the contract under the applicable Federal maritime choice-of-law rules was in Italy. Consequently the law of that country was to be applied to the contractual relationship of the parties, and the issue whether the suit was time-barred thereunder was a question of fact which precluded summary judgment in favor of the defendant. *Pisacane v. Italia Societa Per Azioni di Navigazione*, 219 F. Supp. 424 (U.S. Dist. Ct., S.D.N.Y., July 17, 1963).

Arbitration provision—applicable to dispute with German trustee in bankruptcy

The American plaintiff company entered into a contract with a German shipbuilding partnership for the manufacture of a part of a ship. The contract provided for compulsory arbitration in the event of a dispute, and indicated that the laws of the United States should apply thereto. The German partnership was delinquent in performing its obligations under the contract, giving rise to a claim for damages by the American company. Subsequent thereto the partnership became bankrupt and a German trustee in bankruptcy was appointed. The American company demanded arbitration, but the trustee objected on the grounds that the dispute was not subject to arbitration and that the trustee could not consent to arbitration under German law.

The court held that the dispute was clearly subject to the arbitration clause. Where the contract provided for the application of U. S. law, funds from which an arbitration award would be paid were not under the control of the German trustee, and the appointment of an arbitrator would require no affirmative act by the German trustee, the objections of the German trustee to arbitration would be disregarded. *American Shipbuilding Company v. Willy H. Schlieker, K. G.*, 219 F. Supp. 905 (U.S. Dist. Ct., S.D.N.Y., April 19, 1963).

BRITISH AND COMMONWEALTH DECISIONS *

Nationality—adoption—object of adoption to enable infant to acquire British nationality—Adoption Act, 1958 (7 & 8 Eliz. 2, c. 5)

The 20-year-old infant was French, and applicants were British nationals, domiciled and resident in England with children of their own. Adoption was desired so as to confer British nationality upon the infant

* Prepared by Prof. Egon Guttman, Howard University Law School.

which, in turn, would entitle him to continue to reside in the United Kingdom and free him from disadvantages under exchange controls affecting him as an alien beneficiary under an English settlement. The application was refused, for, although the adoption would be to the advantage of the infant and for his welfare, no question arises of the applicants being *in loco parentis* to him. The benefit to the infant flows simply from the fact that he is being adopted, not from the fact that he is being adopted by the particular adopters; any adopters, provided that they were British subjects, would do. It was an attempt at a mere "accommodation" adoption and thus not within the intention of the Adoption Act. *Re A. (an infant)*, [1963] 1 W.L.R. 231; 2 All E.R. 531 (Ch. Div., Cross, J., Jan. 21, 1963).

Foreign judgment—enforcement in Ireland denied—action in personam in England—service of writ in Ireland on basis of nationality of defendant

The plaintiff obtained leave from the English High Court to serve a writ on the defendant British subject residing in the Republic of Ireland. The writ was duly served but the defendant did not enter an appearance and a valid final judgment was entered in favor of the plaintiff, which he now sought to enforce in Ireland. The question was whether nationality was sufficient to found jurisdiction in an English court so that its judgment would be enforceable in the Republic of Ireland. Holding that nationality may at one time have been a sufficient basis for jurisdiction (Dicey, *Conflict of Laws*, 1st edition, 1896 Rule 80(2) page 369) and still has some support under the French Civil Code, Art. 14, and the Rules of the Irish Court, which are similar to Order XI of the English court, by virtue of which the writ had been issued, yet this basis of jurisdiction no longer reflects the modern approach (Cheshire, *Private International Law*, 3rd edition, 1947 page 787), and is merely a statutory imposition and contrary to international law. Further, no comity between the English and Irish courts is in issue, since the better view appears to be that these courts also now refuse to recognize a judgment *in personam* after service out of jurisdiction to which no appearance had been entered. *Patrick Russell Rainford et al. v. Frederick Norman Newell-Roberts*, [1962] I.R. 95 (High Ct., Davitt, P., July 31, 1961).

Service out of jurisdiction—broadcast from State of Washington into British Columbia

The defendants were broadcasting from radio and television stations in the State of Washington within 39 air miles from Vancouver and 30 air miles from Victoria. Admittedly 80% of the stations' audience was in British Columbia. The plaintiffs maintained that these broadcasts infringed their performing rights in Canada. It was held that the plaintiffs need only show "a good arguable case" to be permitted to serve a notice of a statement of claim outside the jurisdiction of the Canadian Exchequer

Court. This question, whether such broadcasts infringe the Canadian Copyright Act, R.S.C. 1952 c. 55, has never been previously determined. *Composers Authors and Publishers Association of Canada Ltd., v. International Good Music, Inc. (formerly KVOB Inc.) et al.*, [1963] S.C.R. 136 (Sup. Ct. Canada, Kerwin, C. J., Cartwright, Abbott, Martland, and Ritchie, JJ., Jan. 22, 1963).

Income tax—Canada-United States Tax Convention Act, 1943 (7 & 8 Geo. 6, c.21) as amended in 1950 (14 Geo. 6, c.27)—Canada-France Income Tax Convention (1950-51, S.C. 15 Geo. 6, c.40)

The Minister of National Revenue claimed that respondent Canadian company, having failed to withhold tax from amounts paid to three foreign companies, was liable to pay such amount under the Income Tax Act, § 123 (8) (b). The respondent pleaded exemption under international conventions on avoidance of double taxation. Under its contract with Sodak International Film Inc. of New York, respondent was granted the commercial exploitation of 59 motion pictures with an irrevocable surrender unrestricted as to time, in return for a lump sum payable over a stated period of time. Considering this contract as tantamount to an assignment in perpetuity and thus not referring to payments of "rents or royalties" but rather a disposal or sale of so much "inventory or stock in trade goods" productive of corresponding "industrial and commercial profits," the Exchequer Court determined that this contract fell within the exemption granted by Article I of the Canada-United States Tax Convention.

Two further contracts had been entered with "Maroc Film, Casablanca (Maroc)" for a period of five years for payment of 50% of the profits. The sums paid, having reference to exploitation rights and profits, were held to be royalties and thus subject to the withholding provisions of the Income Tax Act. In view of the fact that the Canada-France Income Tax Convention is by Article 2 expressly confined to *Metropolitan France*, "excluding Algeria, the overseas departments and other territories of the French Union," these contracts were wholly outside the purview of the convention. Finally, three contracts had been entered into with Sigma-Vog-Les Films Marceau of Paris, France. These contracts related to the exploitation of films in Canada, payment by lump sums. The court held that, though within the convention, these payments were "income from the lease of motion picture films" and, under Article 13, paragraphs III and IV, of the Canada-France Income Tax Convention, "taxable in the State of the debtor," i.e., Canada. *The Minister of National Revenue v. Paris Canada Films Ltd.*, [1963] Ex. C. R. 43 (Ex. Ct., Dumoulin, J., Nov. 7, 1962).

Tax on submarine mining—discussion of territorial waters and bays

Two Canadian mining companies appealed from assessments of their workings under Sydney Harbor and Spanish Bay by the Municipality of Cape Breton County, Nova Scotia, Canada. Holding those under Sydney Harbor to be assessable but those under the Bay not to be, the court dis-

cussed at length whether land under internal waters and territorial waters formed part of the territory and part of the county. It also discussed international law doctrines and practices concerning bays, the continental shelf, and the distinction between "internal waters" and "territorial waters." *Re Dominion Coal Co. Ltd. and County of Cape Breton, et al.*, 40 D.L.R. 593 (Sup. Ct. Nova Scotia, Jan. 9, 1963; Isley, C. J.; Currie, MacDonald, Patterson and Bissett, JJ.).

Maintenance order—Reciprocal Enforcement of Maintenance Orders Act, R.S.O. 1960 c.346—jurisdiction—assessment of dollar equivalence

After their marriage in Michigan, the parties moved to Ontario, Canada, where the husband acquired a domicile of choice and where he continued to reside throughout the relevant time. The wife took the two children of the marriage to Michigan, where she obtained a decree of divorce and an ancillary order for the payment of \$8.00 per week for each of the children. Declaring the decree of divorce to be a nullity in Ontario, since the husband had never lost his Ontario domicile nor had he attorned to the jurisdiction of the Michigan courts, the court held that the maintenance order, being ancillary to the invalid divorce decree, is also invalid and cannot be registered under the Reciprocal Enforcement of Maintenance Orders Act. Further, a maintenance order expressed in a foreign currency cannot be registered until an Ontario court has determined the equivalence of the sum payable in the currency of Canada on the basis of the rate of exchange at the time the order was made. *Re Ducharme v. Ducharme*, 39 D.L.R. 2d 1 (Ont. C.A., Aylesworth, Gibson and Kelly, JJ.A., April 10, 1963).

Dependents' relief legislation—Dependents' Relief Act, R. S. O. 1960, c. 104—widow residing behind Iron Curtain

When the deceased married, he owned a farm in the Ukraine. Subsequently the Ukraine became one of the Republics of the Union of Soviet Socialist Republics and his farm was absorbed in a collective farm. The deceased's wife was allowed to reside in one-half of the farm house; his daughter and her husband resided in the other half. During the war the deceased was drafted for labor in Germany and later made his way to Canada, where he died. In his will the deceased left some money for his widow and his daughter and these provisions were attacked as being "inadequate." The evidence indicated that the widow, now 55 years old, would receive a pension from the collective farm and would be allowed to continue to reside in her home during her lifetime. Since, therefore, there was adequate provision for her future maintenance and since sums awarded would be added to the treasure of the government in whose jurisdiction she now resides, by reason of taxation on inheritance, and would not go to the widow, an award would defeat the purpose of the Dependents'

Relief Act. *Zajac v. Zwarycz*, 39 D.L.R. 2d 6 (Ont. High Ct., Grant, J., April 10, 1963).

NOTE: In *Re Lukac, Hayzel et al. v. Public Trustee*, 40 D.L.R. 2d 120, Alberta Supreme Court, Milvain, J. (obiter), indicated that the Alberta Family Relief Act, R.S.A. 1955, c. 109, would result in a judge exercising his discretion against an application of funds to support a mental patient residing in a country behind the Iron Curtain, for "the authenticity of information is doubtful and the disposition of funds more so." But particularly, where there is "some indication that the foreign state is making provision for the person in question. I doubt that our courts should ever conclude that a foreign state is inadequately dealing with its subjects, except perhaps under extreme circumstances, in which there was conclusive evidence of a satisfactory and acceptable nature."

Custody of infant—father taking child in defiance of foreign custody order

Incidental to proceedings for judicial separation, a court in Elizabethville, Belgian Congo, subsequently affirmed by the Belgian Cour de Cassation, granted custody of a child to the mother, with reasonable access to the father. Subsequently the father obtained a decree of divorce in California alleging adultery by the mother. During one of his visits to the child, the father surreptitiously took the child and finally brought it to Prince Edward Island, Canada. The mother applied for a writ of habeas corpus to recover the child. The court held that the primary consideration in the determination of the issue is the child's welfare. Relevant guiding factors include the common-law right of the father and the great weight to be placed upon the order of a competent foreign court, but no such order regarding the welfare of a child can be considered final. *Menasce v. Menasce*, 40 D.L.R. 2d, 114 (Prince Edward Island Sup. Ct., Campbell, C.J., MacGuigan and Bell, JJ., March 29, 1963).

BOOK REVIEWS AND NOTES

LEO GROSS

Book Review Editor

Académie de Droit International. Recueil des Cours, 1961. Tomes I, II, III (Vols. 102, 103, 104 of the Collection). Tome I: pp. viii, 699; Tome II: pp. viii, 680; Tome III: pp. viii, 724. Indices. Leiden: A. W. Sijthoff, 1962. Fl. 50 each.

International lawyers have come to take the *Recueil des Cours* so much for granted that we may need reminding that it is no small achievement to publish year after year some two thousand pages of legal analysis contributed by jurists of various nationalities and constituting on the whole—as Judge Jessup observed—the “best thought” on the actualities of international law. Credit for this belongs in large measure to the Curatorium of the Hague Academy and especially to its able and energetic Secretary General, Professor Charles Chaumont, and a tribute to them is both merited and timely—timely because the future of the Academy may now be in doubt as its American foundation grants run out and are not replenished. It is inevitable, I suppose, that the newer and more fashionable disciplines will be the favored beneficiaries of foundations, but surely a relatively small subvention might be available for at least one international center for students and scholars from all parts of the world to pursue a pre-eminently international subject, which ironically has tended to become increasingly “nationalized.” Indeed, what is needed is not merely a continuation but an expansion of the Academy commensurate with the geographical spread and widening subject matter of contemporary international law and organization. One hopes that the present jeopardy of the Academy will stimulate those who take international law seriously to exert their combined influence on its behalf.

The three volumes under review (comprising the 1961 lectures) provide evidence both of the value of the Academy and of the need for further thought and investigation in various areas. Most of the contributions constitute solid scholarly material written by professors, expounding and analyzing new developments and cautiously suggesting new approaches and solutions. This is particularly true of the studies in private international law which account for almost half of three volumes—eight of the eighteen lectures. It is less so in the field of public international law, where some of the lectures lack the customary marks of scholarly work and at times sound more like the hortatory and platitudinous expressions of delegates at international meetings.

In Volume I, the most substantial contributions are those by Professor Paul de Visscher of Louvain on “*La protection diplomatique des personnes*

morales," and by Professor W. Riphagen of Rotterdam on "The Relationship between Public and Private Law and the Rules of Conflict of Laws." De Visser succinctly analyzes questions of nationality and allegiance of companies raised by claims of diplomatic protection, examines problems where stockholders have different nationality, and in the last part considers the relatively new issues raised by "international" entities, especially those which have a national legal status (such as Eurochemic and Eurofima). Dr. Riphagen is concerned with the difficult and elusive problems involved in applying "private law" and "public law" approaches to rules of conflict; he also proposes a third approach, referred to as the "law of nations" approach, which he examines in regard to American cases such as *Lauritzen v. Larsen* and *Netherlands v. Federal Reserve Bank*. Riphagen's prescriptions are far from simple and may seem rather too abstract, but there can be no doubt that his study is of exceptional intellectual quality and it should stimulate others in this field.

Volume I also includes five lectures on "Asia and the United Nations" by A. K. Brohi, a former Minister of Law of Pakistan, whose well-known oratorical talent must have been evident to listeners of these wide-ranging comments on United Nations political problems; in cold print, they seem more journalistic than juridical. Another well-known advocate, Lord Shawcross, is on firmer legal ground in his single lecture (printed in both English and French) on "Problems of Foreign Investment Law," a characteristically forthright statement of the arguments for compensation, acquired rights and third-party adjudication, which at the same time exhibits a sophisticated awareness of political realities and the difficulties of insisting on contractual adherence without regard to "fundamental changes in circumstances."

In the same volume are lectures of Professor de Castro of Madrid on "*La Nationalité, La Double Nationalité, et La Supra-Nationalité*" (the latter incidentally refers to draft agreements for super-nationality in the "Hispano-American" community proposed in the Congresses of Quito and Bogotá). The lectures of a former Polish scholar, Professor M. S. Korowicz, of the Fletcher School, on the well-worn subject of "sovereignty" contain few surprises; one is his observation that in the case of Article 2, paragraph 7, of the U.N. Charter, "the text is rather clear and does not seem to need by itself any interpretation," a statement somewhat indicative of his approach to many problems. The lectures, nevertheless, may serve as a convenient collection of juristic comment on the meaning of sovereignty and undoubtedly many of the author's pieties about sovereignty under law will be widely shared.

Volume II opens with an impressive book-length study of "*Les Relations extérieures des Communautés européennes*" by Dr. Pierre Pescatore, Political Director in the Luxembourg Ministry of Foreign Affairs, and a member of the drafting committees for the Common Market and Euratom treaties. The lectures are presented as a contribution to the "doctrine of the personality of international organizations"; they analyze in illuminating detail the problems of treaty-making, co-ordinating national policies, reconcil-

ing the obligations toward the community with those under other agreements, representation on behalf of members, protection of commercial interests and international responsibility. While the focus is on the European Communities, the relevant experience of other international organizations is also examined and compared. Dr. Pescatore brings to his subject not only considerable learning but also a sharp and lively intelligence which delights in exploring the implications of juridical concepts and in relating them to practical consequences.

The second contribution in this volume is a well-balanced study of the thorny question of "reservations to treaties" by the learned Editor-in-Chief of this JOURNAL, Professor William Bishop. As a good teacher, Professor Bishop is never content with generalization alone; he always furnishes concrete illustrations taken from actual practice, and this adds much to his lectures. Since, in his view, the reservation process is useful to obtain partial agreement when total agreement is impracticable, he does not mind the demise of the unanimity rule and he supports the proposals made by Lauterpacht in his 1953 report to the International Law Commission as the best guide to resolving the competing considerations.

The third contributor to Volume II is J. E. S. Fawcett of Oxford, who has courageously chosen to deal with "Intervention in International Law" and to pass judgment on some controversial cases in the past decade. He characterizes the kinds (or aspects) of intervention as "defensive," "subversive," "collective" and "hegemonial"; the last is a term borrowed from Schwarzenberger to refer to a purported exercise of "international police power" by national states (in contrast to "collective" intervention by an international organization). Fawcett has little hesitation in declaring the Anglo-French action in Suez, which might be described as "hegemonial," to have been in violation of Article 2 (4). The Israeli intervention at the same time is viewed by him as defensive and therefore legal in its initiation but as having exceeded reasonable proportions in its execution. A more complex judgment is rendered on the United States action in Guatemala in 1954 which, in his opinion, seems to have been both "subversive" (because directed at the existing government) and justifiably "defensive" (because intended to repel a threat to Guatemala from an external subversive movement). Hungary, Tibet and Korea are dealt with less equivocally; the first two as involving "subversive" intervention against the "will of the people," the third as a valid collective intervention under Security Council authority. One does not have to differ with any of Fawcett's conclusions to feel that his succinct summaries leave a good many problems open.

The lectures of Professor Paul Reuter of Paris, on "*Les Principes du Droit international public*," complete Volume II. For this reviewer, the most interesting chapters are those on "*Les Actes juridiques*" and on international responsibility, but all of the lectures exhibit the clarity and acuity characteristic of Reuter's writing. He is clearly in the first rank of international lawyers.

The third volume is devoted mainly to lectures on private international

law and comparative law. Professor De Nova, the Dean of the Law School at Pavia, deals with the subject of "Adoption in Comparative Private International Law." He discusses in Part I the problem of applicable law in regard to the requirements for adoption, and reviews a wide range of positions taken by scholars around the world (including, for example, Russian, Hungarian, Turkish and Latin American positions). In Part II he deals with the effects of adoption, again displaying his wide erudition and an engaging skepticism about "smooth-looking reasoning." It is gratifying, by the way, to find a continental scholar who enjoys so easy and colloquial an English style.

Professor Fragistas, a distinguished Greek scholar who has been Rector of the University of Salonika and several times a member of the Greek Cabinet, entitles his lectures "*La Compétence internationale en droit privé*." His concern is not with international tribunals but with the competence of national tribunals to deal with the international matters and apply rules of international treaties and customary international law. Dr. von Overbeck, a Swiss expert on private international law, contributes an analysis of problems of unifying private international law, particularly in regard to succession and testamentary disposition. Professor Giuseppe Biscottini, who is presently at the Catholic University in Milan, entitles his lectures "The Effectiveness of Foreign Administrative Acts" (a subject which he considers to belong to "*le droit administratif international*"), and he deals with the problems of procedure and competence involved in giving legal instruments, such as certificates and diplomas, effectiveness in foreign countries. The comprehensive lectures on the general principles of private international law are the contribution of Professor Wengler of Berlin. Professor Wengler conceives of private international law in a wider sense than "choice of law" rules to be applied by a judge; he includes all rules to solve gaps between positive laws of different systems, and he devotes considerable attention to legislative techniques for allocation of legal questions on a territorial and "supra-territorial" basis.

Volume III also include two studies in the field of public international law. One is a brief contribution of Dr. Marcel Prélôt, a professor of political science at Paris, on the fairly novel subject of "*Le Droit des Assemblées internationales*." He uses the term "international assemblies" (following Scelle) to refer to "institutional conferences" in contrast to diplomatic conferences; accordingly his concern is with such bodies as the U.N. General Assembly and the Assembly of the Council of Europe, and his emphasis is on "parliamentary law" rather than international law. Regrettably, he provides little more than the briefest summaries of the rules, lists of commissions, and a few well-known facts on credentials, immunities and voting procedure. A more enlightening contribution might have been produced if he had begun with the problems raised by Jessup in his lectures on "Parliamentary Diplomacy" given at the Academy in 1956, but curiously these lectures are not even referred to.

The relations of Church and state on the international plane are examined in "The Recent Concordats" by Professor S. Z. Ehler, a former

Czechoslovakian who is now a professor of international law in Dublin. In comparing the concordats concluded since 1938 with previous concordatory practice and conceptions, he finds that the new concordats emphasize the dual international personalities of both the Holy See and the State of the Vatican City, strengthen the episcopal appointing power of the Pope and tend to modify or remove certain relics of "the old-fashioned spirit of militantly anti-clerical liberalism." The dictum "*historia concordatorum historia dolorum*" does not find support in Dr. Ehler's optimistic account of recent concordats.

OSCAR SCHACHTER

Gli Accordi Internazionali delle Organizzazioni Inter-Governative. By Roberto Socini. Padua: CEDAM, 1962. pp. xxxii, 295. L.2500.

The new renaissance in Italy is especially conspicuous in the field of international law: there is a constant outpouring of general treatises and of special studies on practically every subject of international law. In particular, the international lawyers of Italy, unlike their colleagues in many other countries, are paying considerable attention to the multifarious problems created by the sudden growth in the number and activities of international organizations. The book under review tries to bring some order into the chaotic area of international agreements concluded by international organizations. As the author points out, about one third of the agreements registered or filed with the United Nations since 1945 have international organizations as parties to them, and a few years ago there were already more than one thousand such agreements between states Members of the United Nations and international organizations (pp. v, 160).

While general rules of international law usually apply to this new category of international agreements, many special rules have been developed by international institutions. As in other areas of international law, the spirit of imitation has resulted in the establishment of typical agreements followed almost verbatim by a variety of international organizations, global and regional. The author analyzes these popular models in great detail, but at the same time he charts all the interesting deviations from them and speculates on their juridical import.

Part I of the book deals with some preliminary problems, such as the distinction between "agreements" concluded by international organizations and other acts of these organizations or agreements concluded under their auspices. The author considers, for instance, that the loan agreements of the International Bank for Reconstruction and Development are not international agreements but that the guarantee agreements of that Bank constitute such agreements (pp. 44-51).

In Part II, the author discusses the various types of agreements concluded by international organizations, the capacity of international organizations to conclude agreements, and the distribution of the agreement-making power among the various organs of an international organization. He divides agreements concluded by international organizations into five

main categories: status agreements (*e.g.*, those relating to privileges and immunities or headquarters of international organizations), participation agreements (*e.g.*, agreements of association, co-operation or consultation between an organization and a non-member state), relationship agreements between the United Nations and various organizations belonging to the United Nations system (*i.e.*, specialized agencies, the International Atomic Energy Agency and, one may add, the future International Disarmament Organization), co-ordination agreements between various international organizations (both general and regional), and "teleological" agreements designed to attain the objectives of a particular organization (*e.g.*, political and military, economic and social, or technical and administrative) (pp. 82-122).

Part III, entitled rather incongruously "The Dynamics of the Agreements," deals meticulously with the negotiation of agreements by international organizations, signature of agreements, their entry into force, registration and publication, and revision and termination. While the agreements by the United Nations and its specialized agencies (and the International Atomic Energy Agency) are properly registered and published, agreements of regional organizations and of some 100 other organizations are difficult to find. The author consequently advocates the establishment of a special bureau for their publication (pp. 233-234), a function which might be performed by the proposed World Peace through Law Center.

In Part IV, dealing with "The Statics of the Agreements," the author discusses under the heading of "interpretation" such questions as the language of the agreements, the official texts and the question where they should be deposited, the organs entitled to interpret an agreement, and the provisions in the agreements for the settlement of disputes arising under them. Finally, he studies the question of extrinsic and intrinsic validity of agreements made by international organizations; he concludes that agreements made by an organization in violation of a clear constitutional provision are completely invalid, but that in other cases the agreements should be considered merely as illegal and as leading to the responsibility of the organization for any damage caused thereby (pp. 270-272).

While the subject matter of this volume is similar to that covered by J. W. Schneider in his book on the *Treaty-Making Power of International Organizations* (Geneva-Paris, 1959), and by K. Zemanek in the second part of his book on *Das Vertragsrecht der internationalen Organisationen* (Vienna, 1957), Socini's treatment is much more thorough. He exhausts the literature on the subject and is clearly familiar with practically all relevant agreements. The job he has done is so excellent that one might wish he would write another volume about the actual implementation of these agreements concluded by international organizations, the real dynamics of the practice developed by international organizations in applying the agreements in concrete situations. The theory is fine, but what is the practice?

LOUIS B. SOHN

World Economic Agencies: Law and Practice. By C. H. Alexandrowicz.
New York: Frederick A. Praeger, 1962. pp. xvii, 310. Index. \$13.50.

In this survey of global economic organizations Professor Alexandrowicz sought to satisfy the interests of lawyers and economists alike. While sketching the basic economic functions of the agencies he also wishes to stress legal problems which have not received sufficient attention. In large measure the emphasis on the legal desire outweighs the economic. The central concern throughout is to judge the impact of the organizations studied on the evolution of new international law. The reader may learn a great deal about their constitutional evolution, the growth of administrative law, quasi-judicial practices and case law. In these areas the book makes a distinct factual contribution.

Professor Alexandrowicz examines the three specialized agencies antedating the establishment of the United Nations system (U.P.U., I.T.U., I.L.O.) with special care. He devotes some attention to ICAO, FAO, WHO and IMCO, even though WHO can hardly be considered an "economic" agency, but he neglects the International Atomic Energy Agency altogether, despite its important economic attributes. G.A.T.T., the I.M.F. and I.B.R.D. are treated in much greater detail, with rigorous attention to the legal implications of loan agreements and the municipal and international status of exchange control regulations. One valuable chapter is devoted to an analysis of the major current international commodity agreements and a less useful one to a brief discussion of the well-known failure of ECOSOC to "co-ordinate" the system.

Certain themes preoccupy the author in his treatment of all these agencies. He is concerned with the distribution of power among the administrative organs of each agency, though we learn little that is new under this rubric. Further, the author stresses the differences between agencies which enjoy a truly universal membership and those which—while universal in theory—are likely to remain more restricted because their tasks preclude the participation of countries possessing a planned economy. More important than either of these themes is the author's consistent concern with the law-creating potential of each agency, an interest which he explores in terms of comparative "legislative" competence as well as in analyzing the rôle of economic organizations in stimulating the development of customary rules. Finally, the author stresses and explores the significance of administrative and quasi-judicial procedures *not* included in the constitutional structure as a means of adaptation and legal growth. When dealing with the evolution of customary, extra-treaty and administrative rules, he is careful to survey much case law which most previous commentators (except in the instances of the I.L.O. and I.B.R.D.) had neglected.

Perhaps the most impressive finding of this study is the description of a large number of "rules" which seem to enjoy general acceptance in the practice of states and the quasi-judicial activity of international agencies, even though not found in treaty law. Professor Alexandrowicz, always

cautious about claiming a firm legal basis for such discoveries, labels them "international administrative usages" or "para-customary law," which may well develop into full-fledged customary rules, such as the secrecy-of-correspondence rule in U.P.U. On the other hand, the author carefully refrains from accepting the I.L.O.'s claims in this field as fully substantiated. He also documents a variety of experiences in which formal constitutional rules providing for external judicial settlement of disputes have, in fact, given way to the less formal methods of internal conciliation and arbitration. These, in turn, produce decisions of a "para-customary" nature.

On the other hand, a certain over-dependence on documentary sources also characterizes the argument. Economic policy is taken up in terms of constitutional provisions rather than actual decisions. Objectives of organizations are deduced from hortatory statements rather than actual policy. Much time is devoted to the analysis of legal provisions which are really in the dead-letter category. While the book does enrich our knowledge of the law-creating potential of these organizations, it sometimes achieves this aim at the expense of a sophisticated treatment of the political and economic context in which the potential is being realized.

ERNST B. HAAS

The Relation between Proceedings and Premises. A Study in International Law. By Carsten Smith. Oslo, Norway: Universitetsforlaget, 1962. pp. 138. \$5.85.

The author analyzes, with impressive clarity and sound judgment, the problem of the power of an international court to base its decision on legal arguments not advanced, or advanced only in a subsidiary manner, by the parties. His principal object of inquiry is the practice of the Permanent Court of International Justice and the International Court of Justice, although the experience of international arbitral tribunals is somewhat explored. The problem is one that has so far been largely neglected in the literature on the procedure of international tribunals.

It is concluded to be a principle of international law that an international tribunal may independently explore and apply international law in its decision and is not, in this respect, confined to the legal arguments advanced by the parties. In order to avoid the element of surprise and for other reasons, the author recommends that, if it should appear to an international tribunal at any time, even including its deliberations after argument, that some new point of law should be considered in reaching its conclusions, the tribunal should institute a new argumentation on the point and delay rendering its final decision to enable such argumentation. This is held to be desirable for the sound growth of international law, as well as giving full recognition to the right to be heard.

The *Nottebohm* case, in the author's view, represents the most extreme instance of departure by an international tribunal from the legal arguments of the parties. In this case, the International Court of Justice adopted

the link theory of nationality to preclude a state from extending diplomatic protection to a person who was by its law its national. He notes that "the link problem was discussed by the Parties only as an element of abuse of right, and not as a rule limiting the power to exercise the right of diplomatic protection." It was, moreover, "an innovation" to invoke the link theory in a situation involving diplomatic protection in an instance of single nationality, as distinguished from dual nationality. The parties had little opportunity to argue the conclusion finally adopted by the Court, "because the dissociation of protection from nationality combined with the link theory was not recognized in international law before the day of this Judgment." (Page 15.) The decision was and remains "the first instance where the operative part of the judgment was built, and exclusively built, upon what can be characterized as a completely new element." (Page 71.)

An interesting speculation occurs to the reviewer. Does the problem of "surprise premises" or new point of law tend to arise most frequently in situations where the court was badly split on adopting the premises of the parties as a basis for decision, but fairly well agreed on the new or subsidiary legal reasoning as the basis for decision? In other words, does this type of a decision appear when it enables the court to unite for decision purposes? This question might usefully become the subject of a later inquiry.

It is to be hoped that the book will be the precursor of many such studies of special questions in the procedure of international tribunals.

KENNETH S. CARLSTON

Proceedings of Summer Conferences on International Law, Cornell Law School. First Conference, June 26-29, 1957: *International Law in Progress—Viewed by Government Official, Private Practitioner and Professor.* pp. vi, 183. \$3.00.

Second Conference, June 23-25, 1958: *Peace by Adjudication—The Limits of the Use of International Tribunals for Settling Disputes.* pp. vi, 215. \$3.00.

Third Conference, June 20-22, 1960: *International Law in National Courts.* pp. ix, 184. \$5.50.

Fourth Conference, June 18-20, 1962: *The Status of Domestic Jurisdiction.* pp. 155. \$6.25.

Ithaca, N. Y.: Cornell Law School, 1959, 1960, 1963. Indices.

Reading the four published proceedings of these conferences is rather like taking a rambling trip through a variable countryside. There are moments of lucid and panoramic views which reach far. The road may dip into occasional mist, take abrupt turns in unexplored directions, intersect dry fields, invade highly cultivated areas. And so with these four volumes. They are undeniably verbose; the conversation roves and is not meticulously organized. But the moments of arid discussion are scarce, the mist inheres in the subject and is part of its fascination, and the abrupt departures from a theme, if startling, are often absorbing.

This complimentary view rests not upon the novelty of the themes chosen for the conferences, but on the high caliber and articulate disposition of their participants. As director of the conferences, which were made possible by a grant from the Ford Foundation, Michael Cardozo has selected a diverse and distinguished group from the Bench, academic life, the Government and the practicing Bar. The purpose of the conferences, he states, is to assemble from such varied backgrounds participants who, through intensive conversation, will better understand each other's problems and generally enrich the literature of international law. A good part of the appeal of the proceedings lies in the opportunity they afford to consider the attitude towards particular problems of participants who have developed elsewhere their general approach to problems of international law.

The themes chosen for the conferences raise questions of contemporary concern in fields beset with confusion and dispute. The topics for the 1957 conference, bound together under the loose rubric of "international law in progress," included international arrangements for trade and commerce, and international judicial co-operation. In 1958, the conference explored the rôle of international tribunals in settling disputes, and in particular the national practice towards, sources of law for, and enforcement of, decisions of such tribunals. A complementary theme, the application of international law in national courts, was the subject of the 1960 conference, which specifically concerned the act of state doctrine and the sources of international law drawn upon by courts in the United States. The last conference, in 1962, considered the ambiguities in and the complex functions of the concept of domestic jurisdiction. This trend in the conferences from diversity to unity in theme is desirable, for the greater marshaling of such exuberant and energetic minds encourages a richer development of antagonistic positions and enhances the likelihood of a contribution to the understanding of a problem.

Through their inclusion of a variety of points of view within a general discussion, the conferences underscore the differences among contemporary approaches to many problems of international law, relations and transactions. These differences, of course, reach beyond the solutions offered to outstanding problems and pose fundamental questions of methodology and approach to the solutions. Efforts to relate the "rules" of international law to broad concepts of the international community, concepts permeated with the teachings of the sociologist and political scientist, clash with more traditional approaches, which see the formulation of the norms of international law as a process fairly analogous to that under municipal law, with rules to be derived from the sources so cryptically noted in Article 38 of the Statute of the International Court of Justice. Does the search for generally valid principles commence with the identification of shared values and expectations in the contemporary world community, or with the seminal doctrines found in the judicial decisions, arbitrations, treaties, negotiated accords and diplomatic practice of earlier periods? Professor McDougal, in the course of an absorbing discussion with Judge (then Professor) Jessup and Professors Carlston and Lissitzyn in the

1958 conference, sees the "decision-maker," whatever institutional rôle he occupies, as "projecting policy into the future." Judge Jessup quarrels with this approach which, he feels, casts the adjudicator in the rôle of uninhibited legislator and involves a "hyper-intellectual construction" of the decision-making process. Issue is joined as to the nature of international law and the modes for its development. To be sure, the approaches are not mutually exclusive, and what is revealing is the degree to which divergent approaches may lead to common suggestions for resolving outstanding substantive issues.

The proceedings contain several papers, generally reportorial rather than contentious in character, delivered by participants to initiate and provide a focus for discussion. Some among them are of a high quality, such as those of Judge Jessup (1958 conference) on the sources of law applied by a body adjudicating an international dispute, and of Oscar Schachter (1958 conference) on the enforcement of international arbitral and judicial decisions against states. The practice of prefacing discussion with a paper, delivered in advance to all participants, is commendable, for the discussion is more likely to avoid the anarchy apt to flow from the bare statement of a theme, and to take more disciplined form.

At their best, these conferences at the Cornell Law School provoke the reader to consider afresh the question under discussion, as jarring attitudes towards it are recorded in the proceedings. This best occurs often enough, and the decision to publish the proceedings should be applauded.

HENRY J. STEINER

Legal Status of Government Merchant Ships in International Law. By T. Kochu Thommen. The Hague: Martinus Nijhoff, 1962. pp. xii, 177. Index. Gld. 21.50; \$6.00.

Within the compass of this brief monograph Dr. Thommen offers both complete and generally accurate summary of Doctrine and past practice relating to the competence of states over foreign vessels, private and governmental, with special emphasis on authority over such vessels within internal waters and territorial sea, and suggestions for determining the scope of the immunity which ought to be accorded state ships. Special effort is made to extend the survey of state practice to the newer states of Asia and Africa and to the older states of Latin America and Asia. The only evidence cited by Dr. Thommen of the attitudes toward the immunity of state ships held by many of these states consists of their signature to the 1958 Geneva Conventions on the Territorial Sea and the High Seas. This evidence does not necessarily establish, as Dr. Thommen assumes, that in practice these states will govern themselves, with respect to the grant or denial of immunity to foreign state vessels in their ports, in accordance with the provisions of these conventions relating to other sea areas. If, for example, the United States position should be more widely adopted, states may both sign and ratify these conventions, thereby accepting a distinction for purposes of immunity of ships in the areas concerned

between government vessels on commercial service and those on non-commercial service, yet continue to extend immunity to government vessels on commercial service when occasion arises for the exercise of judicial authority in ports. Dr. Thommen's prediction, which he bases partly on the U. S. ratification of the Geneva Conventions and partly on the Tate letter, that the United States will refuse immunity to state commercial vessels in American ports has not been realized and it seems unlikely that in the future the State Department will adhere to an explicit policy based upon the nature of the service being performed by a ship.

Dr. Thommen's proposed solution to the problem of the scope of immunity to be accorded state ships adopts as its principal criterion whether a vessel is one devoted to the exercise of state authority. He would confine the grant of immunity to war vessels, police vessels, and customs ships, and other types of ships devoted to protection of state interests and authorized to engage in measures to that end. All other types of state vessels, irrespective of function or purpose, would be subject to the same competence the state may exercise over private vessels. Though the objective of this classification appears to be that of narrowing the class of ships entitled to immunity, in practice such rigid classification could occasionally lead both to unnecessary grants of immunity and to unnecessary denials of immunity. The major competing policies here are those of protecting states against serious interference with the exercise of essential governmental functions and of securing to individuals normal access to the judicial process. On occasion the first of these policies may demand the grant of immunity to vessels other than those engaged directly in law enforcement activity, since it is entirely conceivable that such vessels may be employed in an essential task of the state. On other occasions, however, the exercise of authority even over a law-enforcement vessel may offer such slight interference with its activities that the policy preserving normal judicial remedies ought to be given preference. In short, the rigidity of categorization proposed does not serve the policies at stake in controversies over the exercise of authority. Admittedly, Dr. Thommen's effort to resolve the problem does have the merit, as he urges, of certainty and clarity, but this objective should not be permitted to override concern for more basic policies.

W. T. BURKE

Essai sur le Secrétariat International. By Jean Siotis. Geneva: Librairie Droz; Paris: Librairie Minard, 1963. pp. 272. Index.

The purpose of this study, No. 41 of the *Publications de l'Institut Universitaire de Hautes Études Internationales*, is to describe and analyze different aspects of the international secretariat from the political point of view. Legal considerations are taken into account only to the extent that they are deemed to influence the functioning of the institution.

Following an introduction, in which the author discusses methodology and explains his basic approach, he undertakes in historical sequence to

describe and analyze the international secretariat in the pre-World War I period, that of the League of Nations, and that of the United Nations. For each, the pattern followed is first to determine the nature and extent of the functions to be performed and then to explain and analyze the structure and method of operation resulting from the needs to be served, and how these in turn influence the functions performed.

Throughout his study, one of the author's central and principal concerns is the extent to which the concept of an international civil service, modeled largely on the national civil services of the advanced Western countries, has validity at the level of international organization. His general conclusion is that it has validity only to the extent that the organization is homogeneous and the functions of the Secretariat are limited to administrative and technical matters. He finds that the success with which the concept was applied by Sir Eric Drummond during the first years of the League of Nations was due to the fact that these conditions existed, that as homogeneity gave way to heterogeneity, with growing discontent within the membership with the peace settlements and with other features of the existing order, and as the activities of the Organization expanded with increasing demands upon the Secretariat, there were correspondingly stronger demands for more recognition of the factor of national representation within the Secretariat, even at the expense of those values of integrity, competence and efficiency, considered necessary to an efficient national administrative service.

When he comes to consider the United Nations Secretariat, it is not surprising to find that the author is skeptical of efforts to combine insistence on firm adherence to the criteria of "efficiency, competence, and integrity" with a substantial enlargement of the functions and powers of the Secretariat, particularly in the political field, within an Organization whose heterogeneity of membership far exceeds that which the League experienced at any time. Furthermore, he is clearly unconvinced that the Secretary General can find sufficient guidance in the general principles of international law and the purposes and principles of the Charter to enable him to exercise discretionary powers, particularly in the political area, with impartiality and neutrality. While he finds Khrushchev's proposals and antics excessive, he does feel that the Soviet leader was calling attention to a problem that as yet had not been satisfactorily resolved. Siotis' conclusion is that a substantial degree of politicization of the Secretariat is inevitable and indeed defensible, and that, in particular, the Secretary General must have available within the Secretariat top-level political advisers who will keep him in intimate contact with governments, if the Secretariat is to discharge in acceptable and effective manner the added responsibilities, particularly in the operational field, which have been, are being, and presumably will be placed upon it.

This is a study that deserves wide attention. One may not agree with the author's conclusions, but one must not disregard them and particularly the analysis and reasoning leading to them. It is unfortunate, particularly from the point of view of the impact of the study on an American audience,

that the author does at times show a lack of understanding of the position of the United States. It is, of course, true that McCarthyism had extremely harmful repercussions so far as official U. S. attitudes toward the Secretariat were concerned, but it is unfair on the basis of that aberration and present-day hangovers from it to place the United States in the same category with the Soviet Union as permanent Members of the Security Council "*qui admettent avec peine*" the existence of an international secretariat, independent, impartial, and composed of officials whose first loyalty is to the international organization.

LLELAND M. GOODRICH

The Organization of American States. By Ann Van Wynen Thomas & A. J. Thomas, Jr. (A Law Institute of the Americas Study.) Dallas: Southern Methodist University Press, 1963. pp. xii, 530, Index. \$10.00.

The authors of this comprehensive study have already proved their scholarly competence and their good judgment in the publication of *Non-Intervention*, a study of the outstanding problem of inter-American relations. The reader will be prepared, therefore, for an equally scholarly and well-balanced study of the larger topic they have here undertaken.

The range of the volume is wide, beginning with the historical background and proceeding in successive chapters through the legal characteristics and organization of the Organization of American States, the principles by which it is governed, and its activities in the fields of collective security, procedures of pacific settlement, maintenance of the peace, and economic, social, cultural and juridical co-operation.

Perhaps the outstanding characteristic of this admirable volume is the detail with which the authors discuss events and the descriptive and critical comment accompanying the narrative. Legal issues are presented clearly and accurately; but accompanying the discussion is an evaluation of the event in terms of inter-American ideals. Here one can only admire the good judgment of the authors, who characterize conference after conference and treaty after treaty in the frankest yet fairest manner. The volume is therefore not a mere recital of facts, but a running commentary upon the development of inter-American relations, more readable in consequence than a mere textbook on the subject.

Chapter III, analyzing the basic characteristics of the Organization of American States, is an example of the combination of detail and running comment that marks the volume as a whole. What is the legal nature of the Organization? Has it an international personality similar to that of the United Nations? What privileges and immunities are enjoyed by its Members in other states? What is the regional nature of the Organization in relation to the United Nations? And of particular interest at the present day, what is the application of Article 51 of the United Nations Charter in relation to the issue of self-defense?

Chapter IV, dealing with membership, contains an accurate description of the expulsion of the present government of Cuba. Chapter V, describing

the Organs of the Organization, gives a clear analysis of the distinct functions of the Conference and of the Meeting of Consultation of Foreign Ministers, in the course of which there is an interesting estimate of the legal value of resolutions and declarations. Chapter VII, dealing with purposes, functions and principles, examines the practical application of the principles of sovereignty and equality, followed by an analysis of the controversial principle of non-intervention so exhaustively treated in the authors' earlier volume. Chapter X, dealing with jurisdiction over aliens, can be commended as a fair and impartial presentation of the conflicting positions of Latin America and the United States in respect to an international standard of justice. Chapter XV, one of the most valuable of the volume, dealing with the inter-American system of peace and security, analyzes the problem of individual and collective self-defense in relation to Article 51 of the Charter of the United Nations, and is to be recommended as a clear presentation of the position taken by the President against the missile bases in Cuba.

Succeeding chapters deal with the pacific settlement of international disputes, the controversies that have arisen under the Rio Treaty, questions of civil strife, the Monroe Doctrine, and economic, social, cultural and juridical co-operation. A final chapter, Epilogue, examines the O.A.S. in terms of five prerequisites necessary for an effective international organization, and is frankly critical of the future. If the Organization fails in maintaining "the ideal of democratic government," it will not be saved from collapse by reason of its "secondary activities" in the economic, social and cultural fields:

As long as many members of the OAS fail to come to grips with the substance of the communist problem, the OAS is sitting on a rumbling volcano. . . . If the antagonisms in fundamental conviction continue, the road to a greater inter-American legal order is closed.

Conclusions perhaps a bit pessimistic, but frankly stated by observers who speak as friends.

Congratulations are due to the authors for a work badly needed, which, in addition to being a piece of careful research, supported by exhaustive footnotes, is written in an exceptionally readable style. A wider knowledge of the Organization of American States is urgently needed, and professors and students alike in the field of inter-American relations will give the volume a warm welcome.

C. G. FENWICK

Sowjetunion und Völkerrecht 1917 bis 1962. By Boris Meissner. Cologne: 1963. pp. 650. Index. DM. 65.

The Soviet Union and International Law constitutes the most complete bibliography of Soviet publications on public international law to appear in any language to date. It also forms the fourth volume in a recently established documentary series on "Eastern Law" (*Dokumente zum Ost-*

recht) at the hand of the leading German sovietologist, Professor Boris Meissner. The prior studies, all appearing in 1962, have been: *Warschauer Pakt* [*The Warsaw Pact*], *Der Rat für gegenseitige Wirtschaftshilfe* [*Council for Mutual Economic Assistance*], and *Sowjetunion und Selbstbestimmungsrecht* [*The Soviet Union and the Right of Self-Determination*]. In the leading Soviet legal periodical¹ the last-mentioned work has already received a blistering, and typically irrelevant, review.

Professor Meissner's 80-page commentary introduces the instant bibliography. He reviews and analyzes the development and content of the Soviet version of international law, carefully taking into account the ideological basis as well as the determining factor of Soviet foreign policy. The author's classification of the phases of Soviet theory—each phase reflecting an ideological reorientation and more or less symbolized by a key personality—is in itself instructive. Beginning with the period of transition from traditional international law to the Marxist-Leninist theory (1917–1923), four main phases are presented in which international law is in turn theoretically viewed as a limited law of compromise (1924–1930, Korovin); a weapon in the international struggle (1931–1938, Pashukanis); a means of combat and co-operation among states (1938–1955), the famous Vyshinsky thesis); a long-term law of co-existence (since 1955–1956, Tunkin).

A brief section on the state of international law in Tsarist Russia recalls an almost universally ignored tradition. The commentary closes with two incisive chapters on the dogma of sovereignty, which constitutes the main pillar of Soviet international law doctrine, and the latter's double-pronged thrust.

The bibliography itself has been deftly put together and translated by Dr. Alexander Uschakow (University of Kiel), author of the above-mentioned COMECON study. Titles are listed on opposing pages in Russian and German. Since the translations remain true to their originals, there are of necessity a number of macabre titles. Anyone familiar with the heavy propaganda content of this literature knows well its tenor. However, this blemish has been adequately dealt with by a factual identification in the index of otherwise unintelligible titles.

The bibliographical coverage of the years 1917 to 1957 is a transplantation of the bibliography published by the Soviet Association of International Law in 1959 under the editorship of Professor Vsevolod Durdenevsky (a former legal adviser to the Soviet Foreign Office during the postwar period, and during the Weimar Republic a regular contributor to German periodicals on East European law). The system employed in the Durdenevsky bibliography has been adopted *in toto*. Any alternative approach would have presented immense conceptual and propagandistic barriers and Dr. Uschakow's supplementary bibliography for 1958–1962 has been assimilated into this system.

Titles from the Durdenevsky bibliography dealing with private inter-

¹ 1963 *Sovetskoe Gosudarstvo i Pravo* [*Soviet State and Law*], No. 10, p. 132.

national law are not included, since a separate documentary study of the same is already in the planning stages as volume five of this productive series. Also absent are publications abroad by Soviet authors, which for some reason had not been included in the original bibliography. These, however, are to be included in a later work planned by Professor Meissner, which will at the same time present Western publications on the Soviet version of international law.

The metamorphoses of Soviet international law doctrine parallel—always with a time gap—other changes in Soviet ideology, policy and practice. The Meissner-USchakow bibliography is a basic reference work which contributes excellently to the documentation and analysis of the constants and variables in this process.

WILLIAM McCULLOCH

Institut für Internationales Recht, Kiel

Medjunarodno pravo [International Law]. 4th ed. By Juraj Andrassy. Zagreb, Yugoslavia: 1961. pp. xiv, 395. Index. \$2.50.

Professor Andrassy of the University of Zagreb has been publishing extensively since at least 1922, and is regarded, along with Professor Bartoš (Belgrade), as the most prominent Yugoslav authority on public international law. The fourth edition of his textbook provides a compact survey for students, resembling in format the German *Kurz-Lehrbücher*. Transposed into American idiom, this would lie somewhere between the textbooks familiar to political science departments and the hornbooks of law school genre.

Judging by the frequency of editions (1949, 1954, 1958 and 1961) and the comments of indigenous students, this is the most widely used international law textbook in Yugoslavia. It also illustrates a surprisingly voluminous literature which is little known in the West and which has been largely ignored in the Soviet Union. This alone merits reviewing, but even more so because the textbook is a refreshing example of judicious presentation from an area where the tendency—and in other lands apparently the requirement—has been to pour a socialist or Marxist content into the pliable molds of international law. Although occasional gestures of this sort are parenthetically inserted here, they do not seriously detract from the book's academic value.

A comparison of the last three editions reveals primarily a slight expansion in bringing the work up to date. The first edition, for reasons of its own, had a somewhat different cast and practically no citations. The latest edition (divided as its two predecessors into nine conventional chapters, in turn comprising 117 subsections) contains extensive source material. This is predominantly "Western," that is, traditional, although there is ample citation to ante- and post-World War II Yugoslav authorities. A modest use is made of Soviet sources (surprisingly, the leading Soviet international law figure since 1956, Tunkin, is not cited). However,

Professor Andrassy does not engage in extensive controversy over divergent "Soviet-Yugoslav-Western" viewpoints. This is a matter of disciplined presentation, for the author does not hesitate to mention hard cases, politically loaded issues: the report of the U.N. Special Committee finding that the Hungarian people are under a foreign rule and are being denied the basic right of selecting their own government (p. 54, note 10); the aggressions in Korea and Egypt (p. 29); the illegality of the use of atomic weapons in their present form (p. 349).

Certain minor quirks are interesting. Thus the term "American" is equivocally used to include South and North America, and the index listing of Hungarian Revolution refers to Russian help in suppressing the Hungarian revolt of 1849.

As to fundamentals, the author categorically affirms international law to be in its essence *law*. Here he avoids the Marxist labyrinth which *a priori* requires class conflict and coercion in order to classify a normative system as legal. But this embarrassing theoretical question has never been well answered even by professional ideologists of that particular faith, and it is clearly not the author's cup of tea. Professor Andrassy is a moderate but confirmed dualist. "The primacy of internal law leads to a negation of international law . . . the primacy of international law may be a postulate but for the present is not a reality" (p. 4). He emphasizes that international law is a "system of legal rules" which "makes it possible to solve every case, even those which were not anticipated beforehand" (p. 2).

The textbook's outstanding virtues are conciseness and academic restraint. This becomes apparent from the beginning; it becomes impressive when treating topics such as regional organizations (pp. 270-284), where the author confines himself to a bare legal description of NATO, the Warsaw Pact, E.E.C., and COMECON, *inter alia*, without engaging in polemics. These qualities merit high praise with but one reservation. This is sometimes achieved at the expense of not coming to grips with contending rules, or contending policies behind would-be-rules, and some views "according to our opinion" are too easily assumed, *e.g.*, the declarative character of the recognition of states (p. 47), without an analysis of the function of the institution of recognition in the international legal order.

It would also have been enlightening to have had the author's express judgment on the existence or the possibility of creating a "socialist international law" (or a derivative thereof known as proletarian, or socialist, internationalism), especially in view of an apparent switch in the Yugoslav literature from espousal to denial of this thesis, and the fact that for a time it served as a vehicle for condemning Soviet hegemony. However, this controversial issue has generally fallen into desuetude among those who, by political inheritance or conviction, have the burden of unequivocally answering it. Here it is denied by implication.

DIETRICH FRENZKE
WILLIAM McCULLOCH

Diplomatic Protest in Foreign Policy: Analysis and Case Studies. By Joseph C. McKenna, S. J. (Jesuit Studies.) Chicago: Loyola University Press, 1962. pp. xiv, 222. Index. \$6.00.

Some years ago a series of lectures by Burton Marshall explored "the limits of foreign policy." Its theme was a warning that in international relations there are limits beyond which the desires of a nation and its people cannot be attained. On some subjects other governments just will not accede to any of the kinds of pressure that our Government can, in practice, bring to bear. Father McKenna's study of diplomatic protest as an instrument of foreign policy develops one aspect of this theme, and demonstrates its validity by sagely selected individual examples and significant statistics on a larger group of instances.

Our State Department often must make a difficult choice between the long-term national interest and the protection of a citizen from some immediate harm at the hands of another nation. When so phrased, the choice looks easy. But often public opinion rises to support a fellow citizen being subjected to apparent abuse by foreigners, and Congressmen, whose influence often stems from control of purse strings, are quick to join in the protests.

In connection with the dispute over neutral rights in 1915-1916, for example, Father McKenna commented that the American "spokesmen more often emphasized the soothing of American public opinion than the merits of their case." This preoccupation with the appeasement of the public may have led the Administration to make protests which, because our ultimate interests in the European war were the same as those of the British, led to "some legal embarrassment" later on. It should not have been overly difficult to predict that before long we would also find ourselves interfering seriously with the trade of neutrals. Father McKenna has emphasized the importance of forethought in facing incidents leading to diplomatic action, but he found that the American Government "has shown an unfortunate inclination toward afterthought."

The specific examples of diplomatic protest by the United States Government studied in detail in this work were selected so as to demonstrate the effect of protest in various kinds of situations and involving large and small nations in various circumstances. The choices were well made, and the descriptions are good history. They involved protests against the interference with our neutral rights by the British during World War I; adverse legislation affecting American petroleum interests in Rumania in 1924; the attack by Chinese rebel troops on the American community in Nanking in 1927; the harsh treatment of a convicted American in a Canadian jail in 1933; and the failure of the Soviet Union to prevent the continuation of propaganda activities in the United States by the Comintern in 1935.

The results of Father McKenna's research are not likely to cause much change in the inclination of our State Department to make a diplomatic protest when a situation arises that would have traditionally led to its

use. Perhaps heed will be given to his admonition that more attention should be paid to plans for action in case of resistance by the other government and to the ultimate consequences for ourselves in case of victory. We could be hoist by our own petard. Beyond this, Father McKenna has concluded that "diplomatic protest seems likely to succeed more often than not, although absolutely vital concessions are not to be expected." He emphasizes that much depends on the existence of similar attitudes in both countries, leading to desires for reciprocity. He also found that "patience is obviously necessary" to success, which often depends on the value the other government "places on United States friendship."

For anyone interested in the implementation of foreign policy through diplomatic action this is an interesting and informative volume. It is based on thorough research and an extensive bibliography. The index is full and the footnotes (which are unfortunately at the chapter ends rather than on the relevant pages) are happily limited to reference material, which is extensive.

MICHAEL H. CARDOZO

Foreign Relations of the United States. Diplomatic Papers, 1941. Vol. VII: *The American Republics.* (Dept. of State Pub. No. 7447). Washington, D. C.: U. S. Govt. Printing Office, 1962. pp. viii, 627. Index. \$3.25.

1942. Vol. VI: *The American Republics.* (Dept. of State Pub. No. 7513). Washington, D. C.: U. S. Govt. Printing Office, 1963. pp. ix, 773. Index. \$3.25.

Each of these volumes completes the publication of *Foreign Relations* for the year concerned, being belatedly released after the other records of those years. The years 1941 and 1942 were war years and these volumes are devoted to the sundry ways in which the United States arranged for 17 American states to get ready for it and then support it in the physical activity of the second World War. The Third Meeting of the Foreign Ministers at Rio de Janeiro in January, 1942, had fixed the lines of American solidarity, reciprocal defense, control of subversive activities, allocation of strategic materials, et cetera. Prior volumes in the two years record relations with Argentina, Bolivia, Brazil, and Chile for 1941. These volumes in substance are the story of acquiring the natural resources of Latin America for the conduct of the war by the United States.

By the time that the Lend-Lease Act became law on March 11, 1941, the United States was pretty well launched on a policy of preparing for the eventual conflict, utilizing the co-operation and collaboration afforded from the results of the Consultation of Foreign Ministers of the American States at Havana in 1940. Assignment of military, naval and aviation advisers to several countries was a repetitive routine. Somewhat elaborate negotiations for defense began with Cuba in May, 1941, and evolved into agreements of June 19 and September 7, 1942, in which Cuba granted military, naval and air privileges fully adequate to the United States' requirements. Chile was a problem child, fearful of the Germans seeking

military aid, ending 1942 participating neither in Hemisphere defense nor Lend-Lease. A seaplane base in Colombia, a defense commission with Mexico, the supply of trainer aircraft to Peru, are typical of the military affairs that occupied some diplomatic attention. Panama, of course, loomed large, beginning much before the 12-point request of Panama early in 1941 and the United States demand for defense sites all over that country. In rather tough negotiations Panama got overpaid for leases of land excessive to the defense needs; payments under the agreements of May 18, 1942, were delayed until May, 1943.

After the United States got the authority of the Lend-Lease Act of March 11, 1941, it began building the war sinews of the world. Lend-Lease agreements were made with American Republics, except Argentina, Bolivia, Chile and Panama, in 1941 and 1942. Other agreements were published at the time; these Latin American agreements are published in these volumes of *Foreign Relations* for the first time. With most of the states the type of the negotiation is indicated for the military hardware supplied to them against reimbursement by annual payments up to 1947 or 1948. The settlements, stipulated at from less than 3 to 48% of the advances, were all made substantially on time. Another negotiation common to all the states was that to acquire all their exportable rubber, Chile, Ecuador, Panama and Peru conducting some arguments as to price and other terms. The Metals Reserve Company was another agency that arranged preclusive buying of platinum in Colombia, and something similar in Chile, Peru and other countries with metal wealth.

The relations were not all focused on war. Resumption of payment on the Colombian foreign debt, disposition of the Cuban sugar crop, reciprocal trade agreements with Cuba and Mexico, arranging for the Rama Road across Nicaragua, financial assistance to Cuba and Haiti and sundry loans by the Export-Import Bank were among the matters not connected with the war that engendered correspondence.

It was noted in reviewing previous volumes of *Foreign Relations* that the selection of United States notes, instructions, memoranda and other papers to the exclusion of the other party's papers made the record a diplomatic monologue instead of a dialogue. These volumes reveal about the same proportion of United States papers to those of the other country, but the tone is much more of the dialogue: negotiations where there are two sides in evidence.

DENYS P. MYERS

Yearbook of the European Convention on Human Rights, 1961. Vol. IV.¹

The Hague: Martinus Nijhoff, 1962. pp. xvi, 682. Index. Gld. 61.50; \$17.10.

Like its predecessors, this fourth volume of the *Yearbook of the European Convention on Human Rights*, which covers the year 1961, is a mine of information on the working of this convention on all levels.

¹ For reviews of the three preceding volumes, see 55 A.J.I.L. 200, 1019 (1961), and 57 *ibid.* 166 (1963).

Under the convention, jurisdiction to ensure the observance of the engagements undertaken by the parties is vested in: (1) the European Commission of Human Rights, (2) the European Court of Human Rights, and (3) the Committee of Ministers of the Council of Europe. The convention (Art. 32) provides that if a question on which the Commission has made a report is not referred to the Court, it is the task of the Committee of Ministers to decide, by a majority of two thirds of the members entitled to sit on the Committee, whether there has been a violation of the convention. Part I (Basic Texts and General Information) of the volume under review contains the "Rules of Procedure adopted by the Committee of Ministers for the Application of Article 32 of the Convention" (p. 14). These Rules provide, *inter alia*, that "The representative of a State which is Party to a dispute referred to the Committee of Ministers shall step down from the Chair [*abandonne la présidence du Comité*] during the discussion of the Commission's Report." They go on to stipulate that "The Parties to the dispute shall, however, retain the right to vote." This is a provision which departs from what the Permanent Court of International Justice called the "well-known rule that no one can be judge in his own suit."²

In Part II of the volume (p. 490) we find extracts from the Report of the Commission in the well-known case of *Nielsen v. Denmark*. Nielsen had been found guilty of having instigated by various means, *including hypnosis*, the commission by a co-accused of an armed robbery of a bank, in the course of which two bank officials were killed. The Commission reported unanimously that the applicant had been informed in sufficient detail of the nature and cause of the accusation against him and that, "considered as a whole," the criminal proceedings brought against Nielsen in the Danish courts did not fall short of the standard required by the convention. The Committee of Ministers, as a consequence, decided that in this case there had been no violation of the convention (p. 591).

The decision of the European Court of Human Rights of July 1, 1961, in the *Lawless* case (Merits) is reproduced in full (p. 438).

In 1961, the Commission on Human Rights dealt with and decided on the admissibility of one "inter-state application" (*Austria v. Italy*). The Austrian Government alleged that the convention had been violated by Italy in the course of the trial of a number of German-speaking youths from Bolzano Province for the murder of an Italian customs officer. Italy has been a party to the convention since 1955, Austria, since September, 1958. The trial court and the Court of Appeal rendered their decisions before Austria's accession to the convention. Italy objected to the jurisdiction of the Commission *ratione temporis*: at the relevant time, she said,

² Interpretation of the Treaty of Lausanne (Iraq Boundary) (1925), Series B, No. 12, p. 32; see, further, the separate opinion of Judge Lauterpacht in *South-West Africa—Voting Procedure*, Advisory Opinion, [1955] I.C.J. Rep. 99, and H. Lauterpacht, *The Development of International Law by the International Court* 158 (1958) ("The principle *nemo judex in re sua*"); and also Art. 27 (3) of the U.N. Charter, under which, in decisions of the Security Council under Ch. VI (Pacific Settlement of Disputes), a party to a dispute shall abstain from voting.

Italy had been under no obligation vis-à-vis Austria to apply the convention; Italy did not have the right reciprocally to file a complaint against Austria in respect of occurrences before September, 1958. The Commission rejected this preliminary objection because it appeared from the Preamble and from Articles 1 and 14 of the convention that the purpose of the parties in concluding the convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests, but to establish an *ordre public* common to the free democracies of Europe (p. 138).

In 1961 the Commission received 344 "individual applications" (petitions), as against 291 in 1960 and 233 in 1959; it gave 222 decisions as against 265 in 1960 and 130 in 1959 (p. 184). Seventeen selected decisions are reproduced. One of them, like three decisions rendered in 1960,³ dealing with the Austrian law of criminal appeals, declared the petition of one *Dunshirn v. Austria* admissible (p. 186); the rest were to the effect that the applications are not admissible.

Part III of the volume (The Convention within the Member States of the Council of Europe) reproduces an extract from proceedings in the Italian Senate, where the Minister of Foreign Affairs gave the reasons for Italy's not having accepted the compulsory jurisdiction of the European Court of Human Rights (p. 597). It also contains texts of decisions of Austrian, German, Luxembourg and Netherlands courts dealing with problems regulated by the convention.

EGON SCHWELB

Annuaire Suisse de Droit International. Vol. XVII, 1960: pp. 332; Vol. XVIII, 1961: pp. 352. Index. Sw. Fr. 34 each.

Index Général des Volumes I (1944)—XV (1958). pp. 123. Sw. Fr. 24. Zurich: Editions Polygraphiques, 1962 and 1963.

The emphasis in Volumes XVII and XVIII of the *Swiss Yearbook of International Law* is still on problems and documents of public international law, although, compared with preceding issues, more room is given now to private international law.

In an essay on the "objectivistic" interpretation of international treaties in Vol. XVII, Justice Antoine Favre stresses the objective existence of the *text* of the treaty and the "objective" elements of treaties but he still concludes that the importance of the subjective and objective factors will vary according to the nature of the treaty. Dr. Raymond Probst deals with the question of Switzerland and international arbitration. After a brief historical survey, he discusses the present Swiss system of treaties of conciliation, arbitration and judicial settlement and the cases to which his country has been a party. His concluding comments concern an interesting initiative taken in 1960 by the Swiss Government toward the conclusion of treaties for the pacific settlement of disputes with states with which Switzerland did not yet have such agreements. Dr. Blaise

³ 57 A.J.I.L. 167 (1963).

Knapp, in his reflections on the jurisprudence of the International Court of Justice in matters of nationality, concentrates in particular on the *Nottebohm* case. While he agrees with the Court on the necessity of a bond between state and citizen, he is concerned about the consequences of the decision on the law of citizenship. It is not clear, however, whether he took sufficiently into account that the Court ruled against Liechtenstein's right of diplomatic protection only with regard to Guatemala.

Vol. XVIII starts with an interesting historical study by Professor Paul Guggenheim on general international law and European public law. He traces the development of the universalistic and of the European-Christian concept of international law, and draws a parallel between the non-organizational character of the former and the organizational expression of the *Res Publica Christiana* and the *Droit Public Européen*. He sees in the present European integration efforts a new European public law which differs both from the international and national legal orders. Finally, Professor Rudolf Bindschedler contributes succinct comments on the Vienna Conference and Convention on Diplomatic Relations of 1961.

The documentary parts again contain valuable reports on Swiss practice in international law in 1959 and 1960 by Professor Guggenheim, repertories of the treaties concluded by Switzerland which entered into force in 1960 and 1961, by Dr. Emanuel Diez, and bibliographical notes (1959-1961) by Professor Henri Thévenaz. In addition, Vol. XVIII gives the full text of the *Flegenheimer* decision of 1958¹ and of the Vienna Convention on Diplomatic Relations with Protocols of Signature.

The General Index covering the first fifteen volumes of the *Yearbook* shows the wide variety of the subjects dealt with therein and should prove very useful.

SALO ENGEL

Shaping the World Economy. Suggestions for an International Economic Policy. By Jan Tinbergen. New York: The Twentieth Century Fund, 1962. pp. xvii, 330. Index. \$2.25, paper; \$4.00, cloth.

This study was prepared by a team organized under the auspices of the Netherlands Economic Institute Division of Balanced International Growth, headed by Professor Tinbergen, the eminent Dutch economist. The Twentieth Century Fund sponsored the work "out of a desire on the part of the Fund to further serious and objective thinking on the problems of the international economy." For the economist and the technician of international development, there are a number of appendices which are valuable in themselves. They range from a study of economic development and co-operation in Africa, the Middle East, Southeast Asia and Latin America to an analysis of world trade flows.

For the student of international relations and legal organization, Professor Tinbergen's views on the international aspects and problems of

¹ Digested in 53 A.J.I.L. 944 (1959).

economic development are the most important. The author recommends a stronger Western contribution to economic development, in response to the Communist challenge. He regards a high degree of centralization on the local, state, continental or world level as necessary for the optimum use of economic policy. He stresses in particular the need of centralized expenditure for development purposes. This means that

there must be an *international financial authority* of considerable strength, and it seems natural that this authority should be able to make *current expenditures* as well as provide loans, just as any central government makes a considerable portion of its development expenditure on a current basis.

He also believes that there is a need for more agencies to deal with the problems of stabilizing the revenues of countries producing primary commodities, and for an international insurance scheme against non-economic risks. He proposes the formation of an international authority within I.D.A., or possibly O.E.C.D., and an increase in commodity agreements at least among the non-Communist countries.

Notwithstanding the number of existing and recommended international development institutions, Professor Tinbergen urges a stronger rôle for the United Nations in the field of economic development: first, through the formulation of the main aims of world economic policy; second, through correction of some of the undesirable features of today's geographic distribution of aid and private investment; third, through regional co-operation and integration, by some of the regional commissions of the United Nations.

Passing from economic to political perspectives, Professor Tinbergen regards it as "in the interest of world peace that the uncommitted countries remain or become as independent of both East and West as it is conceivable for them to be." Finally, he appears to favor a four-Power configuration as likely to promote international security. Apart from the two major power blocs and a United Nations world force, the fourth power would be a neutralist force.

The study's proposals in the field of the international organization of economic development have been widely discussed and, at least in the field of commodity agreements, there has been some progress in the last year or so. Some may doubt the desirability of yet another international financial institution, and most students of international organization would probably concur that the proposed rôle of the United Nations, while highly desirable, has small prospect of implementation in the foreseeable future. Apart from the general lassitude about foreign aid, the disproportionate representation of the under-developed states in the General Assembly is a major reason for skepticism, as is shown by the fate of SUNFED. The steady but modest growth of the United Nations Special Fund is perhaps the best that can be hoped for at this time.

W. FRIEDMANN

BRIEFER NOTICES

A Treatise on the Conflict of Laws. By Albert A. Ehrenzweig. (St. Paul, Minn.: West Publishing Co., 1962. pp. li, 824. \$10.00.) In the last few years, there has been a great outpouring of writing on the conflict of laws in the United States. It has had a remarkable impact upon the schools; what is particularly notable is the impact that it is now having on the courts. Such decisions as *Babcock v. Jackson* and *Pearson v. North East Airlines* are eloquent testimony to this fact. Albert Ehrenzweig has been one of the major figures contributing to this ferment in the field. For years, in many articles and places he has waged war on conceptualism in the conflict of laws. Now he has presented his arguments and philosophy of the subject in this book. Into it he has incorporated a good deal of his earlier writing, but the book furnishes him with scope for a systematic exposition. It ranges over the whole field of the conflict of laws; it surveys problems of jurisdiction, choice of law and foreign judgments; it explores difficult and uncertain areas of constitutional law as far as they bear on conflictual problems. The survey and citation of authority is prodigious; Ehrenzweig draws upon the writings of civilians, upon the writing and case law of other common-law countries, as well as upon the vast mass of American authority.

In this JOURNAL, it is possible only to note a work on the conflict of laws, and this does scant justice to Ehrenzweig's book. It is full of ideas; it is not, as some of the fine writings on conflict of laws have been, an exercise in almost pure iconoclasm. There are various matters and positions with which this reviewer would disagree; and Ehrenzweig not infrequently deals with authority in a way which, in this writer's view, the cases do not permit. The distinction between *lex lata* and *lex ferenda* should not be blurred in this way: a better way to deal with bad authority is to say it is there, bad, and ought to be rejected. Another criticism is that the book is very tightly written; it is not easy to read; and if the more initiated experience this difficulty, the burden on the acolyte is a heavy one. But with all this, the book is a remarkable, in some respects a monumental achievement, and it enriches the literature of the conflict of laws.

ZELMAN COWEN

American-Austrian Private International Law. By Ignaz Seidl-Hohenveldern. (Bilateral Studies in Private International Law, Parker School of Foreign and Comparative Law. Dobbs Ferry, N. Y.: Oceana Publications, 1963. pp. 154. Index. \$7.50.) Arthur Nussbaum initiated these bilateral studies in the conviction that international conflicts law was even less susceptible to the facile generalizations of prevailing doctrine than inter-state law. This is the eleventh study in this series. Although final conclusions will have to await the completion of the collection and an analytical comparison of its findings, it is not too early to say that, while both problems and solutions vary greatly from country to country, at least one general proposition has emerged which is confirmed again in the present study: Courts, in international conflict cases, will, with few though important exceptions,¹ in effect apply their own laws.²

¹ Including the laws of status, pp. 69-76, and of the validity of contracts (favoring the law of validation, p. 32). See Ehrenzweig, *Treatise on the Conflict of Laws* 369-408, 467-490 (1962), reviewed above.

² This may be inferred from the scarcity in the present study of citations to cases in which foreign law was actually applied. See Ehrenzweig, *Fragistas and Yian-*

The author has again proved his singular qualifications as a comparatist and internationalist. Being engaged in teaching on the very border between the Germanic and Romance legal worlds, and having concentrated a good part of his research on American law, he may be counted among those few who have mastered the techniques and assimilated the ideologies of several legal systems. Being, in addition, a renowned scholar in public international law, he has, in the present study, drawn the proper conclusions from the relative unimportance of private law in international conflicts cases. Thus he has devoted six of his nine chapters to public law problems (International Bill of Rights, Financial Matters, Commercial Activities, Social Security, Nazi Occupation and World War II, Matters of Procedure) and has conceded to public international law a dominant rôle in his entire presentation. At the same time, his chapters on family relations, as well as on general notions of conflict of laws, may be counted among the best brief treatments of these topics of private international law. Finally, not the least important contribution of this book is its offering of what is probably the best access for the American lawyer to the statutory law and legal doctrine of Austria.

ALBERT A. EHRENZWEIG

Le Problème de la Faute et sa Place dans la Norme du Droit International. By Alexandre Carlebach. (Bibliothèque de Droit International, Institut des Hautes Études Internationales, Université de Paris, Tome XX. Paris: Librairie Générale de Droit et de Jurisprudence, R. Pichon et R. Durand-Auzias, 1962. pp. vi, 131. Fr. 16.50.) Retreat into the theoretical debates of the half-century 1880-1930 might conceivably afford perspective for judging modern developments in state responsibility. The author has adopted such an approach by criticizing the concepts of Triepel, Jellinek, Jess, Schoen, Strupp, Strisower, Burckhard, Knubben, Anzilotti and Verdross in order to defend and restate, with but rare dissents (pp. 46-49 and 79), the Kelsenian theories of fault and responsibility. A formula rigorously restricting analysis to doctrines of the pre-World War II period obviously does not allow for examination of present-day theories or of practice, whether of jurisprudential or of consensual origins. Although Eagleton is briefly discussed, and there is reference to Dunn, Borchard finds place only in the bibliography and there is no analysis of the contributions of Jessup, Freeman, Sohn, Baxter, Ago, Sperduti, Scelle or Rousseau. For the same apparent reason, developments of the period of the Hague Conferences in 1907 and 1930 are treated as "recent" (pp. 31-33) to the exclusion of the work of the International Law Commission. Preoccupation with earlier doctrinal discussions excludes analysis of jurisprudential contributions, not excepting, in the field of "fault," the *Corfu Channel* case. Adoption of Kelsenian theories leads to emphasis on sanctions, on subjects and objects of obligation, agency, and imputability, at the expense of relating theories of fault to such critical problems as liability without fault, risk in general, contributory negligence, act of state, and extensions of the local remedies rule. For example, liability without fault is recognized only within the Kelsenian context of collective responsibility and in respect of undefined situations involving tangible property (pp. 95 and 110).

nopoulos, *American-Greek Private International Law* 56-57 (1957), reviewed in 52 A.J.I.L. 168 (1958); Ehrenzweig, Ikehara and Jensen, *American-Japanese Private International Law* 41-42 (1964); and, in general, Ehrenzweig, *op. cit.* note 1 above, at 309-347.

It could be hoped that a later edition might strike out on bolder, broader, and more modern lines.

JOHN H. SPENCER

Die Revision internationaler Verträge nach Billigkeit, dargestellt an der Genfer Generalakte (1928/1949) und der Europäischen Konvention zur Friedlichen Streiterledigung (1957). By Gerhard Rohnfelder. (Munich: A. Schubert, 1962. pp. 103.) This well-documented doctoral dissertation from Munich deals with the problem of the revision of international treaties *ex aequo et bono*, in particular according to the General Act for the Pacific Settlement of International Disputes of 1928/1949 and the European Convention for the Peaceful Settlement of Disputes of 1957. The author rightly points out that cases of revision of treaties are not, as a rule, legal disputes as defined in the two conventions. Under both, they are thus subject to the procedures of arbitration set forth therein and are to be decided according to the rules mentioned in Article 28 of the General Act and Article 26 of the Strasbourg Convention. Dr. Rohnfelder shows the inadequacy of both provisions and proposes instead simply a decision of a court of arbitration *ex aequo et bono*. To prevent abuses and to increase the confidence of states in this solution, he takes up a Swedish proposal, made during the elaboration of the European Convention, and suggests that a political body be competent to determine which cases shall come before the court. For the states Members of the Council of Europe the organs of the latter could fulfill this preliminary function. However, since this solution did not prove to be acceptable to governments within the limited framework of the Council of Europe, it is even less likely to be adopted on a more general scale.

This problem of the revision of treaties is part of the general problem of peaceful change. The United Nations Charter, which contains several provisions on peaceful change, still permits only recommendations to this effect by the General Assembly or the Security Council, unless the latter determines that the non-compliance with such a recommendation constitutes a threat to the peace. And yet there has been a great deal of peaceful change, although not necessarily involving the formal revision of treaties. An examination of the record of the United Nations would therefore have been useful for the evaluation of alternative solutions, but this would be a study by itself.*

SALO ENGEL

Reports of International Arbitral Awards. Vol. X. (United Nations Pub. Sales No. 60.V.4. New York: Columbia University Press, 1962. pp. xvi, 779. Index. \$9.00; Sw. Fr. 38.50; 64 s.) The tenth volume in the useful and well-organized series prepared by the Codification Division of the Office of Legal Affairs of the U. N. Secretariat contains the second part of the Venezuelan Arbitrations of 1903-1905, and this completes their re-publication. It will be recalled¹ that the preceding volume in this series contained the first part of them.

The current volume is devoted to the awards of seven Mixed Claims Commissions created under protocols concluded at Washington in 1903 (France-Venezuela, Germany-Venezuela, Italy-Venezuela, Mexico-Venezuela, Netherlands-Venezuela, Spain-Venezuela, and Sweden and Norway-

* It has been done in part by Bloomfield, *Evolution or Revolution?* The United Nations and the Problem of Peaceful Territorial Change, reviewed in 52 A.J.I.L. 812 (1958).

¹ 55 A.J.I.L. 1028 (1961).

Venezuela), plus the eleventh Mixed Claims Commission (France-Venezuela) under the Paris Protocol of 1902. The text reproduces the original reports of Ralston which were first published by the Government Printing Office in 1904 and 1906. The usefulness of the present volume is enhanced by an effective subject index, and the general careful standard of arrangement and attention to detail which one has come to expect in this series.

JAMES N. HYDE

Government Guarantees to Foreign Investors. By A. A. Fatouros. (New York: Columbia University Press, 1962. pp. xvii, 411. Index. \$12.00.) Increased foreign investments, not only in less developed countries, have raised complex problems of legal protection. Guarantees against expropriation and other forms of non-business risks have been given to the investor by capital-receiving countries in their legislation, investment codes, treaties and in contractual arrangements with foreign corporations. Capital-exporting states also provide guarantees to their own nationals, as did the United States in its investment guarantees agreements which the Agency for International Development and its predecessors concluded with more than sixty countries. Not only are the legal character and the effect of these various forms of protection thoroughly considered by the author, but also the practical impact of state promises on economic development. Here other aspects are also investigated, such as currency regulations, the employment of alien personnel, repatriation of capital and earnings, taxation which often has discriminatory effects, and generally the standards of treatment of foreign investors. Of special interest is the discussion of the theories on contracts between states and aliens and the possible application of the French concept of *contrat administratif*. Questions relating to compensation to be given to foreign interests in cases of expropriation, the elements of "just" compensation, its extent and assessment, are also dealt with in detail. The book, with an exhaustive bibliography (which the author supplemented with more recent material in 17 *Rutgers Law Review* 257), is a very valuable contribution to this special field of international economic law of ever increasing importance.

MARTIN DOMKE

Readings and a Discussion Guide for a Seminar on Legal and Political Problems of World Order. Preliminary edition. By Saul H. Mendlovitz, compiler and editor. (New York: The Fund for Education Concerning World Peace through World Law, 1962. pp. x, 858. \$2.25.) It is one thing to recognize the need for an informed public opinion with regard to the major international issues of the day but quite another to provide some method for the development of this opinion. Addressing himself to the task of devising a program designed "to bring responsible and thoughtful persons together to study what might be done now to establish a stable system of peace for the evolving world community" (p. 855), Professor Mendlovitz of Rutgers University Law School has compiled a book of readings for use in conjunction with *World Peace Through World Law* by Grenville Clark and Louis B. Sohn in college seminars or by lay discussion groups. The materials can be covered in twelve sessions: the introductory session points up the issues; the second session analyzes the function of international law; five sessions are devoted to an examination of the United Nations, its structure, its rôle in the maintenance of peace, the validity of the Clark-Sohn scheme for strengthening the organization, its financial problems, U. N. assistance to under-developed countries, and the impact of the "Soviet-Sino" bloc upon the U. N.; disarmament is the

subject of four sessions, treating military and political aspects of the problem, proposals for disarmament, and the socio-economic impact upon countries of reductions in their defense expenditures; the final session summarizes previous discussions and suggests other topics for consideration. Each session's readings are accompanied by an introduction, a set of questions, and a bibliography.

The materials consist of a variety of thoughtfully selected readings which are stimulating and also demanding in that they force the reader to come to grips with the issues as presented by specialists. It would have been useful to include some readings on regionalism. And a seminar using these materials will have to take into consideration both the Test Ban Treaty of 1963, and the implications of the Sino-Soviet controversy for the international legal order.

ALONA E. EVANS

Pan America in Crisis. The Future of the OAS. By William Manger. (Washington, D.C.: Public Affairs Press, 1961. pp. viii, 104. Index. \$3.25.) *Pan America in Crisis* is a thoughtful and quietly original interpretation of the movement to create an inter-American political system. As the title suggests, Dr. Manger's study concentrates upon a diagnosis of present ills, although it also narrates the record of the past. It is to the author's credit that he does not allow the colorful events of recent years to dominate his sense of the subject. For instance, Dr. Manger is quick to point out that our Latin American troubles are not a consequence of the arrival of Castro on the scene or even of the Hemispheric strength of the Communist movement. Dr. Manger regards economic difficulties in each of the Latin republics to be at the root of the crisis. In addition to this, he is properly disturbed by the precedent created by the ouster of Castro's Cuba from the inter-American system. For this development, taken together with the heavy pressure in the opposite political direction put upon the Dominican Republic in 1960, has shattered the tradition of continental solidarity that is so basic to the whole Pan American idea. And finally, Dr. Manger is distressed by the failure of the United States to assert spiritual leadership over the Hemisphere.

Dr. Manger's book does not add much of interest to international lawyers *qua* lawyers. Its account of the political setting would probably benefit, however, those working on legal problems in the Latin American context. The book includes a history of the Pan American movement that manages to be both dull and superficial.

RICHARD A. FALK

The Abolition of War. By Walter Millis and James Real. (New York: Macmillan Co., 1963. pp. xvi, 217. \$4.50.) The authors of this book believe that war is obsolete in the nuclear age and have sufficient confidence in the rationality of men and governments to believe that they will discover this before a nuclear holocaust occurs and take adequate measures to abolish war. They perceive the problem as that of superseding ancient myths by ideas applicable to present conditions of the world. "The apparently insuperable difficulties," they write, "encountered in the renunciation of the war system revolve to a great extent on the ingenious updating of ancient myths, incantations, and propitiatory objects that have their roots in prehistoric times. . . . If the war system is to be dismantled, the ancient shibboleths that help hold it together must be understood for what they are." As an illustration they cite "the curious negative conundrum, 'Would you rather be Red or dead?'" which they sug-

gest is "a tortured extension of the oversimplified rallying cries coined for purposes of cohesion rather than sensibility all through the modern history of war" (p. ix, xi).

The book is largely a discussion of the problem of power in international politics and its management. It says little about international law, but recognizes its important rôle and also that of the United Nations in the "development of power structures in which large-scale organized war is no longer seen as necessary or, indeed, relevant." (p. 210.) This development will take hard thought by scientists, technicians, politicians, editorial writers, business men and workers to adjust their attitudes and action to the new situation, but the suicidal character of nuclear war is so obvious that "it is today possible for the first time to think about a world without war." (p. 216.) The abolition of war will come gradually, they think, through such thought, rather than from a "movement," a treaty or world government.

The book, sponsored by the Center for the Study of Democratic Institutions, is not intended for scholars but for the general public. It has no index, bibliography or footnotes, and some statements on primitive war and the history of war will not stand scrutiny. It is, however, a sound exposition of the present situation of international politics and a healthy antidote to the abundant literature on deterrence, which generally assumes that threats of nuclear war are necessary instruments of policy and so must be made credible, but that nuclear war would be so devastating that such threats must be made incredible to sustain the balance of terror by mutual deterrence through second strike potential.

QUINCY WRIGHT

Stalin's Foreign Policy Reappraised. By Marshall Shulman. (Cambridge, Mass.: Harvard University Press, 1963. pp. ix, 320. Index. \$6.50.) International lawyers who have had a heavy dosage of abstraction about principles of peaceful co-existence may find an antidote in this richly detailed account of the events that brought about a transformation of Soviet policy during the last three years of the Stalin period. Professor Shulman, writing in a non-polemical and coolly authoritative style, takes us behind the rhetoric and incantation to the concrete pressures and conflicts in the Soviet world that marked the development of the "quasi-Right strategy" which had its fruition under Khrushchev. In underlining the shift that occurred under Stalin's leadership, the book departs from the common assumption of a sharp change from Stalin to Khrushchev, and it is this thesis that has naturally attracted most attention, though, at least to this reviewer, it is not the most important contribution of the study. More illuminating is the account of the emergence of new positions (at first unevenly and experimentally) designed to meet an adverse power relationship while the foundations of nuclear and missile technology were being constructed and the Soviet sphere of influence more closely consolidated. In some ways this was not unlike other periods of Soviet détente and collaboration, and tactical similarities are apparent (as, for example, in extolling nationalism and symptomatically reviewing over again Lenin's "Left-Wing Communism: an Infantile Disorder"). But Shulman finds—and this is perhaps the most interesting conclusion of the book—that the defensive and tactical character of co-existence policy has evolved into a more far-reaching "qualitative" transformation of Communist ideology and a substantially different perception of historical reality from that previously expressed. While this does not imply an abandonment of ultimate goals of advancing Soviet society throughout the world, it in-

volves a muting of the classic theory of revolution and an implicit acknowledgment of economic stability in the capitalist world and the strength of nationalism in under-developed areas. Nor does it mean a slighting of the military power, for throughout Shulman's study one is reminded of the priority accorded to the development of nuclear and missile capabilities and of the continuing—if not always proclaimed—belief that Soviet military ascendancy is an essential element in achieving political advances without general war.

In sum, this is hard-headed and sophisticated history, sensitive to the enormous complexities of international relations and the many facets of Soviet and Communist Party activity. While it says nothing about the "new" international law, it can hardly fail to interest the jurists who have been concerned with the implications of contemporary Soviet policy in the juridical sphere.

OSCAR SCHACHTER

The British Year Book of International Law. Index to Volumes I-XXXVI. By J. G. Collier. (London, New York, Toronto: Oxford University Press, 1963. pp. viii, 150. \$7.20.) This useful consolidated index of the *British Year Book of International Law* covers the thirty-six volumes from 1920 to 1960 inclusive. The Articles-Author index is arranged alphabetically by authors and is followed by a similarly arranged index of Notes. There is no separate alphabetical index of articles or notes. The Subject Index of 69 double-column pages appears somewhat meager for thirty-six volumes but will be most helpful. A Table of Cases covers 70 double-column pages and is testimony to the large case law in the fields of public and private international law. The utility of this welcome volume is enhanced by the fact, perhaps not too widely known in the United States, that the first thirty-three volumes of the *British Year Book of International Law* have been reprinted and are now available to American libraries and scholars.

HERBERT W. BRIGGS

Decisions of the International Court of Justice. A Digest. By J. J. G. Sytauw. (Leyden: A. W. Sythoff, 1962; Dobbs Ferry, N. Y.: Oceana Publications, 1963. pp. 237. Index. \$7.50.) This is a useful guide to the jurisprudence of the Court. It contains adequate summaries of the facts, the issues, and the judgments or opinions, along with an indication of the essential dates of the proceedings, the source material and brief bibliographies. The editor hopes to keep the survey up to date by periodical supplements. It will be found very handy for a quick reference; for students who wish to refresh their memories it will be particularly helpful.

LEO GROSS

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* Mention here neither assures nor precludes later review.

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ELEANOR H. FINCH

OFFICIAL DOCUMENTS

CONVENTION ON OFFENCES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT¹

Signed at Tokyo, September 14, 1963

THE STATES Parties to this Convention
HAVE AGREED as follows:

CHAPTER I—SCOPE OF THE CONVENTION

ARTICLE 1

1. This Convention shall apply in respect of:
 - a) offences against penal law;
 - b) acts which, whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.
2. Except as provided in Chapter III, this Convention shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any state.
3. For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends.
4. This Convention shall not apply to aircraft used in military, customs or police services.

ARTICLE 2

Without prejudice to the provisions of Article 4 and except when the safety of the aircraft or of persons or property on board so requires, no provision of this Convention shall be interpreted as authorizing or requiring any action in respect of offences against penal laws of a political nature or those based on racial or religious discrimination.

CHAPTER II—JURISDICTION

ARTICLE 3

1. The state of registration of the aircraft is competent to exercise jurisdiction over offences and acts committed on board.

¹ I.C.A.O. Doc. No. 8364 (1963). The convention was signed on behalf of Congo (Brazzaville), Federal Republic of Germany, Guatemala, Holy See, Indonesia, Italy, Japan, Liberia, Panama, Philippines, Republic of China, Republic of Upper Volta, Sweden, United Kingdom of Great Britain and Northern Ireland, United States of America, and Yugoslavia. As provided in Art. 21, the convention will enter into force ninety days after the deposit of the twelfth instrument of ratification.

2. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction as the state of registration over offences committed on board aircraft registered in such state.

3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

ARTICLE 4

A Contracting State which is not the state of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:

- a) the offence has effect on the territory of such state;
- b) the offence has been committed by or against a national or permanent resident of such state;
- c) the offence is against the security of such state;
- d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such state;
- e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such state under a multilateral international agreement.

CHAPTER III—POWERS OF THE AIRCRAFT COMMANDER

ARTICLE 5

1. The provisions of this chapter shall not apply to offences and acts committed or about to be committed by a person on board an aircraft in flight in the airspace of the state of registration or over the high seas or any other area outside the territory of any state unless the last point of take-off or the next point of intended landing is situated in a state other than that of registration, or the aircraft subsequently flies in the airspace of a state other than that of registration with such person still on board.

2. Notwithstanding the provisions of Article 1, paragraph 3, an aircraft shall, for the purposes of this chapter, be considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation. In the case of a forced landing, the provisions of this chapter shall continue to apply with respect to offences and acts committed on board until competent authorities of a state take over the responsibility for the aircraft and for the persons and property on board.

ARTICLE 6

1. The aircraft commander may, when he has reasonable grounds to believe that a person has committed, or is about to commit, on board the aircraft, an offence or act contemplated in Article 1, paragraph 1, impose upon such person reasonable measures including restraint which are necessary:

- a) to protect the safety of the aircraft, or of persons or property therein; or
- b) to maintain good order and discipline on board; or
- c) to enable him to deliver such person to competent authorities or to disembark him in accordance with the provisions of this chapter.

2. The aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of passengers to restrain any person whom he is entitled to restrain. Any crew member or passenger may also take reasonable preventive measures without such authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft, or of persons or property therein.

ARTICLE 7

Measures of restraint imposed upon a person in accordance with Article 6 shall not be continued beyond any point at which the aircraft lands unless:

- a) such point is in the territory of a non-Contracting State and its authorities refuse to permit disembarkation of that person or those measures have been imposed in accordance with Article 6, paragraph 1 c) in order to enable his delivery to competent authorities;
- b) the aircraft makes a forced landing and the aircraft commander is unable to deliver that person to competent authorities; or
- c) that person agrees to onward carriage under restraint.

2. The aircraft commander shall as soon as practicable, and if possible before landing in the territory of a state with a person on board who has been placed under restraint in accordance with the provisions of Article 6, notify the authorities of such state of the fact that a person on board is under restraint and of the reasons for such restraint.

ARTICLE 8

1. The aircraft commander may, in so far as it is necessary for the purpose of subparagraph a) or b) of paragraph 1 of Article 6, disembark in the territory of any state in which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in Article 1, paragraph 1 b).

2. The aircraft commander shall report to the authorities of the state in which he disembarks any person pursuant to this article, the fact of, and the reasons for, such disembarkation.

ARTICLE 9

1. The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board

the aircraft an act which, in his opinion, is a serious offence according to the penal law of the state of registration of the aircraft.

2. The aircraft commander shall as soon as practicable and if possible before landing in the territory of a Contracting State with a person on board whom the aircraft commander intends to deliver in accordance with the preceding paragraph, notify the authorities of such state of his intention to deliver such person and the reasons therefor.

3. The aircraft commander shall furnish the authorities to whom any suspected offender is delivered in accordance with the provisions of this article with evidence and information which, under the law of the state of registration of the aircraft, are lawfully in his possession.

ARTICLE 10

For actions taken in accordance with this Convention, neither the aircraft commander, any other member of the crew, any passenger, the owner or operator of the aircraft, nor the person on whose behalf the flight was performed shall be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken.

CHAPTER IV—UNLAWFUL SEIZURE OF AIRCRAFT

ARTICLE 11

1. When a person on board has unlawfully committed by force or threat thereof an act of interference, seizure, or other wrongful exercise of control of an aircraft in flight or when such an act is about to be committed, Contracting States shall take all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft.

2. In the cases contemplated in the preceding paragraph, the Contracting State in which the aircraft lands shall permit its passengers and crew to continue their journey as soon as practicable, and shall return the aircraft and its cargo to the persons lawfully entitled to possession.

CHAPTER V—POWERS AND DUTIES OF STATES

ARTICLE 12

Any Contracting State shall allow the commander of an aircraft registered in another Contracting State to disembark any person pursuant to Article 8, paragraph 1.

ARTICLE 13

1. Any Contracting State shall take delivery of any person whom the aircraft commander delivers pursuant to Article 9, paragraph 1.

2. Upon being satisfied that the circumstances so warrant, any Contracting State shall take custody or other measures to ensure the presence of

any person suspected of an act contemplated in Article 11, paragraph 1, and of any person of whom it has taken delivery. The custody and other measures shall be as provided in the law of that state but may only be continued for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted.

3. Any person in custody pursuant to the previous paragraph shall be assisted in communicating immediately with the nearest appropriate representative of the state of which he is a national.

4. Any Contracting State, to which a person is delivered pursuant to Article 9, paragraph 1, or in whose territory an aircraft lands following the commission of an act contemplated in Article 11, paragraph 1, shall immediately make a preliminary enquiry into the facts.

5. When a state, pursuant to this article, has taken a person into custody, it shall immediately notify the state of registration of the aircraft and the state of nationality of the detained person and, if it considers it advisable, any other interested state of the fact that such person is in custody and of the circumstances which warrant his detention. The state which makes the preliminary enquiry contemplated in paragraph 4 of this article shall promptly report its findings to the said states and shall indicate whether it intends to exercise jurisdiction.

ARTICLE 14

1. When any person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, or has disembarked after committing an act contemplated in Article 11, paragraph 1, and when such person cannot or does not desire to continue his journey and the state of landing refuses to admit him, that state may, if the person in question is not a national or permanent resident of that state, return him to the territory of the state of which he is a national or permanent resident or to the territory of the state in which he began his journey by air.

2. Neither disembarkation, nor delivery, nor the taking of custody or other measures contemplated in Article 13, paragraph 2, nor return of the person concerned, shall be considered as admission to the territory of the Contracting State concerned for the purpose of its law relating to entry or admission of persons and nothing in this Convention shall affect the law of a Contracting State relating to the expulsion of persons from its territory.

ARTICLE 15

1. Without prejudice to Article 14, any person who has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1, or has disembarked after committing an act contemplated in Article 11, paragraph 1, and who desires to continue his journey shall be at liberty as soon as practicable to proceed to any destination of his choice unless his presence is required by the law of the state of landing for the purpose of extradition or criminal proceedings.

2. Without prejudice to its law as to entry and admission to, and extradition and expulsion from its territory, a Contracting State in whose territory a person has been disembarked in accordance with Article 8, paragraph 1, or delivered in accordance with Article 9, paragraph 1 or has disembarked and is suspected of having committed an act contemplated in Article 11, paragraph 1, shall accord to such person treatment which is no less favourable for his protection and security than that accorded to nationals of such Contracting State in like circumstances.

CHAPTER VI—OTHER PROVISIONS

ARTICLE 16

1. Offences committed on aircraft registered in a Contracting State shall be treated, for the purpose of extradition, as if they had been committed not only in the place in which they have occurred but also in the territory of the state of registration of the aircraft.

2. Without prejudice to the provisions of the preceding paragraph, nothing in this Convention shall be deemed to create an obligation to grant extradition.

ARTICLE 17

In taking any measures for investigation or arrest or otherwise exercising jurisdiction in connection with any offence committed on board an aircraft the Contracting States shall pay due regard to the safety and other interests of air navigation and shall so act as to avoid unnecessary delay of the aircraft, passengers, crew or cargo.

ARTICLE 18

If Contracting States establish joint air transport operating organizations or international operating agencies, which operate aircraft not registered in any one state, those states shall, according to the circumstances of the case, designate the state among them which, for the purposes of this Convention, shall be considered as the state of registration and shall give notice thereof to the International Civil Aviation Organization which shall communicate the notice to all states parties to this Convention.

CHAPTER VII—FINAL CLAUSES

ARTICLE 19

Until the date on which this Convention comes into force in accordance with the provisions of Article 21, it shall remain open for signature on behalf of any state which at that date is a Member of the United Nations or of any of the Specialized Agencies.

ARTICLE 20

1. This Convention shall be subject to ratification by the signatory states in accordance with their constitutional procedures.

2. The instruments of ratification shall be deposited with the International Civil Aviation Organization.

ARTICLE 21

1. As soon as twelve of the signatory states have deposited their instruments of ratification of this Convention, it shall come into force between them on the ninetieth day after the date of the deposit of the twelfth instrument of ratification. It shall come into force for each state ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.

2. As soon as this Convention comes into force, it shall be registered with the Secretary-General of the United Nations by the International Civil Aviation Organization.

ARTICLE 22

1. This Convention shall, after it has come into force, be open for accession by any state Member of the United Nations or of any of the Specialized Agencies.

2. The accession of a state shall be effected by the deposit of an instrument of accession with the International Civil Aviation Organization and shall take effect on the ninetieth day after the date of such deposit.

ARTICLE 23

1. Any Contracting State may denounce this Convention by notification addressed to the International Civil Aviation Organization.

2. Denunciation shall take effect six months after the date of receipt by the International Civil Aviation Organization of the notification of denunciation.

ARTICLE 24

1. Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each state may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by the preceding paragraph. The other Contracting States shall not be bound by the preceding paragraph with respect to any Contracting State having made such a reservation.

3. Any Contracting State having made a reservation in accordance with the preceding paragraph may at any time withdraw this reservation by notification to the International Civil Aviation Organization.

ARTICLE 25

Except as provided in Article 24 no reservation may be made to this Convention.

ARTICLE 26

The International Civil Aviation Organization shall give notice to all states Members of the United Nations or of any of the Specialized Agencies:

- a) of any signature of this Convention and the date thereof;
- b) of the deposit of any instrument of ratification or accession and the date thereof;
- c) of the date on which this Convention comes into force in accordance with Article 21, paragraph 1;
- d) of the receipt of any notification of denunciation and the date thereof; and
- e) of the receipt of any declaration or notification made under Article 24 and the date thereof.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Tokyo on the fourteenth day of September One Thousand Nine Hundred and Sixty-three in three authentic texts drawn up in the English, French and Spanish languages.

This Convention shall be deposited with the International Civil Aviation Organization with which, in accordance with Article 19, it shall remain open for signature and the said Organization shall send certified copies thereof to all states Members of the United Nations or of any Specialized Agency.

**(EUROPEAN) CONVENTION ON REDUCTION OF CASES
OF MULTIPLE NATIONALITY AND MILITARY OBLI-
GATIONS IN CASES OF MULTIPLE NATIONALITY¹**

Signed at Strasbourg, May 6, 1963

The member states of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve greater unity between its Members;

Considering that cases of multiple nationality are liable to cause difficulties and that joint action to reduce as far as possible the number of cases of multiple nationality, as between member states, corresponds to the aims of the Council of Europe;

Considering it desirable that persons possessing the nationality of two or more Contracting Parties should be required to fulfil their military obligations in relation to one of those parties only,

Have agreed as follows:

¹ European Treaty Series, No. 43.

CHAPTER I

REDUCTION OF CASES OF MULTIPLE NATIONALITY

ARTICLE 1

1. Nationals of the Contracting Parties who are of full age and who acquire of their own free will, by means of naturalisation, option or recovery, the nationality of another party shall lose their former nationality. They shall not be authorised to retain their former nationality.

2. Nationals of the Contracting Parties who are minors and acquire by the same means the nationality of another party shall also lose their former nationality if, where their national law provides for the loss of nationality in such cases, they have been duly empowered or represented. They shall not be authorised to retain their former nationality.

3. Minor children, other than those who are or have been married, shall likewise lose their former nationality in the event of the acquisition *ipso jure* of the nationality of another Contracting Party upon and by reason of the naturalisation or the exercise of an option or the recovery of nationality by their father and mother. Where only one parent loses his former nationality, the law of that Contracting Party whose nationality the minor possessed shall determine from which of his parents he shall derive his nationality. In the latter case, the said law may make the loss of his nationality subject to the prior consent of the other parent or the guardian to his acquiring the new nationality.

However, without prejudice to the provisions of the law of each of the Contracting Parties concerning the recovery of nationality, the party of which the minor referred to in the foregoing paragraph possessed the nationality may lay down special conditions on which they may recover that nationality of their own free will after attaining their majority.

4. In so far as concerns the loss of nationality as provided for in the present article, the age of majority and minority and the conditions of capacity and representation shall be determined by the law of the Contracting Party whose nationality the person concerned possesses.

ARTICLE 2

1. A person who possesses the nationality of two or more Contracting Parties may renounce one or more of these nationalities, with the consent of the Contracting Party whose nationality he desires to renounce.

2. Such consent may not be withheld by the Contracting Party whose nationality a person of full age possesses *ipso jure*, provided that the said person has, for the past ten years, had his ordinary residence outside the territory of that party and also provided that he has his ordinary residence in the territory of the party whose nationality he intends to retain.

Consent may likewise not be withheld by the Contracting Party in the case of minors who fulfil the conditions stipulated in the preceding paragraph, provided that their national law allows them to give up their na-

tionality by means of a simple declaration and provided also that they have been duly empowered or represented.

3. The age of majority and minority and the conditions for being empowered or represented shall be determined by the law of the Contracting Party whose nationality the person in question desires to renounce.

ARTICLE 3

The Contracting Party whose nationality a person desires to renounce shall not require the payment of any special tax or charge in the event of such renunciation.

ARTICLE 4

Nothing in the provisions of this Convention shall preclude the application of any provision more likely to limit the occurrence of multiple nationality whether embodied or subsequently introduced into either the municipal law of any Contracting Party or any other treaty, convention or agreement between two or more of the Contracting Parties.

CHAPTER II

MILITARY OBLIGATIONS IN CASES OF MULTIPLE NATIONALITY

ARTICLE 5

1. Persons possessing the nationality of two or more Contracting Parties shall be required to fulfil their military obligations in relation to one of those Parties only.

2. The modes of application of paragraph 1 may be determined by special agreements between any of the Contracting Parties.

ARTICLE 6

Except where a special agreement which has been, or may be, concluded provides otherwise, the following provisions are applicable to a person possessing the nationality of two or more Contracting Parties:

1. Any such person shall be subject to military obligations in relation to the party in whose territory he is ordinarily resident. Nevertheless, he shall be free to choose, up to the age of 19 years, to submit himself to military obligations as a volunteer in relation to any other party of which he is also a national for a total and effective period at least equal to that of the active military service required by the former party.

2. A person who is ordinarily resident in the territory of a Contracting Party of which he is not a national or in that of a state which is not a party may choose to perform his military service in the territory of any Contracting Party of which he is a national.

3. A person who, in accordance with the rules laid down in paragraphs 1 and 2, shall fulfil his military obligations in relation to one party, as prescribed by the law of that party, shall be deemed to have fulfilled his

military obligations in relation to any other party or parties of which he is also a national.

4. A person who, before the entry into force of this Convention between the parties of which he is a national, has, in relation to one of those parties, fulfilled his military obligations in accordance with the law of that party, shall be deemed to have fulfilled the same obligations in relation to any other party or parties of which he is also a national.

5. A person who, in conformity with paragraph 1, has performed his active military service in relation to one of the Contracting Parties of which he is a national, and subsequently transfers his ordinary residence to the territory of the other party of which he is a national, shall be liable to military service in the reserve only in relation to the latter party.

6. The application of this article shall not prejudice, in any respect, the nationality of the persons concerned.

7. In the event of mobilisation by any party, the obligations arising under this article shall not be binding upon that party.

CHAPTER III

APPLICATION OF THE CONVENTION

ARTICLE 7

1. Each Contracting Party shall apply the provisions of Chapters I and II.

It is however understood that each Contracting Party may declare, at the time of ratification, acceptance or accession, that it will apply the provisions of Chapter II only. In this case the provisions of Chapter I shall not be applicable in relation to that party.

It may, at any subsequent time, notify the Secretary-General of the Council of Europe that it is applying the provisions of Chapter I as well. This notification shall become effective as from the date of its receipt, and the provisions of Chapter I shall thereupon become applicable in relation to that party.

2. Each Contracting Party which has applied the provisions of the first sub-paragraph of paragraph 1 of this article may declare, at the time of signing or at the time of depositing its instrument of ratification, acceptance or accession that it will apply the provisions of Chapter II only in regard to Contracting Parties which are applying the provisions of Chapters I and II. In this case the provisions of Chapter II shall not be applicable between the party making such a declaration and a party applying the second sub-paragraph of paragraph 1.

CHAPTER IV

FINAL CLAUSES

ARTICLE 8

1. Any Contracting Party may, when signing this Convention or depositing its instrument of ratification, acceptance or accession, declare

that it avails itself of one or more of the reservations provided for in the Annex to the present Convention. No other reservation shall be permitted.

2. Any Contracting Party may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a notification addressed to the Secretary-General of the Council of Europe, which shall become effective as from the date of its receipt.

3. A Contracting Party which has made a reservation in respect of any provision of the Convention in accordance with this article may not claim application of the said provision by another party; it may, however, if its reservation is partial or conditional claim the application of that provision in so far as it has itself accepted it.

ARTICLE 9

1. Any Contracting Party may, by a declaration made to the Secretary-General of the Council of Europe on signature or on depositing its instrument of ratification, acceptance or accession, or at any subsequent time, with regard to states and territories for which it assumes international responsibility, or for which it is empowered to contract, define the term "nationals" and specify the "territories" to which the present Convention shall be applicable.

2. Any declaration made in accordance with this article may, in respect of the nationals and territories mentioned in such declaration, be withdrawn according to the procedure laid down in Article 12 of this Convention.

ARTICLE 10

1. This Convention shall be open to signature by the member states of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary-General of the Council of Europe.

2. This Convention shall enter into force one month after the date of deposit of the second instrument of ratification or acceptance.

3. In respect of a signatory state ratifying or accepting subsequently, the Convention shall come into force one month after the date of deposit of its instrument of ratification or acceptance.

ARTICLE 11

1. After this Convention has come into force the Committee of Ministers of the Council of Europe may unanimously decide to invite any state which is not a Member of the Council to accede to it. Any state so invited may accede by depositing its instrument of accession with the Secretary-General of the Council.

The Convention shall come into force in respect of any state acceding therefore to one month after the date of deposit of its instrument of accession.

ARTICLE 12

1. This Convention shall remain in force indefinitely.
2. Any Contracting Party may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary-General of the Council of Europe.
3. Such denunciation shall take effect one year after the date of receipt by the Secretary-General of such notification.

ARTICLE 13

The Secretary-General of the Council of Europe shall notify the member states of the Council and the government of any state which has acceded to this Convention of:

- (a) any signature and any deposit of instruments of ratification, acceptance or accession;
- (b) all dates of entry into force of the Convention in accordance with Articles 10 and 11 thereof;
- (c) any reservation made in accordance with Article 8, paragraph 1;
- (d) the withdrawal of any reservation in accordance with Article 8, paragraph 2;
- (e) any declaration or notification received in accordance with the provisions of Article 7 and Article 9, paragraph 1;
- (f) any notification received in pursuance of the provisions of Article 9, paragraph 2, and of Article 12 and the date on which denunciation takes effect.

In witness whereof, the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, this 6th day of May 1963 in English and in French, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatory and acceding governments.²

ANNEX

Any Contracting Party may declare that it reserves the right:

1. to make the loss of nationality referred to in Article 1, paragraphs 1, 2 and 3, subject to the condition that the person concerned already ordinarily resides or at some time takes up his ordinary residence outside its territory, except where, in the case of acquisition of a foreign nationality of his own free will, such person is exempted by the competent authority from the condition of ordinary residence abroad;

²Signatures omitted. The convention was signed on behalf of Austria, France, Germany, Italy, The Netherlands, Norway, and the United Kingdom. The Government of the French Republic availed itself of the reservation set forth in paragraph 2 of the Annex, and the Government of the Federal Republic of Germany declared that, for the application of the convention, any person who is German within the meaning of Art. 116 of the Basic Law of the Federal Republic is a *ressortissant* of the Federal Republic.

2. not to regard a declaration made by a woman with a view to acquiring her husband's nationality by virtue and at the time of marriage as an option within the meaning of Article 1;

3. to allow any of its nationals to retain his previous nationality if a Contracting Party for whose nationality he applies in the manner referred to in Article 1 gives its prior consent thereto;

4. not to apply the provisions of Articles 1 and 2 when the wife of one of its nationals has acquired another nationality while her husband retains the nationality of such Party.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND-JAPAN

TREATY OF COMMERCE, ESTABLISHMENT AND NAVIGATION *

Signed at London, November 14, 1962; entered into force May 4, 1963

The United Kingdom of Great Britain and Northern Ireland and Japan;

Animated by the desire to maintain and strengthen the amicable relations existing between their respective countries;

Desiring to facilitate and extend still further their mutual relations of trade and commerce; and

Desiring to provide for the continued enjoyment of fair and equitable treatment of their respective nationals and companies;

Have resolved to conclude a Treaty of Commerce, Establishment and Navigation and have appointed as their Plenipotentiaries for this purpose:

The United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as "the United Kingdom"):

The Right Honourable the Earl of Home, K.T., Her Majesty's Principal Secretary of State for Foreign Affairs;

The Right Honourable Frederick James Erroll, M.P., President of the Board of Trade;

Japan:

His Excellency Mr. Katsumi Ohno, Ambassador Extraordinary and Plenipotentiary of Japan in London:

Who, having communicated their respective full powers, found in good and due form, have agreed as follows:

ARTICLE 1

The territories of the Contracting Parties to which the present treaty applies are:

* Great Britain, Treaty Series No. 53 (1963) (Cmd. 2085). The Exchange of Notes concerning Voluntary Export Control and the Exchange of Notes constituting an Agreement in accordance with the Second Protocol concerning Trade Relations, both signed on the same date as the treaty, are omitted.

- (a) on the part of the United Kingdom, the United Kingdom of Great Britain and Northern Ireland, and any territory to which the present Treaty has been extended in accordance with the provisions of Article 32; and
- (b) on the part of Japan, the territory of Japan.

ARTICLE 2

In the present treaty

- (1) the term "territory" means, in relation to a Contracting Party, any territory of that Contracting Party to which the present treaty applies;
- (2) the term "nationals":
 - (a) means physical persons;
 - (b) in relation to the United Kingdom means all citizens of the United Kingdom and Colonies, all citizens of any territory for the international relations of which the United Kingdom is responsible and all British protected persons; except in each case those who belong to any territory to which the present treaty may be extended under the provisions of Article 32 but has not been so extended; and
 - (c) in relation to Japan means all nationals of Japan;
- (3) the term "vessels":
 - (a) in relation to the United Kingdom means all ships registered at a port in any territory of that Contracting Party to which the present treaty applies; and
 - (b) in relation to Japan means all ships carrying the papers required by the law of Japan in proof of Japanese nationality;
- (4) the term "companies":
 - (a) means all legal persons except physical persons;
 - (b) in relation to a Contracting Party means all companies which derive their status as such from the law in force in any territory of that Contracting Party to which the present treaty applies; and
 - (c) in relation to a country means all companies which derive their status as such from the law in force in that country.

ARTICLE 3

- (1) Nationals of one Contracting Party shall be accorded, with respect to entry into, residence in and departure from any territory of the other treatment not less favourable than that accorded to the nationals of any other foreign country.
- (2) The nationals of one Contracting Party who are lawfully present within any territory of the other shall be free to travel anywhere within

that territory and shall not be required, for this purpose, to obtain travel documents or permits. Nothing in this paragraph shall, however, be construed so as to prevent a Contracting Party from restricting entry into any place or area within the territory of that Contracting Party to authorized persons for reasons of national security, provided that in such cases the nationals of the other Contracting Party shall be accorded treatment not less favourable than that accorded to the nationals of the former Contracting Party or of any other foreign country.

(3) Any conditions as to the duration of his residence or as to his employment, profession, business or occupation which a national of one Contracting Party who is permitted to reside in any territory of the other is required to observe during the period of his residence in that territory shall be imposed at the time of the grant to him of permission to enter or to reside, shall be made known to him at the time when they are imposed and shall not thereafter be varied so as to make them more restrictive.

(4) Subject to any conditions imposed consistently with the provisions of paragraphs (1) and (3) of this article, the nationals of one Contracting Party in any territory of the other shall be permitted to engage there in every lawful employment, profession, business or occupation on terms not less favourable than the nationals of any other foreign country.

ARTICLE 4

The nationals of one Contracting Party in any territory of the other shall be exempted from all compulsory service whatsoever in the armed forces, civil defence services or police forces; from all forms of compulsory labour; and from the compulsory performances of all judicial, administrative and municipal functions whatever, other than those imposed by the laws relating to juries. They shall also be exempted from all contributions, whether in money or in kind, imposed as an equivalent for such service or for the performance of such functions.

ARTICLE 5

(1) The nationals of one Contracting Party shall in any territory of the other be accorded liberty of conscience and freedom of worship. In the exercise of these rights they may conduct religious services provided that these services are not contrary to public morals or public order. They shall be at liberty to erect and to maintain buildings for religious purposes provided that such buildings conform to the law applicable generally to buildings of like nature. Such buildings shall be respected and shall not be entered or searched except by due process of law.

(2) The nationals of one Contracting Party shall in any territory of the other also be permitted to bury or cremate their dead according to their religious customs in suitable and convenient places established or maintained for the purpose, subject to the general law relating to the registration of deaths, to burials and cremations, and subject to any non-dis-

criminatory sanitary or medical requirements laid down by the authorities of that territory.

ARTICLE 6

(1) The companies of one Contracting Party shall in any territory of the other be accorded treatment not less favourable than that accorded to the companies of any other foreign country in all matters relative to the carrying on of all kinds of business, including finance, commerce, industry, banking, insurance, shipping and transport, as well as in all matters relative to the establishment and maintenance for such purpose of branches, agencies, offices, factories and other establishments appropriate to the conduct of their business.

(2) Neither Contracting Party shall in any territory enforce, as a condition for the operation of any company of the other, any requirements as to the nationality of the directors, administrative personnel, technicians, professional consultants, auditors or shareholders of that company more restrictive than requirements applied to the companies of any other foreign country.

ARTICLE 7

(1) The nationals and companies of one Contracting Party shall enjoy in any territory of the other constant and complete protection and security for their persons and property.

(2) Nationals of one Contracting Party taken into the custody of the authorities in any territory of the other, whether in connection with criminal proceedings or otherwise, shall be informed without undue delay of the grounds on which they are so taken. While they are detained in such custody they shall receive reasonable and humane treatment and their property shall not be disposed of except by due process of law.

(3) Nationals and companies of one Contracting Party accused in any territory of the other of crime shall enjoy, on the same conditions and to the same extent as nationals and companies of the latter Contracting Party or of any other foreign country, all rights and privileges in connection with their trials permissible under the law of that territory. They shall be entitled to a public trial without undue delay. This paragraph shall not, however, prohibit the exclusion of the public from all or any part of any trial in the interests of national security or of public safety, order or morals or for the protection of children and young persons.

(4) The nationals and companies of one Contracting Party shall have access to the courts of justice, tribunals and administrative authorities in any territory of the other for the declaration, prosecution or defence of their rights, on terms not less favourable than those enjoyed by the nationals and companies of the latter Contracting Party or of any other foreign country. In any event proceedings to which nationals or companies of one Contracting Party are parties in any territory of the other shall be heard and determined without undue delay.

(5) The nationals and companies of one Contracting Party shall in any proceedings in any territory of the other be at liberty to employ the services

of legal advisers and representatives of their choice from among those competent to act in such proceedings. Without prejudice to the foregoing such nationals and companies shall enjoy treatment not less favourable than that accorded to the nationals and companies of the other Contracting Party or of any other foreign country.

(6) Nationals of one Contracting Party shall in all proceedings, other than criminal proceedings, before the courts of justice or tribunals in any territory of the other be at liberty to employ interpreters, who are acceptable to the courts of justice or tribunals, to translate the proceedings of the said courts or tribunals into a language which such nationals can understand, and to translate into the language in which the proceedings are conducted statements, evidence or arguments put orally by them or on their behalf in any other language.

(7) Nationals of one Contracting Party against whom criminal proceedings are taken before the courts of justice in any territory of the other shall be entitled, if their acquaintance with the language in which the proceedings are conducted is insufficient for them to understand the proceedings and subject to the payment of any appropriate costs, to have the proceedings translated by interpreters into a language which such nationals can understand, unless the said courts consider that the interpretation of any part of the proceedings can without injustice be dispensed with and such nationals, or their representatives, do not object. In any event, any statements, evidence or arguments put orally in a language other than that in which the proceedings are conducted shall be translated into the latter language by interpreters, subject to the payment of any appropriate costs.

(8) In all matters dealt with in this article, nationals and companies of one Contracting Party in any territory of the other shall not be required to make any payments which are other or more onerous than those imposed on nationals and companies of the latter Contracting Party or of any other foreign country. Moreover nationals of one Contracting Party shall in any territory of the other be admitted to the benefit of free legal assistance and exemption from court fees on the same conditions and to the same extent as the nationals of the latter Contracting Party or of any other foreign country.

ARTICLE 8

(1) The nationals and companies of one Contracting Party shall not be subjected in any territory of the other to any taxation or any requirement connected therewith except under the conditions and with the formalities prescribed by the law in force in that territory.

(2) The nationals and companies of one Contracting Party shall not be subjected in any territory of the other to any taxation or any requirement connected therewith which is other or more onerous than the taxation and connected requirements to which the nationals and companies of the latter Contracting Party in the same circumstances are or may be subjected.

(3) The nationals and companies of one Contracting Party not resident

for tax purposes in any territory of the other shall not be subjected in respect of income attributable to their establishments in that territory in which their business activities are carried on to any taxation or any requirement connected therewith which is other or more onerous than the taxation and connected requirements to which the nationals and companies of the latter Contracting Party resident for tax purposes in that territory are subjected in respect of the like income.

(4) The provisions of paragraph (3) of this article shall not be construed, in relation to any territory of a Contracting Party, as obliging that Contracting Party to grant to nationals of the other who are not resident for tax purposes in that territory the same personal allowances, reliefs and reductions for tax purposes as are granted to the nationals of the former Contracting Party resident for tax purposes in that territory.

(5) Subject to the provisions of paragraph (4) of this article, the nationals and companies of one Contracting Party shall enjoy, at the hands of the fiscal authorities and tribunals of the other, treatment and protection not less favourable than that accorded to the nationals and companies of the latter Contracting Party.

(6) In all matters referred to in this article, the treatment accorded by one Contracting Party to nationals and companies of the other shall not be less favourable than that accorded to the nationals and companies of any other foreign country.

(7) The provisions of paragraph (6) of this article shall not apply to special tax advantages accorded in any territory of either Contracting Party solely by virtue of an agreement for the avoidance of double taxation and the prevention of fiscal evasion with any other foreign country.

(8) The term "taxation" as used in this article means taxes of every kind.

ARTICLE 9

The dwellings, offices, warehouses, factories, shops and all other premises owned, leased or occupied by nationals and companies of one Contracting Party in any territory of the other shall be respected. Except under the conditions and with the formalities prescribed by law and applicable to nationals and companies of the latter Contracting Party, such premises shall not be entered or searched, nor shall the contents thereof be seized, examined or inspected.

ARTICLE 10

(1) The nationals and companies of one Contracting Party shall be permitted in any territory of the other to acquire property, movable or immovable, or any interest therein on the same conditions as are applicable to the nationals and companies of any other foreign country.

(2) The nationals and companies of one Contracting Party shall be permitted in any territory of the other to own and to dispose of property, movable or immovable, or any interest therein on the same conditions as are applicable to the nationals and companies of the latter Contracting Party or of any other foreign country.

(3) The nationals and companies of one Contracting Party shall be permitted

(a) to remove their movable property, and

(b) to transfer the proceeds of the sale of any property, movable or immovable, or of any interest therein, belonging to them

from any territory of the other subject to conditions or restrictions not other or more onerous than those applicable to the nationals and companies of the latter Contracting Party or of any other foreign country.

(4) The provisions of paragraph (2) of this article relative to the grant of national treatment shall not be construed as extending to the conditions of registration of aircraft in the national register of any territory of either Contracting Party.

(5) Nothing in this article shall be construed so as to prevent a Contracting Party from restricting in any territory the acquisition, ownership, or disposal of ships or of any interest in ships.

ARTICLE 11

In any case where nationals and companies of one Contracting Party are entitled, under the present treaty, to carry on business in any territory of the other, they shall be entitled to exercise this right either in person or through agents of their own choice or in both such ways to no less an extent than nationals and companies of any other foreign country.

ARTICLE 12

(1) The nationals and companies of one Contracting Party shall enjoy in any territory of the other treatment not less favourable than that enjoyed by the nationals and companies of any other foreign country with regard to the formation under the law of that territory of new companies.

(2) The nationals and companies of one Contracting Party shall enjoy in any territory of the other treatment not less favourable than that enjoyed by the nationals and companies of the latter Contracting Party or of any other foreign country with regard to the formation and membership under the law of that territory of chambers of commerce or similar bodies.

(3) Neither Contracting Party shall in any territory enforce, in relation to the nationals and companies of the other, any requirements as to the nationality of directors, administrative personnel, technicians, professional consultants, auditors or shareholders of any company of the former Contracting Party more restrictive than requirements applied in relation to the nationals and companies of any other foreign country.

(4) The companies of one Contracting Party more than one half of the interests in which are owned or which are controlled directly or indirectly, by the nationals or companies of the other shall in all the matters dealt with in the present treaty be accorded treatment not less favourable than that accorded to the companies of the former Contracting Party more than one half of the interests in which are owned or which are controlled,

directly or indirectly, by the nationals and companies of any other foreign country.

ARTICLE 13

The nationals and companies of one Contracting Party shall be accorded in any territory of the other treatment not less favourable than that accorded to the nationals and companies of any other foreign country with respect to the introduction of foreign capital or technology.

ARTICLE 14

The nationals and companies of one Contracting Party shall be accorded equitable treatment in any territory of the other in respect of any measure of requisition, civil or military, of disposal, limitation, restriction or expropriation, affecting their property, rights and interests, or affecting the property, rights and interests of any company of the other Contracting Party in which they own interests, and shall be accorded prompt, adequate and effective compensation for any such measures. Without prejudice to the foregoing, in all matters dealt with in this article they shall be accorded in any territory of the other treatment not less favourable than that accorded to the nationals and companies of the latter Contracting Party or of any other foreign country.

ARTICLE 15

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, the nationals and companies of one Contracting Party shall be accorded in any territory of the other treatment not less favourable than that accorded to the nationals and companies of the latter Contracting Party or of any other foreign country.

ARTICLE 16

(1) With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with the foregoing, any advantage, favour, privilege or immunity accorded in any territory by one Contracting Party to any product originating in or destined for any other foreign country shall be accorded to the like product originating in any territory of the other Contracting Party (from whatever place arriving) or destined for any such territory.

(2) For the purposes of this article and of Articles 17 and 18:

(a) fish, whales and other natural produce of the sea taken by vessels of either Contracting Party, and

(b) products produced or manufactured at sea in vessels of either Contracting Party from fish, whales and other natural produce of the sea shall be deemed to be products originating in the territories of that Contracting Party.

ARTICLE 17

(1) No prohibition, restriction, rule or formality shall be imposed or maintained on the importation into any territory of one Contracting Party of any product originating in any territory of the other (from whatever place arriving) which shall not equally extend to the importation of the like product originating in any other foreign country.

(2) No prohibition, restriction, rule or formality shall be imposed or maintained on the exportation of any product from any territory of one Contracting Party to any territory of the other which shall not equally extend to the exportation of the like product to any other foreign country.

(3) In so far as prohibitions or restrictions may be enforced in any of their territories on the importation or exportation of any products, the Contracting Parties undertake as regards import and export licences to do everything in their power to ensure

- (a) that the conditions to be fulfilled and formalities to be observed in order to obtain such licences should be published promptly in such a manner as to enable the public to become acquainted with such conditions and formalities;
- (b) that the method of issue of the licences should be as simple and stable as possible;
- (c) that the examination of applications and the issue of licences to the applicants should be carried out with the least possible delay;
- (d) that the system of issuing licences should be such as to prevent traffic in licences. With this object, a licence issued to any person should state the name of the holder and should not be capable of being used by any other person.

(4) The conditions to be fulfilled or formalities to be observed before quotas are allotted or licences are given in any territory of one Contracting Party in respect of

- (a) the importation of products originating in any territory of the other, or
- (b) the exportation of products to any territory of the latter Contracting Party

shall not be more onerous than the conditions to be fulfilled or formalities to be observed before quotas are allotted or licences are given in the case of any other foreign country.

(5) Subject to the requirement that such measures shall not be applied in any arbitrary manner, the general rules laid down in the preceding paragraphs of this article shall not be construed so as to prevent the adoption by either Contracting Party of measures

- (a) necessary to protect human, animal or plant life or health;
 - (b) taken for the regulation of the trade in any narcotic substance which is within the scope of any international agreement which relates to the international control of narcotic substances and to which that Contracting Party is a party;
 - (c) taken in pursuance of obligations under any inter-governmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES to the General Agreement on Tariffs and Trade¹ and not disapproved by them or which is itself so submitted and not so disapproved.
- (6) The provisions of paragraphs (1), (2) and (4) of this article shall not prevent a Contracting Party, if a member of the International Monetary Fund, from taking measures in any territory to restrict imports from, or to direct exports elsewhere than to, the territories of the other Contracting Party in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that Contracting Party may at that time apply under the Articles of Agreement of the International Monetary Fund,² provided that measures taken under the provisions of this paragraph shall not be applied in a manner which would cause unnecessary damage to the commercial or economic interests of the other Contracting Party or would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party as compared with other foreign countries.
- (7) Neither Contracting Party shall impose any measure of a discriminatory nature that hinders or prevents importers or exporters of products of either Contracting Party from obtaining marine insurance on such products from insurers of either Contracting Party.

ARTICLE 18

(1) The Contracting Parties recognise that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or national products so as to afford protection to national production.

(2) Products originating in any territory of one Contracting Party and imported into any territory of the other shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like products originating in any territory of the latter Contracting Party or in any other foreign country.

(3) Products originating in any territory of one Contracting Party and imported into any territory of the other shall in that territory be accorded treatment not less favourable than that accorded to like products originat-

¹ Cmd. 9413 [55-61 U.N. Treaty Series].

² Treaty Series No. 21 (1946), Cmd. 6885 [2 U.N. Treaty Series 39].

ing in any territory of the latter Contracting Party or in any other foreign country in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

(4) Neither Contracting Party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation shall originate in any territory of that Contracting Party or in any foreign country.

(5) The provisions of paragraphs (1), (2), (3) and (4) of this article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(6) The provisions of paragraphs (1), (2), (3) and (4) of this article shall not prevent the payment by either Contracting Party of subsidies exclusively to producers in any territory of that Contracting Party, including payments to producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of paragraphs (1), (2), (3) and (4) of this article and subsidies effected through governmental purchases of national products.

(7) The provisions of paragraphs (1), (3) and (4) of this article shall not apply to laws, regulations, or requirements relating to the exhibition of cinematograph films, provided that in this matter cinematograph films originating in any territory of one Contracting Party shall be accorded in any territory of the other treatment not less favourable than that accorded to like films originating in any other foreign country.

(8) Products destined for exportation from any territory of one Contracting Party to any territory of the other shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like products destined for exportation to any other foreign country.

ARTICLE 19

(1) Nothing in the present treaty shall be construed so as to derogate from the obligations undertaken by either Contracting Party towards the other by virtue of the provisions of the Union Convention of Paris of 20th March, 1883, for the Protection of Industrial Property,³ as revised at London on 2nd June, 1934,⁴ or of any subsequent revision thereof, so long as such provisions are in force between the Contracting Parties.

³ Commercial No. 8 (1884), C. 4043.

⁴ Treaty Series No. 55 (1938), Cmd. 5833 [192 L.N. Treaty Series 17; 34 A.J.I.L. Supp. 89 (1940)].

(2) Without prejudice to the provisions of the foregoing paragraph, the nationals and companies of one Contracting Party shall be accorded in any territory of the other treatment not less favourable than that accorded to nationals and companies of the latter Contracting Party with regard to the protection of industrial property.

ARTICLE 20

(1) The vessels of one Contracting Party shall be entitled, *inter alia*

- (a) to have liberty of access to all ports, waters and places open to international commerce and navigation in any territory of the other;
- (b) to compete for and carry passengers and cargoes, alike in any of the territories of the Contracting Parties and elsewhere.

(2) In all matters referred to in the foregoing paragraph of this article and, in addition, in all other matters relative to commerce, navigation or the treatment of shipping, the vessels of one Contracting Party, their passengers and cargoes shall be accorded in any territory of the other treatment not less favourable than that accorded to the vessels, passengers and cargoes of the latter Contracting Party or of any other foreign country; the vessels of one Contracting Party, their passengers and cargoes shall be accorded all the rights, liberties, favours, privileges, immunities and exemptions accorded to the vessels, passengers and cargoes of the other Contracting Party or of any other foreign country and shall not be subjected to any other or more onerous duties, charges, taxes or other impositions of whatsoever kind or denomination than would be levied in similar circumstances in relation to such vessels, passengers and cargoes.

(3) Neither Contracting Party shall apply exchange restrictions in such a manner as to hamper the participation of vessels of the other Contracting Party in the transportation of passengers or cargoes to or from any territory of either Contracting Party or elsewhere.

(4) The Contracting Parties shall ensure that all dues and charges levied for the use of maritime ports within any of their territories and all byelaws and regulations of such ports shall be duly published before coming into force and that in each maritime port the port authority shall keep open for inspection by all persons concerned a table of the said dues and charges and a copy of the said byelaws and regulations.

(5) The provisions of this article shall not apply to inland navigation or coasting trade. However,

- (a) the vessels of one Contracting Party, if engaged in trade to or from places not within the limits of the coasting trade or inland navigation in any territory of the other, may engage in the carriage between ports within those limits of passengers holding through tickets or cargoes consigned on through bills of lading to or from such places not within those limits, provided that such vessels obtain permits authorising such carriage in accordance with the law of that territory; and

- (b) the vessels of one Contracting Party may proceed from one port to another in any territory of the other for the purpose of landing the whole or part of their passengers or cargoes brought from places not within those limits or taking on board the whole or part of their passengers or cargoes destined for such places not within those limits.

ARTICLE 21

(1) A vessel of one Contracting Party which is forced by stress of weather or any other cause to take refuge in any territory of the other shall be entitled to refit therein, to procure all necessary stores, and to put to sea again without paying any duty, charge, tax or other imposition of whatsoever kind or denomination exceeding that which would be levied in similar circumstances in relation to a vessel of the latter Contracting Party or of any other foreign country.

(2) If in the territory of one Contracting Party a vessel of the other Contracting Party is wrecked, runs aground, is under any distress, or requires services, it shall be entitled

- (a) to receive all such assistance and protection as would be given by the former Contracting Party to one of its own vessels or to a vessel of any other foreign country;
- (b) to call upon any salvage or other vessels of whatever nationality to render such services as it may consider necessary; and
- (c) to discharge or tranship its cargo, equipment or other contents in case of need; no payment of any duty, charge, tax or other imposition of whatsoever kind or denomination shall be levied in respect thereof unless such cargo, equipment or other contents is delivered for use or consumption in that territory; the authorities of the territory may, however, if they think fit, require security for the protection of the revenue in relation to such goods.

(3) Nothing in the foregoing provisions of this article shall exempt any vessel of one Contracting Party from the operation of any law of the other Contracting Party which permits the removal or sale of any such vessel which is, or is likely to become, an obstruction or danger to navigation, or of any part thereof or property recovered therefrom, provided that the vessels of one Contracting Party shall be accorded in the territory of the other under any such law treatment not less favourable than that accorded to the vessels of the latter Contracting Party or of any other foreign country.

(4) Where a vessel of one Contracting Party, or any part thereof or its cargo, equipment or any other contents, is salvaged, such vessel or part thereof or such cargo, equipment or other contents, or the proceeds thereof, if sold, shall be delivered up to the owner or his agent when claimed, provided that the claim is made within the period fixed by the law of the other Contracting Party. The owner or his agent shall be liable for the payment of any expenses incurred in the preservation of the vessel and its

contents and of the salvage fees and other expenses incurred, but such fees and expenses shall not exceed those which would have been payable in similar circumstances in respect of a vessel of the latter Contracting Party or of any other foreign country.

ARTICLE 22

(1) Nothing in the present treaty shall be construed so as to derogate from the obligations undertaken by either Contracting Party towards the other by virtue of the provisions of the International Convention relating to the Simplification of Customs Formalities signed at Geneva on 3rd November, 1923,⁵ or of the International Convention to facilitate the Importation of Commercial Samples and Advertising Material signed at Geneva on 7th November, 1952,⁶ or of any subsequent revision thereof, so long as such provisions are in force between the Contracting Parties.

(2) Without prejudice to the provisions of the foregoing paragraph, all facilities or privileges in respect of commercial travellers, commercial samples and advertising material accorded in any territory by one Contracting Party to any other foreign country shall be accorded to the other Contracting Party.

ARTICLE 23

(1) Persons, baggage and goods and also vessels and other means of transport shall be deemed to be in transit across any territory of one Contracting Party when the passage across that territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the Contracting Party across whose territory the traffic passes. Traffic of this nature is termed in this article "traffic in transit."

(2) There shall be freedom of transit through any territory of one Contracting Party, via the routes most convenient for international transit, for traffic in transit to or from any territory of the other. No distinction shall be made which is based on the nationality of persons, the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

(3) The Contracting Parties may require baggage and goods and also vessels and other means of transport in transit through any of their territories to be entered at the proper custom house.

(4) Traffic in transit through any territory of one Contracting Party to or from any territory of the other shall not, except in case of failure to comply with applicable customs laws and regulations, be subject to any delays or restriction other than to the minimum extent that may be necessary to ensure compliance with the applicable customs laws and

⁵ Treaty Series No. 16 (1925), Cmd. 2347 [80 L.N. Treaty Series 372; 19 A.J.I.L. Supp. 146 (1925)].

⁶ Treaty Series No. 81 (1955), Cmd. 9644 [221 U.N. Treaty Series 255].

regulations, and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

(5) All charges and regulations imposed by one Contracting Party on traffic in transit to or from any territory of the other shall be reasonable, having regard to the conditions of the traffic.

(6) With respect to all charges, regulations and formalities in connection with transit, one Contracting Party shall accord to traffic in transit to or from any territory of the other treatment not less favourable than that accorded to traffic in transit to or from any other foreign country.

(7) One Contracting Party shall accord to baggage and goods which have been in transit through any territory of the other treatment not less favourable than that which would have been accorded to such baggage and goods had they been transported from their place of origin to their destination without going through that territory. Either Contracting Party shall, however, in relation to any territory, be free to maintain any requirements of direct consignment existing on the date of signature of the present treaty, if such direct consignment is a condition of eligibility for preferential rates of duty.

(8) The provisions of this article shall not oblige either Contracting Party to afford transit across any territory for persons whose admission into that territory is forbidden and, in relation to goods, shall not prevent either Contracting Party from taking non-discriminatory measures necessary to prevent abuse of transit facilities or to protect public morals or human, animal or plant life or health.

ARTICLE 24

Nothing in the present treaty shall be construed so as to derogate from the obligations undertaken by either Contracting Party towards the other by virtue of the provisions of the Protocol on Arbitration Clauses signed at Geneva on 24th September, 1923,⁷ or of the Convention on the Execution of Foreign Arbitral Awards signed at Geneva on 26th September, 1927,⁸ or of any multilateral agreement amendatory or supplementary thereto, so long as such provisions are in force between the Contracting Parties.

ARTICLE 25

(1) Nothing in the present treaty shall be construed so as to derogate from the obligations undertaken by either Contracting Party towards the other by virtue of the provisions of the Agreement of Madrid of 14th April, 1891, for the Prevention of False Indications of Origin on Goods,⁹ as re-

⁷ Treaty Series No. 4 (1925), Cmd. 2812 [7 L.N. Treaty Series 158; 20 A.J.I.L. Supp. 194 (1926)].

⁸ Treaty Series No. 28 (1930), Cmd. 3655 [92 L.N. Treaty Series 302; 27 A.J.I.L. Supp. 1 (1933)].

⁹ Treaty Series No. 13 (1892), C. 6818.

vised at London on 2nd June, 1934,¹⁰ or of any subsequent revision thereof, so long as such provisions are in force between the Contracting Parties.

(2) Without prejudice to the provisions of the foregoing paragraph, either Contracting Party shall provide in any territory suitable civil remedies and, in cases of fraud, suitable penal sanctions in respect of the use of any indication that the goods in connection with which it is used have been produced or manufactured in any territory of the other, if such indication be false or misleading.

ARTICLE 26

Nothing in the present treaty shall be construed so as to derogate from the rights and obligations that either Contracting Party has or may have as a contracting party to the General Agreement on Tariffs and Trade or any multilateral agreement amendatory or supplementary thereto.

ARTICLE 27

Nothing in the present treaty shall affect the obligations of either Contracting Party under the Articles of Agreement of the International Monetary Fund nor preclude the imposition of particular exchange restrictions whenever the Fund specifically authorises or requests a Contracting Party to impose such particular restrictions.

ARTICLE 28

All the provisions of the present treaty relative to the grant of treatment not less favourable than that accorded to any other foreign country shall be interpreted as meaning that such treatment shall be accorded immediately and unconditionally, without request or compensation.

ARTICLE 29

(1) Nothing in the present treaty shall entitle the United Kingdom to claim the benefit of any treatment, preference or privilege which may at any time be accorded by Japan exclusively

- (a) to persons who originated in the territories to which all right, title and claim were renounced by Japan in accordance with the provisions of Article 2 of the Treaty of Peace with Japan signed at the city of San Francisco on 8th September, 1951¹¹ (hereinafter referred to as "the Peace Treaty"); or
- (b) to any area set forth in Article 3 of the Peace Treaty in so far as the situation provided for in the second sentence of the said article continues with respect to the administration, legislation and jurisdiction over such area.

¹⁰ Treaty Series No. 54 (1938), Cmd. 5832 [192 L.N. Treaty Series 9].

¹¹ Treaty Series No. 33 (1952), Cmd. 8601 [186 U.N. Treaty Series 45; 46 A.J.I.L. Supp. 71 (1952)].

(2) Nothing in the present treaty shall entitle Japan to claim the benefit of any treatment, preference or privilege which may at any time be accorded by any territory of the United Kingdom exclusively to any one or more of the other territories enumerated in the following list:

The United Kingdom of Great Britain and Northern Ireland,
Canada,
The Commonwealth of Australia,
New Zealand,
The Republic of South Africa,
India,
Pakistan,
Ceylon,
Ghana,
The Federation of Malaya,
The Federation of Nigeria,
The Republic of Cyprus,
Sierra Leone,
Tanganyika,
Jamaica,
Trinidad and Tobago,
Uganda,
Territories for the international relations of which the Governments of the United Kingdom, Australia, New Zealand and the Republic of South Africa are responsible at the date of signature of the present Treaty,
The Irish Republic, and
In relation to paragraph (1) of Article 16 only, Burma.

(3) The provisions of the present treaty relative to the grant of treatment not less favourable than that accorded to any other foreign country shall not be construed so as to oblige one Contracting Party to extend to the other the benefit of any treatment, preference or privilege which may be extended by the former Contracting Party by virtue of

- (a) the formation of a customs union or a free trade area, or
- (b) the adoption of an agreement designed to lead to the formation of such a union or area within a reasonable length of time.

(4) Without prejudice to the provisions of Article 4, nothing in the present treaty shall be construed so as

- (a) to prevent a Contracting Party from taking, either singly or with other countries, any action considered necessary by that Contracting Party for the protection of national security, where such action relates to
 - (i) special nuclear materials or to materials or equipment from which they are produced; or

- (ii) the production of or traffic in arms, ammunition or implements of war, or to such production of or traffic in other goods or materials as is carried on directly or indirectly for the purpose of supplying a military establishment of the Contracting Party or of any other foreign country; or
- (b) to prevent a Contracting Party from taking any action
 - (i) considered necessary by that Contracting Party to protect its essential security interests in time of war or other emergency in international relations or in time of public emergency threatening the life of the nation; or
 - (ii) in pursuance of its obligations under the United Nations Charter¹² for the maintenance or restoration of international peace and security;

provided that the Contracting Parties shall aim to restrict any such action to that involving the least possible deviation, both in extent and duration, from the provisions of the present treaty.

(5) Nothing in the present treaty shall be construed so as to grant any rights or impose any obligations in respect of

- (a) any matter concerning which provision is made in any treaty, convention or agreement relating to international civil aviation to which either or both of the Contracting Parties is a party; or
- (b) copyright in literary or artistic works; or
- (c) rights of performers, producers of phonograms and broadcasting organisations.

ARTICLE 30

Any representations which may be made by either Contracting Party with regard to any matter affecting the operation of the present treaty shall be the subject of sympathetic consideration and, where appropriate, mutual consultation.

ARTICLE 31

Any dispute that may arise between the Contracting Parties as to the interpretation or application of any of the provisions of the present treaty shall, upon the application of either Contracting Party, be referred to the International Court of Justice, unless in any particular case the Contracting Parties agree to submit the dispute to some other tribunal or to dispose of it by some other procedure.

ARTICLE 32

(1) The United Kingdom may, at the time of exchange of the instruments of ratification or at any time thereafter, give notice in writing

¹² Treaty Series No. 67 (1946), Cmd. 7015 [39 A.J.I.L. Supp. 190 (1945)].

through the diplomatic channel of its intention to extend the present treaty to any territory for the international relations of which the United Kingdom is responsible.

- (a) In a case where the intention of the United Kingdom is to extend the treaty without modification or reservation, the treaty shall be extended to the territory specified in such notice as from the thirtieth day after the date of such notice.
 - (b) In a case where the intention of the United Kingdom is to extend the treaty with modification or reservation, both Contracting Parties shall consult as to the terms of modification or reservation to be made in connection with the extension of the treaty to the territory specified in such notice. The treaty shall be extended to such territory by an agreement setting out the terms of modification or reservation as well as necessary provision for the entry into force of such extension.
- (2) After the expiry of a period of six years from the coming into force of the present treaty either Contracting Party may, provided twelve months' prior notice to that effect has been given, terminate the application of the present treaty to any territory to which it has been extended under the provisions of the foregoing paragraph.

ARTICLE 33

(1) The present treaty shall be ratified and the instruments of ratification shall be exchanged at Tokyo as soon as possible. It shall come into force as from the thirtieth day after the exchange of the instruments of ratification, and shall thereafter remain in force during a period of six years.

(2) In case neither Contracting Party shall have given notice to the other twelve months before the expiry of the said period of six years of intention to terminate the treaty, it shall remain in force until the expiry of twelve months from the date on which notice of such intention is given.

(3) A notice given under paragraph (2) of this article shall apply to any territory to which the present treaty has been extended under Article 32.

In witness whereof the above named Plenipotentiaries have signed the present treaty and have affixed thereto their seals.

Done in duplicate at London this Fourteenth day of November, 1962, in the English and Japanese languages both texts being equally authoritative.

For the United Kingdom of Great Britain and Northern Ireland:

HOME	(L.S.)
F. J. ERBOLL	(L.S.)

For Japan:

KATSUMI OHNO	(L.S.)
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PROTOCOL OF SIGNATURE

At the time of signing the Treaty of Commerce, Establishment and Navigation between the United Kingdom of Great Britain and Northern Ireland and Japan (hereinafter referred to as "the treaty"), the undersigned Plenipotentiaries, duly authorised thereto, have further agreed as follows:

(1) The term "territory of Japan" shall not be deemed to include, for the purposes of the treaty, any area referred to in Article 3 of the Treaty of Peace with Japan signed at the city of San Francisco on 8th September, 1951, in so far as the situation provided for in the second sentence of the said article continues with respect to the administration, legislation and jurisdiction over such area. The term "nationals" in relation to Japan includes inhabitants of such area who are nationals of Japan.

(2) The term "nationals," in relation to the United Kingdom, shall also apply to all British subjects who have made a claim to retain the status of a British subject under Section 2 of the British Nationality Act, 1948, or who are British subjects without citizenship under Section 13 (1) of that Act, except in either case those who belong to any territory to which the treaty may be extended under the provisions of Article 32 but has not been so extended. In this connection, any such person may be required by the Japanese authorities to produce a passport or other document in lieu thereof for the purpose of confirming that he falls under one or other of the said categories.

(3) With reference to paragraph (3) of Article 2, the term "vessels" does not include warships.

(4) The provisions of paragraph (1) of Article 3 shall not apply to advantages relating to passports and visas accorded by a Contracting Party to the nationals of any other foreign country by virtue of a special agreement. However, the foregoing shall not be interpreted so as to nullify the provisions of paragraph (1) of Article 3.

(5) With reference to Article 3, the United Kingdom reserves the right to apply the provisions of the said article in the United Kingdom as if Great Britain and Northern Ireland were each a separate territory.

(6) With respect to the profession of patent agent, the provisions of paragraph (4) of Article 3 shall not oblige Japan to accord to nationals of any territory of the United Kingdom treatment more favourable than that accorded by that territory to nationals of Japan.

(7) Without prejudice to the provisions of an agreement for the avoidance of double taxation and the prevention of fiscal evasion between any territory of the United Kingdom and Japan,

(a) the provisions of paragraph (2) of Article 8 shall not oblige the United Kingdom to grant, in respect of any territory of the United Kingdom, to nationals of Japan not resident for tax purposes in that territory the same personal allowances, reliefs and reductions for tax

purposes as are granted to nationals of the United Kingdom not resident for tax purposes in that territory, and

- (b) the provisions of paragraph (6) of Article 8 shall not oblige Japan to accord to nationals and companies of any territory of the United Kingdom treatment with respect to exemption from taxation in Japan more favourable than that accorded in that territory to nationals and companies of Japan.

(8) The provisions of Article 8 shall not be construed as affecting the provisions of the Japanese law under which distributed profits are, in the case of Japanese corporations, taxed at a lower rate than undistributed profits.

(9) With respect to the matter of enjoyment of rights pertaining to land in Japan, the provisions of Article 10 and of paragraph (4) of Article 12 shall not oblige Japan to accord to the nationals and companies of any territory of the United Kingdom, or to companies of Japan more than one half of the interests in which are owned or which are controlled, directly or indirectly, by such nationals and companies, treatment more favourable than that accorded in that territory to nationals and companies of Japan.

(10) The provision of paragraph (1) of Article 16 shall not preclude either Contracting Party from imposing a countervailing or anti-dumping duty in the circumstances and subject to the conditions laid down in the provisions of the General Agreement on Tariffs and Trade which govern the imposition of such duty in relation to the trade of contracting parties to that Agreement.

(11) The provisions of paragraph (2) of Article 16 shall not preclude Japan from treating fish, whales and other natural produce of the sea taken by vessels of the United Kingdom within the territory of any other foreign country, and products produced or manufactured at sea therefrom, as products originating in the territory of that foreign country.

(12) The provisions of Articles 17 and 23 shall not prevent the United Kingdom from requiring, as a condition of permitting

- (a) the exportation of any product from any of its territories, or
- (b) the transit through any of its territories of any product exported from the Sterling Area,

satisfactory evidence that payment for such product has been or will be made in accordance with any exchange control regulations in force in that territory.

(13) The permits referred to in paragraph (5) of Article 20 will be issued on a basis no more restrictive than that on which they were issued on the date of signature of the treaty.

(14) With reference to paragraph (3) of Article 29, a Contracting Party shall, before entering into any customs union, free trade area or agreement designed to lead thereto, inform the other of its plans in so far as they are relevant to the treaty and give adequate opportunity for consultation about the effect of the terms of entry on the benefits which the other Contracting

Party might expect to gain from the treaty. The former Contracting Party shall also, after its entry, keep the latter informed of developments relevant to the treaty, in so far as this is compatible with the position of the former Contracting Party as a member of the customs union or free trade area or as a participant in the said agreement.

(15) Wherever the treaty contains a provision according national treatment and also a provision according treatment not less favourable than that accorded in relation to any other foreign country in respect of any matter, the Contracting Party beneficiary in each particular case shall be entitled to claim the benefits of either provision.

(16) The present Protocol shall form an integral part of the treaty.

In witness whereof the respective Plenipotentiaries have signed the present Protocol and have affixed thereto their seals.

Done in duplicate at London this Fourteenth day of November, 1962, in the English and Japanese languages, both texts being equally authoritative.

For the United Kingdom of Great Britain and Northern Ireland:

HOMB (L.S.)

F. J. ERROLL (L.S.)

For Japan:

KATSUMI OHNO (L.S.)

FIRST PROTOCOL CONCERNING TRADE RELATIONS BETWEEN THE UNITED
KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
AND JAPAN

At the time of signing the Treaty of Commerce, Establishment and Navigation between the United Kingdom of Great Britain and Northern Ireland and Japan (hereinafter referred to as "the treaty"), the undersigned Plenipotentiaries, duly authorised thereto, have agreed as follows:

(1) If the Government of either Contracting Party find that any product of the territory of the other Contracting Party is being imported into the territory of the former Contracting Party in such increased quantities and under such conditions as to cause or threaten serious injury to producers in the territory of that former Contracting Party of like or directly competitive products, that Government, in case they wish to take action under the present Protocol to prevent or remedy such injury, shall give to the Government of the other Contracting Party notice to this effect with a full explanation of the circumstances, and the two Governments shall enter into consultation, not later than seven days after such notice is given, with a view to finding a mutually acceptable solution.

(2) If no mutually acceptable solution is found within thirty days after the consultation has begun, the Government of the importing Contracting Party may take action to prevent or remedy the injury referred to in

paragraph (1) above, notwithstanding the provisions of Article 17 of the treaty, provided that such action:

- (a) shall not be taken lightly;
- (b) shall be limited, so far as administratively practicable, to the specific products in respect of which it is necessary and shall not be more severe than is needed to remedy the injury caused or threatened; and
- (c) shall be discontinued immediately either when a mutually acceptable solution is found or when the situation which gave rise to the action is rectified.

(3) In critical circumstances where delay would cause damage which it would be difficult to repair, action under paragraph (2) above may be taken provisionally within thirty days after the consultation has begun, on the condition that such consultation shall be continued in an endeavour to find a mutually acceptable solution.

(4) If the Government of either Contracting Party take action under the provisions of paragraph (2) or paragraph (3) above, the Government of the other Contracting Party may take counteraction substantially equivalent in scope and duration, notwithstanding the provisions of Article 17 of the treaty, provided that such counteraction shall not be taken or shall be discontinued, as the case may be, if and to the extent that the Government of the former Contracting Party take measures having the effect of compensating for their initial action. If the Government of the former Contracting Party so request, the two governments shall immediately enter into consultation in respect of any such counteraction.

(5) The term "territory" in paragraph (1) above means, in relation to the United Kingdom, the United Kingdom of Great Britain and Northern Ireland, including The Channel Islands and the Isle of Man. The present Protocol may, however, be applied when it is necessary to protect the established interests in the United Kingdom market of any territory other than the United Kingdom for whose international relations the United Kingdom is responsible.

(6) The present Protocol shall be ratified and the instruments of ratification shall be exchanged at Tokyo as soon as possible. It shall thereafter come into force on the date of the coming into force of the treaty. It shall terminate when the treaty is terminated in accordance with the provisions of Article 33 thereof or at any time earlier by mutual consent of the two governments. The two governments shall consult together at any time at the request of either government for the purpose of reviewing the necessity of the present Protocol.

In witness whereof the respective Plenipotentiaries have signed the present Protocol and have affixed thereto their seals.

Done in duplicate at London, this Fourteenth day of November, 1962, in the English and Japanese languages, both texts being equally authoritative.

For the United Kingdom of Great Britain and Northern Ireland:

HOME (L.S.)
F. J. ERROLL (L.S.)

For Japan:

KATSUMI OHNO (L.S.)

SECOND PROTOCOL CONCERNING TRADE RELATIONS BETWEEN THE
UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND
AND JAPAN

At the time of signing the Treaty of Commerce, Establishment and Navigation between the United Kingdom of Great Britain and Northern Ireland and Japan (hereinafter referred to as "the treaty"), the undersigned Plenipotentiaries, duly authorised thereto, have agreed as follows:

(1) In case import restrictions have been continuously enforced by either Contracting Party with regard to any specific product and the sudden removal of import restrictions on such product of the other Contracting Party would result in serious injury to domestic producers of the former Contracting Party of like or directly competitive products, the importing Contracting Party may continue to apply import restrictions, notwithstanding the provisions of Article 17 of the treaty, to any such products mentioned in agreements which are to be concluded in accordance with the present Protocol in such manner and under such conditions as may be specified in the said agreements.

(2) The Governments of the Contracting Parties shall review the operation of the agreements made in accordance with paragraph (1) above, with a view to ensuring orderly development of the trade between the Contracting Parties, at any time upon the request of the Government of either Contracting Party, and not less frequently than once a year unless otherwise mutually agreed.

(3) The present Protocol shall be ratified and the instruments of ratification shall be exchanged at Tokyo as soon as possible. It shall thereafter come into force on the date of the coming into force of the treaty. It shall terminate when the treaty is terminated in accordance with the provisions of Article 33 thereof or at any time earlier when there are no longer any import restrictions in force under the present Protocol.

In witness whereof the respective Plenipotentiaries have signed the present Protocol and have affixed thereto their seals.

Done in duplicate at London, this Fourteenth day of November, 1962, in the English and Japanese languages, both texts being equally authoritative.

For the United Kingdom of Great Britain and Northern Ireland:

HOME (L.S.)
F. J. ERROLL (L.S.)

For Japan:

KATSUMI OHNO (L.S.)

HUMAN RIGHTS IN THE UNITED NATIONS

By MYRES S. McDOUGAL * and GERHARD BEBE **

"They meant simply to declare the right, so that enforcement of it might follow as fast as circumstances should permit.

"They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people of all colors everywhere."

—LINCOLN

The human rights program of the United Nations represents a tremendous collective effort, by the formulation of accepted principle and the establishment of new procedures, to extend protection of basic individual liberties, most broadly conceived, to levels of effective authority higher than the nation state. Rational appraisal of this program would require comprehensive consideration of the goals of the program, the conditions under which these goals are being sought, the inadequacies of traditional international law, the origins and scope of the program, the specific content of proposed United Nations prescriptions, measures of enforcement being proposed and finding acceptance, and experience thus far in the application of new principle. Our exposition here must of necessity be brief and impressionistic.¹

* Sterling Professor of Law, Yale University School of Law; member of the Board of Editors of this JOURNAL.

** Formerly Lecturer in Law, Yale University School of Law.

This article expresses only the strictly private views of the authors; in no way does it reflect, interpret, or advocate any official policy.

The text of this article, with substantially its present content, was first written some twelve years ago for publication in Germany which, because of fortuitous events, did not ensue. Though we have not found it possible fully to canvass changing attitudes and conditions during the past twelve years, we are pleased that the article may now be published in this JOURNAL. Perhaps it is an appropriate commentary upon the slowness of progress with respect to human rights that an article prepared so long ago should still be regarded as having some relevance. The text has been modestly updated and given a contemporary documentation by Mr. Bingham Leverich of the 1963-64 International Law Division of the Yale Law School. Dr. Egon Schwelb has assisted with helpful guidance in this revision.

The article is being simultaneously published in German in *Die Grundrechte. Handbuch und Theorie der Grundrechte*. In Verbindung mit Otto Bachof, Kurt Ballerstedt, Paolo Barile und anderen. Herausgegeben von Karl August Bettermann und Hans Carl Nipperdey. Berlin: Verlag Duncker & Humblot.

The authors are indebted to the Wenner-Gren Foundation for Anthropological Research for aid in their work.

¹ The best comprehensive studies are: Lauterpacht, *International Law and Human*

GOALS OF THE UNITED NATIONS PROGRAM

For its goals the United Nations program is heir to all the great historic movements for man's freedom (including the English, American, and French revolutions and the events they set in train), to the enduring elements in the tradition of natural law and natural rights and in most of the world's great religions and philosophies, and to the findings of contemporary science about the interrelations of simple respect for human dignity and all other individual and community values.² It is familiar history how rudimentary demands for freedom from despotic executive tyranny have gradually been transformed into demands for, and provision of, protection against not only the executive but all institutions or functions of government and even private oppression, and how early demands for the barest "civil liberties," embodied in the most primitive conception of rule by "law," have burgeoned into insistence upon comprehensive "human rights"—that is, into demands for effective participation in all community value processes upon which minimum civil liberties depend.³ This history can be traced in the changing relation of the individual to the state, from the absolutist state through the liberal or "laissez-faire" state to the emerging conception of political organization as an instrument of all values, with government of, by, and for all people.⁴ From demands for physical security and inviolability of the person, with freedom from cruel and inhuman punishment and arbitrary detention, may be noted a progression to demands for freedom of expression and opinion, of conscience and worship, and of meeting and association.⁵ With the impact of industrialization, large-scale concentration of economic power, and urbanization, and the attendant ills of exploitation, unemployment, and inadequate housing, medical care, education, and so on, came not unnaturally demands for

Rights (1950); Jacob Robinson, *Human Rights and Fundamental Freedoms in the Charter of the United Nations* (1946); Nehemiah Robinson, *The Universal Declaration of Human Rights. Its Origin, Significance, Application and Interpretation* (2nd ed., 1958); Chakravarti, *Human Rights and the United Nations* (1958); Ganjil, *International Protection of Human Rights* (1962). See also: United Nations, Dept. of Public Information, *These Rights and Freedoms* (1950); United Nations *Work for Human Rights* (4th ed., 1961), U.N. Pub. Sales No. 62.1.3; *A Standard of Achievement* (Special 15th Anniversary Edition, 1963), U.N. Pub. Sales No. 62.1.13; Guradze, *Der Stand der Menschenrechte im Völkerrecht* (1956).

² Lauterpacht, note 1 above, and McDougal, review, 60 *Yale Law J.* 1051 (1951); Lasswell, *World Politics and Personal Insecurity* (1935); Arendt, *The Origin of Totalitarianism* (1951); Dollard and Associates, *Frustration and Aggression* (1939); Pear (ed.), *Psychological Factors of Peace and War* (1950); Klineberg, *Tensions Affecting International Understanding* (1950); Cantril (ed.), *Tensions That Cause War* (1950) (common statement and individual papers by a group of social scientists brought together by UNESCO); Kisker (ed.), *World Tension—The Psychopathology of International Relations* (1951); Kardiner, *The Mark of Oppression* (1951).

³ Corwin, *Liberty Against Government* (1948); Barker, *Principles of Social and Political Theory* 232-238 (1951); Laske, *The Rise of European Liberalism* 109 (1936).

⁴ Barker, *op. cit.* 244-252; Mannheim, *Man and Society in an Age of Reconstruction* 386 (1948); Buchanan-Lutz, *Rebuilding the World Economy* 34 (1947).

⁵ Corwin, note 3 above; Tawney, *Equality* (1931).

improved working and health conditions, fair and adequate wages, access to education and skill acquisition, and protection against the hazards of sickness, unemployment, old age, and the like.⁶ Today the recognition is general, and demands are made accordingly, that "liberty" requires "the ordering of social and economic conditions by governmental authority."⁷

It is in response to the ever increasing demands of people everywhere for greater access to, and wider sharing of, basic values, of the kind so impressionistically indicated above, that the United Nations program for human rights is being framed and implemented.⁸ For more systematic exposition and appraisal of the specific content of the United Nations formulations, these growing, common demands of people may be conveniently categorized in terms of certain particular values,⁹ as follows:

the wide sharing of *power*, both formal and effective, including participation in the processes of government and of parties and pressure groups and equality before the law;

the fundamental *respect* for human dignity which both precludes discriminations based on race, sex, color, religion, political opinion or other ground irrelevant to capacity and provides a positive recognition of common merit as a human being and special merit as an individual; the *enlightenment* by which rational decisions and other choices can be made, including freedom of inquiry, opinion, and communication; equal and adequate access to *wealth* processes, to opportunities for work and to the resources and technology necessary to the production of goods and services for maintaining rising standards of living and comfort;

the opportunity to achieve health and *well-being*, and the inviolability of the person, with freedom from cruel and inhuman punishments and positive opportunity for the development of talents and enrichment of personality;

opportunity for the acquisition of the *skill* necessary to express talent and to achieve individual and community values to the fullest;

⁶ Lasswell, "The Interrelations of World Organization and Society," 55 Yale Law J. 889 (1946); Maciver, *Democracy and Economic Challenge* 29 (1952).

⁷ Wade, *Introduction to Dicey, Law of the Constitution* (9th ed., 1950).

⁸ Former Secretary General Lie, in his address to the New York Herald Tribune Forum, said: "The demand for freedom, for equality of rights, for economic opportunity, can be heard with rising insistence and urgency by all who have ears to hear.

"We face here one of the great challenges of our civilization. Either we must find effective ways to answer it by the peaceful evolutionary means proclaimed in the United Nations Charter or we shall find ourselves engulfed in a succession of violent upheavals that will bring widespread chaos." New York Herald Tribune, Oct. 20, 1952, at p. 10.

⁹ This categorization is derived from Lasswell and Kaplan, *Power and Society* (1950), and has been used in various previous publications, including McDougal and Leighton, "The Rights of Man in the World Community: Constitutional Illusions versus Rational Action," 14 Law and Contemporary Problems 490 (1949), and 59 Yale Law J. 60 (1949); and in McDougal, "The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order," 61 Yale Law J. 917 (1952). Some of these publications are collected in McDougal and Associates, *Studies in World Public Order* (1961).

opportunity for *affection*, fraternity, and congenial personal relationships in groups freely chosen;
 freedom to choose standards of *rectitude* and responsibility, to explain life, the universe, and values, and to worship as may seem best;
 and, in sum, a *security* which includes not merely freedom from violence and threats of violence, but also full opportunity to preserve and increase all values by peaceful, non-coercive procedures.

Though it is for these values that men have long framed constitutions, established and administered governments, and sought an appropriate formulation of principle and balancing of power, the United Nations program seeks to extend this effort to more people, in a vaster area, at higher levels of authority, and "with a grander vision and on a more comprehensive scale" than hitherto attempted.¹⁰

CONDITIONS UNDER WHICH THE UNITED NATIONS SEEKS ITS GOALS

The conditions under which the United Nations seeks its human rights goals may be described most generally in terms of two trends of contradictory impact: the first and most comprehensive trend is that toward an ever tightening global interdependence of all peoples in securing their basic values, and it is the increasing recognition by peoples of this interdependence that is the dynamic and integrating stimulus behind the human rights program; the interfering trend is that toward the relative bipolarization—or perhaps, more recently, tripolarization—of the world's power structures, which, with its rising crisis in security and continuously more imminent portents of violence, increases the unwillingness of active decision-makers in nation states to loosen controls over individuals and, hence, threatens the whole human rights program, as well as most of man's values and institutions, with disaster.

The major outlines of peoples' contemporary interdependences are only too clear.¹¹ More than 150 years ago Kant wrote:

The intercourse, more or less close which has been steadily increasing between the nations of the earth, has now extended so enormously that a violation of the right in one of the parts of the world is felt all over it.¹²

Today accelerating changes in technology, in population growth, in the demands and identifications of peoples, and in techniques of organization multiply by many times the intensity of this interdependence. In an earth-space arena of ever increasing dimensions and of hydrogen and atomic bombs, as well, perhaps, as of other new instruments of unimaginable

¹⁰ McDougal and Leighton, note 9 above.

¹¹ Wright (ed.), *The World Community* (1948); Ogburn (ed.), *Technology and International Relations* (1949); Staley, *World Economy in Transition* 3-56 (1939); Lasswell, "The Interrelations of World Organization and Society," 55 *Yale Law J.* 889 (1946); Bourquin, "Pouvoir Scientifique et Droit International," 70 *Hague Academy Recueil des Cours* 335-402 (1947).

¹² Kant, *Perpetual Peace* 142 (Smith ed., 1917).

destructiveness, it needs little emphasis that no people can be secure—even in the minimal sense of freedom from violence and threats of violence—unless all peoples are secure. It is scarcely less obvious that security, even in this minimal sense, is dependent upon the abundant production and wide sharing of all other values: upon, in terms of the categorizations suggested above, a sharing of power which does not repress and accumulate hatreds but gives outlet to constructive energies; upon a respect for human dignity which does not breed psychopathic personalities, resentments, and predispositions to violence, but rather gives ample opportunity for the fullest development of personality and creative capacity; upon a flow of enlightenment which facilitates realistic orientation in contemporary world processes and the making of decisions which rationally promote major objectives; upon the production and distribution of the goods and services necessary to maintain continually rising standards of living and the provision of ample opportunities for employment on respected jobs; upon maintenance of standards of health and well-being and protection of the person which permit the fullest and freest participation in all value processes; upon continually widening positive identifications of peoples with peoples and intensifying loyalties to larger areal groupings; and, finally, upon sufficient consensus in conceptions of right and wrong to support appropriate institutions and a growing sense of common responsibility, whatever the details of justification, for preservation and enhancement of the values of all peoples. Conversely, whatever values we summarize as “human rights,” however narrowly or broadly we may conceive them, are with equal obviousness dependent upon “security” and all other values.¹³ Most broadly and rationally conceived, the “human rights” and “security” of any people and all peoples may in fact be said to be not merely “interdependent” but *identical*; the different words are but alternative ways of describing the same aspirations and interrelations of people.

It is not, however, rational co-operation in the peaceful pursuit of interdependent values, but rather the trend toward bipolarization or tri-polarization, and contending systems of public order with nation states organizing themselves into “garrisoned camps,” that today most conspicuously dominate the world arena. The growth of great power blocs, with several of the dominant Powers insisting upon the inevitability of world dominion by totalitarian measures, the destructive potentialities of

¹³ These interdependences are outlined in more detail in McDougal and Leighton, note 9 above, and McDougal, “The Role of Law in World Politics,” 20 *Miss. Law J.* 253 (1949). See also Klineberg, *Tensions Affecting International Understanding* 187–212; Horkheimer, “The Lessons of Fascism,” in Cantril (ed.), *Tensions That Cause Wars* 209–242; Kisker, *World Tension—The Psychopathology of International Relations* 312; Lasswell, “World Loyalty,” in Wright (ed.), *The World Community* 200–225; Gorove, “Towards World Loyalty,” 23 *Miss. Law J.* 159–188 (1952); Flugel, *Man, Morals and Society* 316–317 (1945); West, *Conscience and Society* 226–237 (1945); “A Plea For Rational Approach to the Problem of War and Peace,” 16 *U. of Chicago Law Rev.* 390–396 (1948/49).

the newly developed weapons, and the continued incidence in many parts of the world of ignorance, disease, poverty, and exploitation, with their attendant political instabilities, all combine to create general expectations of rising insecurities and more comprehensive violence. These expectations of imminent violence both increase the ordinary difficulties in co-operation between nation states and facilitate processes within nation states deeply inimical to human rights. As lines between probable combatants are more and more sharply drawn, proposals for co-operation between nation states for the promotion of "human rights" or "security" or any other value are appraised in terms, not of possible long-range effects in an ever receding peaceful world, but rather of immediate impact on fighting effectiveness. Within nation states, measures considered indispensable to security in a bipolar world of impending atomic war, whether rationally calculated or not, tend to move even the freer societies toward practices resembling those of the totalitarianism they fight.¹⁴ The whole global transformation has been aptly described as a movement toward "garrison-police" states, in which demands for power are accentuated at the expense of every other value, with increasing militarization, governmentalization, centralization, concentration, and regimentation, and in which all values other than power are "politicized" in such practices as "the compulsion to work" and the gradation and stabilization of income, the "requisitioning of talent and skill," the "administration of hate" and "withdrawal of affection," the "requisitioning of loyalty," the "dogmatization and ritualization" of rectitude, and so on.¹⁵ In this context it is small wonder that the United Nations' human rights program exhibits some of the symptoms of incipient paralysis.

THE INADEQUACIES OF TRADITIONAL INTERNATIONAL LAW

The failure of traditional international law to develop doctrines and procedures for protecting the fundamental rights of the individual has been many times recounted. The sum of the story is that under the impact of nineteenth-century positivistic notions, antithetical to the premises of the great founders of international law, who addressed their prescriptions to "sovereigns" and "subjects,"¹⁶ that only nation states were the appropriate "subjects" of international law, it became respected dogma that the relations between a nation state and its members—"subjects" or "nationals" or "citizens"—was a matter of internal or "domestic" concern only and, hence, beyond the reach of international law.¹⁷ Exceptions or

¹⁴ Lasswell, *National Security and Individual Freedom* (1950).

¹⁵ This description is that of Lasswell in *The World Revolution of Our Time* (1951). See also his *National Security and Individual Freedom* (1950); "'Inevitable War'": A Problem in the Control of Long Range Expectations," 2 *World Politics* 1-40 (1949); and "The Prospects of Cooperation in a Bi-polar World," 15 *U. of Chicago Law Rev.* 887-901 (1947/48).

¹⁶ Corbett, *Law and Society in the Relations of States* 54 (1951); Idelson, "The Law of the Nations and the Individual," 30 *Grotius Society Transactions* 50 (1944).

¹⁷ Hyde, *International Law Chiefly as Interpreted and Applied by the United States*

qualifications were, of course, admitted. Should the active decision-makers in a nation state abuse members too much, "humanitarian intervention" might become legal. This doctrine has been authoritatively, if optimistically, summarized as prescribing that

each state has a legal duty to see that conditions prevailing within its own territory do not menace international peace and order, and to this end it must treat its own population in a way which will not violate the dictates of humanity and justice or shock the conscience of mankind

and is alleged to "require of each state a minimum protection" of "all inhabitants of its territory."¹⁸ Nation states have, furthermore, by special agreement often assumed obligation to treat their members in accord with stipulated standards of human decency.¹⁹ Notable instances that may be recalled include early agreements among the Christian European states and with the Mohammedan rulers for religious freedom, agreements for repressing slavery and the slave trade and for promoting humane conditions of labor, agreements for preventing white slavery and for policing the opium trade, the "minorities treaties" after World War I, and the general provisions in the peace treaties concluded since World War II for the protection both of minorities and of others.²⁰ Sporadic exceptions to negative doctrine and occasional agreements, poorly implemented, obviously do not, however, add up to the comprehensive and effective protection of the members of nation states against oppression by elites from within their nation states.

For "aliens"—that is, individuals regarded as members of one nation state but caught in the territorial jurisdiction of another—international law has, in curious contrast, developed somewhat more extensive protection.²¹ The standard by which this protection is to be measured is still,

209 (1945); Oppenheim, *International Law* 279 (Lauterpacht, 7th ed., 1948). Kuntz, "Present-Day Efforts at International Protection of Human Rights: A General Analytical and Critical Introduction," 1951 *Proceedings, American Society of International Law* 117, still maintains that "to make individuals direct subjects of international law . . . has no chance to be realized, for theoretical as well as practical reasons."

¹⁸ "The International Law of the Future," 30 *Am. Bar Assn. Journal* 35-37 (1944); 38 *A.J.I.L. Supp.* 54-135 (1944). See also Oppenheim, note 17 above.

¹⁹ Jessup, *A Modern Law of Nations* 88 (1948); Fenwick, *International Law* 265 (3rd ed., 1948).

²⁰ Consultative Council of Jewish Organizations, *Implementation of an International Covenant of Human Rights* 27 (1952); Arts. 15 and 19, par. 4, *Italian Peace Treaty*; Art. 2, *Hungarian and Bulgarian Peace Treaties*, and Art. 3, *Rumanian Peace Treaty*. Full text, Dept. of State, *Treaties of Peace* . . . (Pub. 2743, *European Series* 21); 42 *A.J.I.L. Supp.* 47, 179, 225, 252 (1948); Martin, "Human Rights in the Paris Peace Treaties," 24 *Brit. Yr. Bk. Int. Law* 392-398 (1947); Kertesz, "Human Rights in Peace Treaties," 14 *Law and Contemporary Problems* 627-646 (1949). See also Schwelb, "The Austrian State Treaty and Human Rights," 5 *Int. and Comp. Law Q.* 265 (1956).

²¹ Roth, *Minimum Standard of International Law Applied to Aliens* 23 (1949); Dunn, *The Protection of Nationals* 47 (1931).

however, a subject of bitter dispute, and the procedures for making effective the protection, whatever the standard, are still most inadequate. A majority perhaps of nation states insist that there is an "international standard of civilized justice," transcending all local peculiarities and inadequacies, with which the decision-makers in nation states must comply in protecting aliens.²² But a vigorous minority continues to assert that the only international standard is that of "equality of treatment," that aliens will be treated no worse than members—a standard which may offer small protection indeed.²³ For securing redress, an injured or deprived alien, or his representative, furthermore, is not given access to national or international *fora* as an individual, but is rather required to turn to the nation state that accepts him as a member for intervention through normal diplomatic channels. The fiction is that the wrong done the individual is a wrong done his nation state, and international law imposes no duty on the nation state to prosecute his claim, leaving any action to unfettered official discretion and considerations of political or other expediencies.²⁴ The inadequacies of the whole structure of doctrine and practice for protecting the fundamental human rights of individuals become even more apparent when it is added that not even this meager protection is available to stateless persons, persons of double nationality when both nation states are involved, and persons who are members of an unrecognized nation state.²⁵

It may perhaps require emphasis, to forestall possible over-estimation of the degree of innovation in the United Nations program, that the notion underlying the common rationalizations of the doctrines and practices outlined above, that the individual human being is not an appropriate "subject" of international law, is but a doctrinal half-truth, sometimes accepted and sometimes rejected. An opposing tradition has always recognized the individual as the ultimate beneficiary of all the doctrines and practices of international law,²⁶ and in relatively recent times has succeeded in

For a detailed discussion, see Harvard Law School, *Research in International Law, the Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 A.J.I.L. Spec. Supp. 133-218 (1929); Borchard, *The Diplomatic Protection of Citizens Abroad* (1919). The recent discussions in the International Law Commission offer a great variety in view.

²² Borchard, cited above, Preface; Dunn, cited above, pp. 62-63; Roth, cited above, pp. 81-110; Borchard, "The Minimum Standard of the Treatment of Aliens," 1939 Proceedings, Am. Soc. Int. Law 51-63.

²³ Dunn, cited above, pp. 56, 140-141; Roth, above, pp. 62-80.

²⁴ Freeman, "Human Rights and the Rights of Aliens," 1951 Proceedings, Am. Soc. Int. Law 127.

²⁵ *Ibid.* 123, 127. See, however, the Statute of the Office of the United Nations High Commissioner for Refugees, annexed to General Assembly Res. 427/V/1950; Convention on the Status of Refugees, 1951, cited in note 46 below; and the Convention on the Status of Stateless Persons, 1954, U.N. Conference on the Status of Stateless Persons, Final Act and Convention, U.N. Doc. E/CONF.17/5/Rev.1., and 1954 Yearbook of Human Rights 369.

²⁶ Lauterpacht, *International Law and Human Rights* 78-79 (1950); Verdross, *Völkerrecht* 492-493 (1950); Schindler, "Gedanken zum Wiederaufbau des Völkerrechts," in his *Recht, Staat und Völkergemeinschaft* 237, 239, 240 (1948); Politis,

securing for him direct access to international *fora* of various kinds for the protection of many special interests.²⁷ Similarly, rational effort to achieve and maintain effective sanctions has long subjected the individual, unshielded by his nation state, directly to duties under international law—most notably with respect to the laws of war, neutrality, and piracy, and under agreements with respect to slave trading, counterfeiting, fisheries, arms smuggling, and so on.²⁸ In terms of realistic description, it is obvious that the individual human being—both as a player of rôles in such institutions as the nation state, international governmental organizations, political parties, pressure groups, and private associations, and as a person whose loyalties and choices may transcend any particular rôle or combination of rôles—is an effective participant in the world power process. Not all traditional international law precludes recognition in formal doctrine and authoritative decision of this reality.²⁹

THE ORIGINS AND SCOPE OF THE UNITED NATIONS PROGRAM

International co-operation in the days of the League of Nations produced no comprehensive program for the protection of human rights. The emphasis in President Wilson's Fourteen Points,³⁰ in the 1919 Peace Treaties, and in the "Minorities Treaties" was not upon the rights of individuals but upon the rights of nations and of minority groups within

The New Aspect of International Law 24-25 (1928). See also O'Sullivan, "The Concern of International Law for the Individual," 34 *Grotius Society Transactions* 6-29 (1948); Dunn, "The International Rights of the Individual," 1941 *Proceedings, Am. Soc. Int. Law* 18; McDougal, "International Law, Power and Policy: A Contemporary Conception," 82 *Hague Academy Recueil des Cours* 173, 174, 287-256 (1953).

²⁷ Hambro, "Individuals before International Tribunals," 1941 *Proceedings, Am. Soc. Int. Law* 22-27; Lauterpacht, cited above, p. 48. See also explanatory paper on measures of implementation prepared by the Secretary General, U.N. Doc.A/5411 (April, 1963).

²⁸ Lauterpacht, note 1 above, p. 38 *et seq.*; Levy, "Criminal Responsibility of Individuals and International Law," 12 *U. of Chicago Law Rev.* 313, 326 (1945); McDougal and Feliciano, *Law and Minimum World Public Order* 706 (1961).

Art. II of the Convention for the Protection of Submarine Telegraph Cables, 75 *Brit. and For. State Papers* 356 (1883-1884); North Sea Convention, 79 *ibid.* 894 (1887-1888); Convention for Unification of Certain Rules of Law with Respect to Assistance and Salvage at Sea, 3 *U. S. Treaties* 2943 (1923); Convention for Preservation and Protection of Fur Seals, *ibid.* 2966; Convention on the Suppression of Counterfeiting Currency, 4 *Hudson, International Legislation* 2692 (1928-1929); Convention Between the U. S. and Other Powers to Suppress Slave Trade and Slavery, 4 *U. S. Treaties* 5022 (1938); Convention on the Suppression of Traffic in Women and Children, 1 *Hudson, International Legislation* 726 (1919-1921); Convention For Limiting the Manufacture and Regulating the Distribution of Narcotics, 139 *L. N. Treaty Series* 301. See also the decision of the U. S. Consular Court in Tangier on a piracy charge, *New York Times*, Dec. 21, 1952, p. 1, col. 1.

²⁹ Lauterpacht, "The Subjects of the Law of Nations," 64 *Law Quarterly Rev.* 97, 99 (1948); Wright, "International Law and Power Politics," 2 *Measure* 185 (1951).

³⁰ Message to the Congress, Jan. 18, 1918, 56 *Cong. Rec., Pt. I*, p. 651, 65th Cong., 2nd Sess.; reprinted in 13 *A.J.L.L.* 161 (1919).

nations.⁸¹ The principal emphasis upon the rights of individuals was in the Japanese proposal to the Peace Conference, a proposal subsequently rejected, for equality of treatment of aliens.⁸² An elementary international protection to individuals was offered by the Minority Treaties—especially the important German-Polish Convention concerning Upper Silesia⁸³—but this protection was achieved only through identification with a national minority group.

Stimulated by the mounting evidences of a new barbarism and by the need to clarify war aims, Allied official pronouncements and declarations began, however, early in World War II unmistakably to emphasize the individual and his rights. In his famous "Four Freedoms" speech to the United States Congress on January 6, 1941,⁸⁴ President Roosevelt included freedom from want and freedom from fear, along with freedoms of expression and of worship, in "four essential human freedoms" upon which world order should be founded, and his broad conception of human liberties was later confirmed, in the Atlantic Charter and in the Declaration by the United Nations, as embodying specific war and peace aims.⁸⁵ The Dumbarton Oaks Proposals included among the purposes of the projected organization "international cooperation in the solution of international economic, social, and other humanitarian problems" and, at the instance of the United States, promotion of "respect for human rights and fundamental freedoms."⁸⁶ At the San Francisco Conference these modest beginnings were transformed into the various human rights provisions which today constitute so important and so conspicuous a part of the United Nations Charter.

The United Nations Charter explicitly recognizes that the maintenance of "international peace and security" and the protection of human rights are today interdependent, if not identical, purposes; announces the promotion of human rights as one of the major aims of the new organization; and imposes upon both Member states and the organization a clear legal obligation to promote the increased protection of human rights. This structure of purpose and obligation is outlined in various provisions of the Charter. In the Preamble, the "peoples of the United Nations," not merely the Member states, reaffirm their "faith in fundamental human rights" and "in the dignity and worth of the human person." Article 1 includes among stated purposes the achievement of

⁸¹ Jones, "National Minorities: A Case Study in International Protection," 14 *Law and Contemporary Problems* 599 (1949); Mitrany, "Human Rights and International Organization," 3 *India Q.* 115 (1947).

⁸² 1 Miller, *The Drafting of the Covenant* 183 (1928); see also pp. 269, 461.

⁸³ Kaeckenbeeck, *The International Experiment of Upper Silesia* (1942).

⁸⁴ 87 Cong. Rec., Pt. I, pp. 46-47, 77th Cong., 1st Sess.

⁸⁵ 6 Dept. of State Bulletin 3 (1942); 35 *A.J.I.L. Supp.* 191 (1941); 36 *ibid.* 191 (1942).

⁸⁶ Dept. of State, *Postwar Foreign Policy Preparation 1939-1945*, p. 327 (Pub. 3580, Gen. Foreign Pol. Series 15, 1950). For the Dept. of State's preliminary work and drafting of a "Bill of Rights" see *ibid.* 84, 98, 115-116; for the text of the draft, see *ibid.* 483-485, Annex No. 14.

international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 13 orders the General Assembly to "initiate studies and make recommendations" for the purpose of

promoting international cooperation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or opinion.

Article 55, seeking "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations," includes among the purposes of "international economic and social cooperation" the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion"; and in Article 56

All Members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in Article 55.

Article 62 empowers the Economic and Social Council to "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all," and Article 68 orders the Council to "set up commissions in economic and social fields and for the promotion of human rights." Article 76 stipulates that "basic objectives" of the international trusteeship system are, *inter alia*, "to encourage respect for human rights and for fundamental freedoms for all" and, it is worth note, "to encourage recognition of the interdependence of the peoples of the world." Though human rights and fundamental freedoms are nowhere in the Charter more explicitly defined than in these quoted provisions, both immediate legal obligations and a continuous program of definition and implementation seem clearly contemplated. In his closing address to the San Francisco Conference, President Truman summarized common expectations:

Under this document [the Charter] we have good reason to expect an international bill of rights acceptable to all the nations involved. That Bill of Rights will be as much a part of international life as our own Bill of Rights is part of our Constitution. The Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere—without regard to race, language, or religion—we cannot have permanent peace and security in the world.³⁷

³⁷ 1 U.N.C.I.O. Docs. 717 (1945). Art. 2(7) of the United Nations Charter, which recites that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter," has been on occasion invoked as imposing limitation on the powers both of nation states to make new agreements and of the U.N. Organization

The first major implementation of the Charter provisions came with the Universal Declaration of Human Rights, drafted after two years of study by the Commission on Human Rights established under Article 68 of the Charter by the Economic and Social Council, and approved, without dissenting vote, by the General Assembly on December 10, 1948.³⁸ This Declaration was not designed or proposed as an enforceable treaty obligation, but rather as a broad clarification and recommendation of policy. It was intended, as the General Assembly proclaimed it,

as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of member states themselves and among the peoples of territories under their jurisdiction.³⁹

The rights stipulated in the Declaration are most comprehensive. They include, among many items, not only provision for equality of treatment with respect to all rights and freedoms set forth in the Declaration, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," and the traditional personal liberties such as freedom and security of person, right to a fair trial, and freedom of thought, expression, opinion, religion, assembly, association, and movement, but also certain more recently emerging political, economic, and social claims, such as those to nationality and freedom to change nationality, to asylum from persecution, to take part in government and to have equal access to public service, to social security and choice of employment, and to education, leisure, participation in cultural life, and an adequate standard of living. Despite its lack of status as enforceable treaty obligation or even as "authoritative interpretation" of such obligation, and despite the imprecision of some of its language,⁴⁰ this Declaration has, because of its authoritative community origin and eloquent formulation of the growing common demands of peoples

to undertake programs of definition and implementation with respect to human rights. It seems clear, however, that this article imposes no limitation on the powers of nation states to make new agreements and little, if any, limitation on the powers of the organization in the domain of human rights. The words "domestic jurisdiction" have no inherent or established doctrinal meaning and were purposely left vague in the Charter to enable the organization effectively to meet unknowable future contingencies. The explicit stipulations in the Charter for promoting human rights would have been meaningless had it been intended that the "domestic jurisdiction" clause should preclude definition and implementation. See McDougal and Leighton, note 9 above, at 77, and Lauterpacht, note 1 above, at 166.

³⁸ For the text of the Declaration, see Res. 217 (III) in General Assembly, 3rd Sess., Official Records, Pt. I, Resolutions, p. 71; 43 A.J.I.L. Supp. 127 (1949).

³⁹ *Ibid.*

⁴⁰ Lauterpacht, note 1 above, pp. 394-408; Fawcett, "A British View of the Covenant," 14 Law and Contemporary Problems 439 (1949); Ch. Malik, "Progress of the Covenant on Human Rights," 10 United Nations Bulletin 554-557 (1951).

throughout the world, exercised an important influence on subsequent decision-making and prescribing in many world arenas.⁴¹ Its future influence may, because of the increasing importance of General Assembly resolutions as a source of customary law, be even greater.

The Genocide Convention, drafted by a special *ad hoc* committee and revised and approved by the General Assembly on December 9, 1948,⁴² should also perhaps be regarded as a measure in implementation of the human rights provisions of the Charter. This convention was designed as enforceable treaty obligation after 20 ratifications, and became operative on January 12, 1951, though the major Powers have been slow to ratify. Framed to complement the Nuremberg verdict, which restricted "crimes against humanity" to "inhumane acts, in connection with the planning or waging of aggressive war,"⁴³ the Genocide Convention makes the intentional destruction "in whole or part" of "a national, ethnical, racial, or religious group as such" an international crime. Acts which constitute genocide include "killing members of the group," "causing serious bodily or mental harm to members of the group," "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," "imposing measures intended to prevent births within the group," and "forcibly transferring children of the group to another group." Not only genocide but also "conspiracy to commit genocide," "direct and public incitement to commit genocide," "attempt to commit genocide," and "complicity in genocide" are made punishable. Constitutional rulers and public officials as well as private individuals are made responsible.⁴⁴ For enforcement, the contracting parties undertake to enact

⁴¹ See Schwelb, "The Influence of the Universal Declaration of Human Rights on International and National Law," 1959 Proceedings, Am. Soc. Int. Law 217, and "Die Kodifikationsarbeiten der Vereinten Nationen auf dem Gebiete der Menschenrechte," 8 Archiv des Völkerrechts 16, 36 (1959); Lin Mousheng, "The Human Rights Program," in 1961-1962 Annual Review of United Nations Affairs 102, 105 (1963); A Standard of Achievement, *op. cit.* note 1 above, at 12-32; Schwelb, Human Rights and the International Community (1964).

⁴² Res. 260 (III); General Assembly, 3rd Sess., Official Records, Pt. I, Resolutions, p. 174; 45 A.J.I.L. Supp. 7 (1951). It should be noted that Arts. 2 and 3 of the convention make constitutional rulers and officials responsible for acts committed against their own citizens. As of June, 1962, the convention had been ratified or acceded to by 64 states.

⁴³ Office of United States Chief of Counsel of Prosecution of Axis Criminality, Nazi Conspiracy and Aggression, Opinion and Judgment (1947); 41 A.J.I.L. 172 (1947). The Nuremberg Judgment marks a full recognition of the international responsibility of the individual and affirms a realistic principle of international law. "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." International Military Tribunal Judgment, Sept. 30, 1946. See I Trial of the Major War Criminals 222-223 (1947); Schwelb, "Crimes Against Humanity," 23 Brit. Yr. Bk. Int. Law 178-226 (1946); McDougal and Feliciano, *op. cit.* note 28 above, at 126 and 165.

⁴⁴ Cf. Art. IV of the Genocide Convention. See also Art. 25 of the draft statute for an international criminal court: "The Court shall be competent to judge natural persons, whether they are constitutionally responsible rulers, public officials or private indi-

necessary domestic legislation and to provide effective penalties, with trial before

a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Disputes as to "interpretation, application, or fulfillment" of the convention are to be referred to the International Court of Justice.

Numerous other measures in implementation of the human rights provisions of the Charter have been completed under the auspices of the United Nations and its specialized agencies.⁴⁵ The problem of statelessness and the status of refugees and stateless persons has been treated in the Convention Relating to the Status of Refugees of 1951,⁴⁶ the Convention Relating to the Status of Stateless Persons of 1954,⁴⁷ and the more recent Convention on the Reduction of Statelessness of 1961.⁴⁸ In the area of labor law, protection of trade union rights and freedom of association, as well as protection against forced labor, slavery, and servitude is afforded by the Convention Concerning Freedom of Association and Protection of the Right to Organize of 1948,⁴⁹ the Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively of 1949,⁵⁰ the Supplementary Convention on the Abolition of Slavery, the

viduals." Report of the Committee on International Criminal Jurisdiction, General Assembly, 9th Sess., Official Records, Supp. No. 12 (A/2645) (1953).

⁴⁵ For more detailed discussion of these measures, see Schwelb, "International Conventions on Human Rights," 9 Int. and Comp. Law Q. 654 (1960); United Nations Work for Human Rights, *op. cit.* note 1 above, at 12-35.

⁴⁶ For text see Final Act and Convention Relating to the Status of Refugees, U.N. Doc. A/CONF. 2/108/Rev. 1, U.N. Pub. Sales No. 1951. IV.4; 11 U.N. Bulletin 143-148 (1951); 1951 Yearbook on Human Rights 581. As of June, 1962, the convention had been ratified or acceded to by 38 states. See also Weis, "The International Protection of Refugees," 48 A.J.I.L. 193 (1954).

⁴⁷ For text see Final Act and Convention Relating to the Status of Stateless Persons, U.N. Doc. E/CONF. 17/5/Rev. 1, U.N. Pub. Sales No. 1956. XIV.1; 1954 Yearbook on Human Rights 369. As of June, 1962, the convention had been ratified or acceded to by 11 states. Note that stateless persons are granted merely treatment "not less favorable" than that accorded to aliens generally in the matter of wage-earning employment (Art. 17) and the right of association (Art. 15), whereas refugees are entitled to "the most favourable treatment accorded to nationals of a foreign country, in the same circumstances." (Convention Relating to the Status of Refugees, note 46 above, Arts. 17 and 15.)

⁴⁸ For text see Final Act and Convention on the Reduction of Statelessness, U.N. Docs. A/CONF. 9/14 and A/CONF. 9/15.

⁴⁹ For text see U.N. Dept. of Public Information, These Rights and Freedoms 192-197 (1950); 1948 Yearbook on Human Rights 427. As of June, 1962, the convention had been ratified or acceded to by 58 states. See also Jenks, The International Protection of Trade Union Freedom 24 (1957).

⁵⁰ For text see These Rights and Freedoms, cited above, pp. 193-202; 1949 Yearbook on Human Rights 291. As of June, 1962, the convention had been ratified or acceded to by 53 states. See also Jenks, note 49 above, and "The Application of International

Slave Trade, and Institutions and Practices Similar to Slavery of 1956,⁵¹ and the Convention Concerning the Abolition of Forced Labor of 1957.⁵² The right of freedom of information, though a subject on which Member states have had considerable difficulty in reaching agreement, has nevertheless found some expression in the Convention on the International Right of Correction of 1952,⁵³ the Draft Convention on the Gathering and International Transmission of News of 1949,⁵⁴ and the Draft Convention on Freedom of Information.⁵⁵

The goal of prevention of discrimination and the protection of minorities, a subject which is currently being systematically studied by a subcommission of the Commission on Human Rights, has so far been given authoritative sanction only in the limited prescription in the Convention and Recommendation Concerning Discrimination in Respect of Employment

Labour Conventions by Means of Collective Agreements," 19 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 197-224 (1958).

⁵¹ For text see Final Act of the U.N. Conference of Plenipotentiaries on a Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, U.N. Doc. E/CONF. 24/23, U.N. Pub. Sales No. 1957. XIV.2; 1956 Yearbook on Human Rights 289. As of June, 1962, the convention had been ratified or acceded to by 38 states.

⁵² For text see International Labour Office, Official Bulletin, Vol. XL (1957), No. 1; Appendix XVI to the Record of Proceedings of the International Labour Conference, 40th Sess., Geneva, 1957; 1957 Yearbook on Human Rights 303. As of June, 1962, the convention had been ratified or acceded to by 54 states. See also Jenks, Human Rights and International Labour Standards (1960).

⁵³ For text see General Assembly, Res. 630 (VII), 7th Sess., Official Records, Supp. No. 20 (A/2361), p. 22; 1952 Yearbook on Human Rights 373. As of Dec. 31, 1962, the convention had been ratified or acceded to by 7 states, and hence had come into force.

⁵⁴ The text of the Draft Convention on the Gathering and International Transmission of News had been amalgamated with the original Draft Convention Concerning the Institution of an International Right of Correction in 1949 to form the Draft Convention on the International Transmission of News and the Right of Correction, which was approved by the General Assembly (Res. 277 C (III)). The General Assembly, however, also adopted a resolution providing that the amalgamated draft convention shall not be open for signature until the General Assembly has taken definite action on the Draft Convention on Freedom of Information (Res. 277 A (III)). For text of the amalgamated Draft Convention, see 1949 Yearbook on Human Rights 356; General Assembly, Res. 277 (III), 3rd Sess., Official Records, Pt. II, Resolutions, pp. 21-30 (1949). In 1952 the provisions on the right of correction were taken out again. See note 53 above.

⁵⁵ For revised draft of the convention now before the General Assembly, see U.N. Doc. A/AC.42/7. At the 14th, 15th and 16th sessions of the General Assembly (1959, 1960, 1961) the Third Committee revised the Preamble and Arts. 1 to 4 of the draft convention. See the Reports of the Third Committee, U.N. Docs. A/4341, A/4636 and A/5041. At its 1962 session, the General Assembly resolved to give priority to the draft convention and declaration on freedom of information (Res. 1840 (XVII)). Other instruments which might also be mentioned as implementing the goal of freedom of information include the following: Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific, and Cultural Character, 1948 Yearbook on Human Rights 431; Agreement on the Importation of Educational, Scientific, and Cultural Materials, 1950 *ibid.* 411; The International Telecommunication Convention, 1947 United Nations Yearbook 932.

and Occupation of 1958,⁵⁶ and the Convention and Recommendation against Discrimination in Education of 1960.⁵⁷ The status of women, on the other hand, has been quite extensively treated in the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value of 1951,⁵⁸ the Convention on the Political Rights of Women of 1952,⁵⁹ the Convention on the Nationality of Married Women of 1957,⁶⁰ and the recent Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages of 1962.⁶¹ In recent years, governments have turned again to the use of declarations when the method of international treaties has proved practically impossible; witness the United Nations draft Declarations on the Right of Asylum,⁶² on Freedom of Information,⁶³ and

⁵⁶ For text see International Labour Conference, 42nd Sess., Geneva, 1958, Records of Proceedings, p. 834, Convention No. 111; 1958 Yearbook on Human Rights 307. As of June, 1962, the convention had been ratified or acceded to by 35 states.

⁵⁷ For text see U.N. Doc. E/CN.4/Sub.2/210. The convention entered into force on May 22, 1962.

In December, 1962, the General Conference of UNESCO adopted without dissent a Protocol instituting a Conciliation and Good Offices Commission to deal with disputes between states parties. The Commission is modeled on the Human Rights Committee as contemplated in the Draft Covenant on Civil and Political Rights as adopted by the Commission on Human Rights at its tenth session. The Protocol is contained in U.N. Doc. E/CN.4/Sub.2/228, Memorandum submitted by UNESCO to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Jan. 7, 1963).

⁵⁸ For text see Sixth Report of the International Labour Organisation to the United Nations, Geneva, 1952, p. 160; 1951 Yearbook on Human Rights 469. As of June 10, 1962, the convention had been ratified or acceded to by 38 states.

⁵⁹ For text see General Assembly, Res. 640 (VII), 7th Sess., Official Records, Supp. No. 20 (A/2361), p. 28; 1952 Yearbook on Human Rights 375. As of June, 1962, the convention had been ratified or acceded to by 36 states. See also Convention on the Political Rights of Women. History and Commentary, ST/50A/27, U.N. Pub. Sales No. 1955.IV.17; The United Nations and the Status of Women; U.N. Pub. Sales No. 61.1.9.

⁶⁰ For text see General Assembly, Res. 1040 (XI), Annex, 11th Sess., Official Records, Supp. No. 17 (A/3572), p. 18; 1957 Yearbook on Human Rights 301. As of June, 1962, the convention had been ratified or acceded to by 27 states. See also Nationality of Married Women, Doc. E/CN.6/254 and Addenda, U.N. Pub. Sales No. 1955.IV.1; Legal Status of Married Women, U.N. Pub. Sales No. 57.IV.8.

⁶¹ For text see General Assembly, Res. 1763 (XVII), 17th Sess., Official Records, Resolutions, Supp. No. 17 (A/5217), p. 28. Another convention which should perhaps be mentioned in connection with the status of women is the Convention for the Suppression of the Traffic of Persons and of the Exploitation of the Prostitution of Others, General Assembly, Res. 317 (IV), 4th Sess., Official Records, Resolutions, pp. 33-35 (1949).

⁶² For text of the declaration as drafted by the Commission on Human Rights and a note by the Secretary General reporting on the progress of its consideration by the Third Committee of the General Assembly, see U.N. Doc. A/5145. At the 17th Session of the General Assembly the Third Committee revised and approved the Preamble and Art. 1 of the Declaration. At the same session the Assembly decided to complete the drafting of this instrument at its 1963 session. See Report of the Third Committee, U.N. Doc. A/5359, and General Assembly Res. 1839 (XVII).

⁶³ For text of the declaration as submitted to the General Assembly in 1960 by the Economic and Social Council, see ECOSOC Res. 756 (XXIX). The General Assembly

on the Rights of the Child.⁶⁴ All of these instruments are organic parts of the United Nations human rights program, and comprehensive review would give them detailed exposition and appraisal.

The most important measures yet projected in the fulfillment of the Charter provisions are, however, the two proposed Covenants, one on Civil and Political Rights and the other on Economic, Social, and Cultural Rights,⁶⁵ designed as comprehensive definition in the form of treaty obligation of the principal human rights with respect to which Member states are today willing to permit and undertake appropriate international implementation.⁶⁶ These Covenants, in one form or another, were studied and deliberated by the Human Rights Commission for some eight years until the final drafts were completed in 1954. In the same year they were submitted for approval to the Third Committee of the General Assembly, which has been considering them, article by article, since 1954, and to date has adopted, with numerous amendments, the preambles of both conventions, all the substantive articles of the Covenant on Economic, Social, and Cultural Rights, and all the substantive articles of the Covenant on Civil and Political Rights.⁶⁷

has yet to consider the draft declaration. See also U.N. Docs. A/5363 and A/5444 (1963).

⁶⁴ For text of the declaration see General Assembly, Res. 1386 (XIV), 14th Sess., Official Records, Resolutions, Supp. No. 16 (A/4354), p. 19, and U.N. Doc. A/4249. A survey of various declarations and draft declarations is offered in Schwelb, *Human Rights and the International Community* 59-72 (1964).

⁶⁵ For the full text of both draft Covenants as prepared by the Commission on Human Rights, see its Report of its Tenth Session to the Economic and Social Council, 18th Sess., Official Records, Supp. No. 7 (U.N. Docs. E/2573; E/CN.4/705), pp. 62-72. For the text of the two draft covenants as revised by the Third Committee of the General Assembly at the 10th (1955) to 17th (1962) sessions, see U.N. Doc. A/C.3/L.1062 (1963); for the text of the articles revised at the 18th session (1963), see the Report of the Third Committee, U.N. Doc. A/5655. For Secretariat annotations on the text of the draft covenants, see Doc. A/2929 (1955). For a general discussion of the provisions see: Simsarian, "Economic, Social, and Cultural Provisions in the Human Rights Covenant—Revision of the 1951 Session of the Commission on Human Rights," 24 *Dept. of State Bulletin* 1003-1014 (1951); Saba, "Les Droits économiques, sociaux, et culturels dans le future Pacte des Droits de l'homme," 78 *Journal du Droit International* 464-481 (1951); Ch. Malik, "Human Rights in the United Nations," 13 *U.N. Bulletin* 248-253 (1952); Simsarian, "Two Covenants of Human Rights Being Drafted," 27 *Dept. of State Bulletin* 20-23 (1952), and his "Progress in Drafting Two Covenants on Human Rights in the United Nations," 46 *A.J.I.L.* 710-718 (1952).

⁶⁶ Holcombe, in "The Covenant on Human Rights," 14 *Law and Contemporary Problems* 413 (1949), offers this appraisal: "It is a project for a piece of international legislation, more ambitious and perhaps more important than any other in the history of international law."

⁶⁷ For the texts of the articles as adopted thus far by the Third Committee of the General Assembly, see: General Assembly, Third Committee, 10th Sess., Official Records, Report (A/3077); *ibid.*, 11th Sess., Report, pp. 4-21 (A/3525); *ibid.*, 12th Sess., Report, pp. 6-14 (A/3764 and Add. 1); *ibid.*, 13th Sess., Report, pp. 4-13 (A/4045); *ibid.*, 14th Sess., Report (A/4299); *ibid.*, 15th Sess., Report, p. 10 (A/4625); *ibid.*, 16th Sess., Report, pp. 14-15 (A/5000); *ibid.*, 17th Sess., Report (A/5365).

At the 18th Session of the General Assembly (1963) the Third Committee adopted

The original plan was for a single Covenant on Human Rights,⁶⁸ but in ordering two separate covenants the General Assembly recognized that there are many fundamental differences between traditional civil and political rights and the newly emerging claims to economic, social, and cultural benefits—differences in the degree of precision with which definitions and standards can be formulated, differences in appropriate modes of implementation, ranging from judicial enforcement and general legislation through many forms of community and private action, and differences in the resources available and time required for achievement of specified standards.⁶⁹ Because of the central importance that these two Covenants, when completed and ratified, will have in the whole United Nations program, it may be worth while to subject to brief examination both the specific content of the prescriptions being proposed and the measures of enforcement or implementation being discussed.

THE CONTENT OF PROPOSED UNITED NATIONS PRESCRIPTIONS

For concise and systematic summary and appraisal of the rights presently proposed for inclusion in the two Covenants, it may be helpful to outline the content of both Covenants, disregarding for this immediate purpose necessary differences in precision of formulation and modes of implementation, in terms of possible impact on the wide sharing of the basic values which were itemized at the beginning of this article for describing the growing, common demands of peoples around the globe and the objectives of all democratic government, national and international. It is, of course, recognized that, because of the interdependence of all values and institutional practices in a hierarchy of community processes, the various provisions in the Covenants may even in the short run affect more than one value and must in the long run affect all values. Summary in terms of the values principally and most immediately affected may, however, serve to highlight both the very broad scope of the new protection being proposed

Arts. 2 and 4 of the draft Covenant on Civil and Political Rights and decided to insert an article on the rights of the child following Art. 22 of that Covenant. The Third Committee also adopted a provision on the right to freedom from hunger to be added as par. 2 of the combined Arts. 11 and 12 of the draft Covenant on Economic, Social and Cultural Rights (U.N. Doc. A/5655, Report of the Third Committee). See draft Covenants reprinted below, p. 857.

⁶⁸ General Assembly, Res. 421 (V) E, 5th Sess., Official Records, Resolutions, p. 48 (1950). The Soviet bloc throughout pressed for a single Covenant, Doc. E/CN.4/SR. 269, p. 10; General Assembly, Third Committee, 6th Sess., Official Records, A/C.3/SR. 868, p. 130. See also the statement of the delegate of Chile, Doc. E/CN.4/SR. 267, p. 7; Joint proposal of Chile, Egypt, Pakistan and Yugoslavia, Doc. A/C.3/L.182 (Nov. 30, 1951).

⁶⁹ General Assembly, Res. 543 (VI), 6th Sess., Official Records, p. 36; Third Committee, 6th Sess., Official Records, Report, pp. 10-12 (A/1212). See also statement of delegates of the United Kingdom (Docs. E/CN.4/SR.268, p. 4, and A/C.3/SR.361, p. 87), United States (Doc. A/C.3/SR.361, p. 78), France (Doc. A/C.3/SR. 368, p. 98), New Zealand (Doc. A/C.3/SR.367, p. 121), and Denmark (Doc. A/C.3/SR.362, p. 89); further, Doc. E/CN.4/529, pp. 13-16.

for the individual human being and some surprising omissions of traditional rights. We proceed value by value, in the order listed at the beginning of the article.⁷⁰

Power

An abundance of provisions in the Covenant on Civil and Political Rights, as might be expected, bear directly upon the sharing of power. Article 6(1) precludes arbitrary deprivation of life,⁷¹ and Article 9(1) arbitrary arrest and detention. Article 12 seeks to establish freedom of movement⁷² and choice of residence within a state, freedom to leave and re-enter one's own country, as well as to leave another country, and freedom from arbitrary exile. Article 14 provides that all persons shall be equal before courts or tribunals and stipulates certain procedures for fair trials;⁷³ Article 16 asserts that "everyone shall have the right to recognition everywhere as a person before the law"; and Article 24 establishes that "all persons are equal before the law" and that

the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground

⁷⁰ The summary we here make is basically in terms of the draft covenants as presented by the Commission on Human Rights in the Report of its Tenth Session to the Economic and Social Council, 18th Sess., Official Records, Supp. No. 7 (U.N. Docs. E/2573; E/CN.4/705), pp. 62-72 (1954). Any significant changes or additions made by the Third Committee of the General Assembly in adopting the articles will also be specified in the footnotes.

⁷¹ The Third Committee has made additions to Art. 6 which provide that sentence of death may not be imposed on people below 18 years of age, as well as on pregnant women, and that "nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the covenant." For amended text of Art. 6, see General Assembly, Third Committee, 12th Sess., Official Records, Report, p. 14 (A/3764 and Add. 1).

⁷² The British delegate doubted whether freedom of movement was a basic right (Doc. E/CN.4/SR.315, p. 5); the Australian delegate even moved for its deletion (*ibid.*, p. 6); "... freedom of speech, the right of association, and human rights in general would be an illusion," asserted correctly the Indian delegate, "if the right to liberty of movement was not ensured." (Doc. E/CN.4/SR.315, p. 5.) The Third Committee amended Art. 12 so as to stipulate more clearly that "no one may be arbitrarily deprived of the right to enter his own country" and to provide that this right is not to be subject to any of the restrictions set forth in the article's first paragraph. For the amended text of Art. 12, see General Assembly, Third Committee, 14th Sess., Official Records, Report (A/4299).

⁷³ For a justified criticism of the ambiguity of the conception of a crime, see the comment of the delegates of Belgium (Doc. E/CN.4/SR. 310, p. 14) and of France (Doc. E/CN.4/L.182, p. 15). The amendments of the Third Committee to Art. 14 have added to the minimum guarantees to which an accused is entitled the right "to communicate with counsel of his own choosing," the right "to be tried without undue delay," and the right "to be tried in his presence." The amendments also provide protection against double jeopardy, and guarantee convicted persons the right to review of their convictions and sentences by a higher tribunal. For the amended text of Art. 14, see General Assembly, Third Committee, 14th Sess., Official Records, Report (A/4299).

such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth, or other status.⁷⁴

Article 3 adds a further understanding by the parties "to ensure the equal rights of men and women to the enjoyment of all civil and political rights set forth in this covenant." Article 23, moreover, significantly provides that "every citizen shall have the right and the opportunity," without irrelevant distinctions (specified in Article 2) and "without unreasonable restrictions," "to take part in the conduct of public affairs, directly or through freely chosen representatives," "to vote and be elected at genuine periodic elections held by universal suffrage and by secret ballot and guaranteeing the free expression of the will of the electors," and to have "access, on general terms of equality, to public service in the community." Article 15 seeks to prevent punishment for crimes retroactively declared. Article 19 offers protection for freedom of opinion and expression, Article 20, for freedom of peaceful assembly, and Article 21, for freedom of association. Article 13 prohibits the arbitrary expulsion of aliens.⁷⁵

The provisions of the Covenant on Economic, Social and Cultural rights bear less directly on power, but Article 2(2), which imposes a guarantee that the rights enunciated in the Covenant "will be exercised without distinction of any kind," and Article 8, which undertakes to ensure "the free exercise of the right of everyone to form and join local, national, and international trade unions of his choice,"⁷⁶ affect access to the bases of effective power in any community.

One perhaps unfortunate inclusion in both Covenants is the amorphous Article 1, on "self-determination,"⁷⁷ which purports to give to "all peoples and all nations" the "right of self-determination, namely the right

⁷⁴ Art. 24, as first drafted, established a general equality clause applicable to all rights, and not merely to those recognized by the Covenants. See comments of the delegates of Yugoslavia (Docs. E/CN.4/SR.326 and E/CN.4/SR.327, pp. 7-8), India (Doc. E/CN.4/SR.327, p. 4), and of Lebanon (Doc. E/CN.4/SR.327, p. 9). For more recent developments, see note 81 below.

⁷⁵ Cf. Art. 32 *et seq.* of the Convention on Refugees.

⁷⁶ The Third Committee made significant amendments to Art. 8. Amended Par. 1 a includes the texts basically as originally proposed by the Human Rights Commission. Par. 1 b preserves the right of unions to form national federations or confederations and the latter to form international union organizations. Par. 1 c protects the right of unions to function freely, subject only to legal restrictions necessary "to national security and order or for protection of the rights of others." Par. 1 d secures the right to strike when done in conformity with the laws of the country. Par. 2 permits "lawful restrictions" of these rights by the armed forces, police, or administration of a state. For the amended text of Art. 8, see General Assembly, Third Committee, 11th Sess., Official Records, Report, pp. 11-12 (A/3525).

⁷⁷ For criticism of the ambiguity of terms and the problems involved, see Nisot's statement (Doc. E/CN.4/SR.252). See also Secretary General's Memorandum: The Principle of Self-Determination in Relation to Chapters XI, XII, and XIII of the Charter (Doc. E/CN.4/662, April 16, 1952); and his Note: The Right of Peoples and Nations to Self-Determination (Doc. E/CN.4/516, March 2, 1951). Art. 1 underwent considerable re-wording at the hands of the Third Committee. For the revised text see General Assembly, Third Committee, 10th Sess., Official Records, Report (A/3077).

freely⁷⁸ to determine their political, economic, social and cultural status,"⁷⁹ and adds that the "right of peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources." In absence of a clear definition of peoples and of recognition that there are community responsibilities that transcend varying anachronistic indicia of "nations," deference to this vague doctrine can do much harm to the cause of a world order in which individual freedoms are secure, and the appropriateness of including such a doctrine in a Covenant defining individual freedoms is highly questionable.⁸⁰ It should also be noted that neither Covenant contains provisions, as did the Universal Declaration of Human Rights, for protection of nationality or freedom to change nationality, or for political asylum.

Respect

Provisions in the Covenant on Civil and Political Rights designed to promote respect for the inherent dignity of the human being are comprehensive in their range. Article 2(1) commits each ratifying state to ensuring "to all individuals within its territory and subject to its jurisdiction" the rights recognized in the Covenant "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status," and, as indicated above, Article 24 prohibits "any discrimination" with respect to any rights, even those not embodied in the Covenant, on such grounds.⁸¹ Article 25 guarantees to members of ethnic, religious, or linguistic minorities the right, in community with other members of their group, to enjoy their own culture, profess and practice their own religion, or to use their own language. Article 7 forbids torture, cruel and inhuman treatment or punishment, and involuntary medical or scientific experimentation. Article

⁷⁸ Doc. E/CN.4/SR. 263, p. 4, comment of the French delegate stressing the democratic means by which the right to self-determination must be exercised.

⁷⁹ Comment on the relationship between the right to self-determination and subversive activities and treason; see Doc. E/CN.4/SR.261, p. 8.

⁸⁰ See relevant comments by Cassin (France) (Doc. E/CN.4/SR.253), by the delegates of the United Kingdom (Doc. A/C.3/SR.642), of The Netherlands (Docs. A/C.3/SR.567, A/C.3/SR.642), of Canada (Docs. A/C.3/SR.570, A/C.3/SR.645) and of Australia (Docs. A/C.3/SR.564, A/C.3/SR.647). See also Roosevelt, "The Universal Validity of Man's Right to Self-Determination," 27 Dept. of State Bulletin 917 (1952).

⁸¹ This provision underwent a fundamental change in the Third Committee, which inserted the words "In this respect" at the beginning of the second sentence of Art. 24, which now reads:

"All persons are equal before the law and are entitled without any discrimination to equal protection of the law. *In this respect* the law shall prohibit any discrimination and guarantee to all persons equal and effective protection. . . ."

As amended, the text does not prohibit all types of discrimination, particularly discrimination in private relations. The text as it now stands prohibits discrimination only in respect of the principle of equality before the law and in respect of equal protection of the law. The restrictive amendment was proposed by the United Kingdom and Greece and adopted in a roll-call vote of 88 to 30, with 11 abstentions. See Report of the Third Committee, 16th Sess., Doc. A/5000, pars. 105, 110 and 114.

8 prohibits slavery, servitude, and forced or compulsory labor. Article 11 bars imprisonment "merely on the ground of inability to fulfill a contractual obligation." Articles 16 and 24 secure personality and equality before the law. Article 17 stipulates both against "arbitrary or unlawful interference" with "privacy, home, or correspondence" and "unlawful attacks" upon "honor and reputation," and requires the "protection of the law against such interference or attacks." Mention may be made also of requirements in Article 10 that "all persons deprived of their liberty shall be treated with humanity" and that "accused persons shall be segregated from convicted persons."⁸²

The Covenant on Economic, Social and Cultural Rights contains, as indicated, a general guarantee of all rights enunciated in it "without distinction of any kind," and, in Article 3, a special undertaking "to ensure the equal right of men and women" to the enjoyment of all rights set forth in the Covenant.

Enlightenment

In the Covenant on Civil and Political Rights Article 19 provides that everyone shall have the rights "to hold opinions without interference" and to "freedom of expression," which latter right shall include "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers" through all media. Article 18 includes "freedom of thought" among freedoms protected.⁸³

The Covenant on Economic, Social and Cultural Rights offers more positive formulations. Article 14⁸⁴ recognizes "the right of everyone to education" and to an education which will encourage "the full development of the human personality," strengthen "respect for human rights and freedoms," promote "maintenance of peace," and enable "all persons to participate effectively in a free society." Primary education is to be "compulsory and available free to all"; secondary education is to be

⁸² The Third Committee added to Art. 10 the provision that accused juvenile persons be separated from adults, be brought as speedily as possible to trial, and be accorded treatment appropriate to their age and legal status. For the amended text of Art. 10, see General Assembly, Third Committee, 13th Sess., Official Records, Report, p. 12 (A/4045).

⁸³ The Third Committee added a paragraph to Art. 18 which provides for the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions. For the amended text of Art. 18, see General Assembly, Third Committee, 15th Sess., Official Records, Report, p. 10 (A/4625).

⁸⁴ The Third Committee added a provision to Art. 14 to the effect that "the development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of the teaching staff shall be continuously improved." It also added a stipulation that no part of Art. 14 should be construed as interfering with the liberty of individuals and private bodies to establish educational institutions, subject to the principles of par. 1 and to the minimum standard of education of the state. For the amended text of Art. 14, see General Assembly, Third Committee, 12th Sess., Official Records, Report, p. 6 (A/3764 and Add. 1).

"generally available" and made "progressively free"; higher education is to be "equally accessible to all" and made "progressively free"; and fundamental education for all who have not completed primary education is to be "encouraged as far as possible." The freedom of parents to choose private schools is preserved. In Article 15 each state which has not achieved compulsory, free primary education undertakes "within two years, to work out and adopt a detailed plan of action for the progressive implementation" of the principle.⁸⁵ Article 16 includes stipulations for "the right of everyone" to take part in cultural life and "to enjoy the benefits of scientific progress and its applications," for the taking of necessary steps "for the conservation, the development and the diffusion of science and culture," and for respecting "the freedom indispensable for scientific research and creative activity."⁸⁶

Wealth

In the Covenant on Economic, Social, and Cultural Rights, Article 6 recognizes the "fundamental right of everyone to the opportunity, if he so desires, to gain his living by work which he freely accepts,"⁸⁷ and includes among the steps to be taken in implementing this right

programmes, policies and techniques to achieve steady economic development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7 requires, as one of the "just and favorable conditions of work," remuneration which provides "all workers as a minimum" with both "fair wages and equal remuneration for work of equal value"⁸⁸ without distine-

⁸⁵ It should be noted that Art. 15, providing for implementation of compulsory primary education, is the only article of the Covenant on Economic, Social and Cultural Rights which provides for a positive obligation accompanied by a precise time limit for its implementation. Doc. E/CN.4/SR.291, p. 9. See *ibid.*, pp. 11, 13, 14.

⁸⁶ The amendments made to Art. 16 by the Third Committee secured the right of everyone "to benefit from the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author," and also provided that "the states parties to the Covenant recognize the benefits to be derived from the encouragement and development of international contacts and cooperation in the scientific and cultural fields." For the amended text of Art. 16, see General Assembly, Third Committee, 12th Sess., Official Records, Report, p. 10 (A/3764 and Add. 1).

⁸⁷ The joint Yugoslav-Uruguayan draft proposal (Doc. E/CN.4/L.58/Rev. 1), though stressing the element of freedom, suggested an explicit recognition of the right to work: "Everyone has the right to work: that is, everyone should be granted the right to *obtain* employment in order to earn his living by work which he freely accepts." As to the right of aliens to work, see the positive comments of delegates of the United States, Chile, and Greece (Doc. E/CN.4/SR.272). See also Commission on Human Rights, Activities of the United Nations and of the Specialized Agencies in the Field of Economic, Social, and Cultural Rights (Doc. E/CN.4/364/Rev. 1), p. 146, para. 49-61 (1952).

⁸⁸ Cf. Yugoslavia's amendment (Doc. E/CN.4/L.63/Rev. 1) proposing to tie up "fair wages" with the cost of living and profits of the enterprises.

tion of any kind," and "a decent living for themselves and their families." Article 8 protects

the free exercise of the right of everyone to form and join local, national and international trade unions of his choice for the protection of his economic and social interests.

The most obvious omissions are those of the right to own property and of protection against arbitrary deprivations of property.⁸⁰ Article 17 of the Universal Declaration provides that "everyone has the right to own property alone as well as in association with others" and that "no one shall be arbitrarily deprived of his property." Some protection of individual claims to resources may be necessary to protect other freedoms in a world of increasing governmentalization, centralization, concentration, and bureaucratization, and it should not be impossible to draft an article which would both protect the individual against arbitrary confiscation and yet permit community "nationalization" in appropriate instances.⁸⁰

Well-Being (Safety, Health)

Two articles in the Covenant on Civil and Political Rights stipulate certain minimal protections. Article 6, as has been seen, protects against arbitrary deprivation of life, and imposes certain limits on capital punishment;⁸¹ and Article 7 prohibits torture, inhuman and degrading treatment or punishment, and medical or scientific experimentation without free consent.

In the Covenant on Economic, Social and Cultural Rights, Article 13 defines health as "a state of complete physical, mental and social well-being," recognizes "the right of everyone to the enjoyment of the highest attainable standard of health," and prescribes a definite series of steps to be taken to promote the full realization of this right. Article 7 stipulates for "safe and healthy working conditions" and for "rest, leisure and reasonable limitation of working hours and periodic holidays with pay." Article 10 seeks special protections for motherhood, children, and young persons.⁸² Article 11 recognizes "the right of everyone to adequate food,

⁸⁰ Proposals of France (Doc. E/CN.4/L.66; comment, Doc. E/CN.4/SR.302); United States (Doc. E/CN.4/599), and Uruguay (Doc. E/CN.4/603). See, however, the statement of the Chilean delegate (Doc. E/CN.4/SR.303, p. 3). See also the proposal of the United States (Doc. E/CN.4/L.313), revised (Doc. E/CN.4/L.313/Rev. 1), the amendments to it proposed by Egypt, India, and Lebanon (Doc. E/CN.4/L. 316); the alternative proposal by Chile (Doc. E/CN.4/L.320/Corr. 1); and the text proposed by the sub-committee (Doc. E/CN.4/L. 321).

⁸⁰ More recent attitudes in the United Nations are reflected in the General Assembly Resolution of Dec. 14, 1962, on Permanent Sovereignty over Natural Resources. See Doc. A/RES/1803 (XVII); 57 A.J.I.L. 710 (1963).

⁸¹ Art. 6 in its early drafting explicitly applied an international standard, admitting capital punishment only if the laws imposing it are "not contrary to the principles of the Universal Declaration of Human Rights or the Convention on the Prevention and Punishment of the Crime of Genocide." For recent changes, see General Assembly, 12th Sess., Report of Third Committee (U.N. Doc. A/3764), pars. 85, 102 and 120.

⁸² The Third Committee has added to Art. 10 the more precise stipulation that,

clothing, and housing.”⁹³ Article 9 adds a right to social security; and Article 12 generalizes a right “to an adequate standard of living and the continuous improvement of living conditions.”

Skill

Many of the provisions concerning enlightenment bear equally upon skill. In the Covenant on Economic, Social and Cultural Rights, Article 14, with its detailed provisions for education, Article 16, with its emphasis upon the conservation, development, and diffusion of science and culture, and Article 8, protecting the right to form and join trade unions, are particularly relevant.

Affection

Article 10(3) of the Covenant on Economic, Social and Cultural Rights states that “the family, which is the basis of society, is entitled to the widest possible protection” and is “based on marriage, which must be entered into with the free consent of the intending spouses.” Article 22 of the Covenant on Civil and Political Rights reiterates these points and adds that the right of men and women of marriageable age to marry and to found a family shall be recognized. It also requires the parties to direct their legislation “towards equality of rights and responsibilities for the spouses as to marriage, during marriage, and at its dissolution,” and to lay down “social measures for the protection of any children” in cases of the dissolution of marriage.

Rectitude

Freedom of belief gets comprehensive protection in Article 18 of the Covenant on Civil and Political Rights.⁹⁴ This establishes a right to “freedom of thought, conscience and religion” and provides that this right

shall include freedom to maintain or to change his religion or belief, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

It is added that “no one shall be subject to coercion which would impair his freedom to maintain or to change his religion or belief” and that

freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect

during a reasonable period before and after childbirth, mothers should be accorded paid leave from work or leave with adequate social security benefits. For that revised text of Art. 10, see General Assembly, Third Committee, 11th Sess., Official Records, Report, p. 17 (A/3525).

⁹³ The Third Committee decided to amalgamate Arts. 11 and 12. The new combined article retained basically the same wording as the original two. For its text, see *ibid.*, p. 19. At the 18th Session the Third Committee added a provision on the right to freedom from hunger to the combined Arts. 11 and 12. U.N. Doc. A/5655, Annex.

⁹⁴ For the amendments made to Art. 18 by the Third Committee, see note 83 above.

public safety, order, health, or morals or the fundamental rights and freedoms of others.

Authorized Derogations

It remains to mention certain provisions in the Covenant on Political and Civil Rights designed to permit a nation state under conditions of necessity to derogate from the high standards otherwise demanded by the Covenant. Article 4 provides that, in "time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed," states

may take measures derogating from their obligations under this Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

No derogations may be made from certain rights—such as those relating to protection from arbitrary deprivation of life and to freedom from torture, inhuman punishment, slavery, and so on—and a state "availing itself of the right of derogation" must "inform immediately the other states Parties to the Covenant through the intermediary of the Secretary-General, of the provisions from which it has derogated, the reasons by which it was actuated and the date on which it has terminated such derogation." Several articles contain, in addition, a general qualification that the rights they seek to protect may be limited, though only by law, in the interests of national security and public safety, order, health and morals.⁹⁵ The possibility that these necessary provisions may be abused is obvious⁹⁶ and probably avoidable only if comprehensive measures of international implementation are achieved.⁹⁷

Throughout both Covenants runs explicit recognition that the protection of human rights is "the foundation of freedom, justice, and peace in the world," and taken in sum, despite all omissions and ambiguities, it is obvious that the two Covenants represent a most substantial achievement in prescribing, for implementation by appropriate national and international authority, both new protection for individual human rights and the general conditions of a free, peaceful, and abundant world society.⁹⁸

⁹⁵ These general qualifications are rather haphazardly itemized in the various articles. See Art. 12, Art. 18, par. 3, Art. 19, par. 3, Art. 20, Art. 21.

⁹⁶ See comment of Malik (Lebanon), Doc. E/CN.4/SR.86, p. 13.

⁹⁷ A less defensible derogation would have been established if one of the proposed federal-state clauses had been accepted. See proposal of Australia and India (Doc. E/2447, Annex II, Sec. B, No. III). It is difficult to see why one nation state should, because of peculiarities in internal constitutional structure (sometimes more alleged than real), seek or be allowed to assume lesser obligations with respect to human rights than other nation states. The Third Committee of the General Assembly has not yet considered Art. 27 of the Covenant on Economic, Social, and Cultural Rights or Art. 52 of the Covenant on Civil and Political Rights.

⁹⁸ Certainly the completion and ratification of the two Covenants, as presently

ENFORCEMENT MEASURES PROPOSED

The most difficult problem still confronting the framers of the United Nations' human rights program is that of devising effective procedures for enforcement. Since the two Covenants are designed as treaty obligations and contain express promises by the parties to enact all necessary legislation and take other appropriate measures to secure the stipulated rights, any failures in performance that can be proved will of course make available to the other parties to the Covenants all the sanctions that are ordinarily available for violation of treaty obligation.⁹⁹ The representatives of the Soviet Union and its satellites have contended from the beginning that no other measures of enforcement are needed or admissible, and that the establishment of any special international machinery for the implementation of human rights prescriptions would be an invasion of the "domestic jurisdiction" and "sovereignty" of nation states.¹⁰⁰ The other Members of the United Nations have, however, rejected this argument and many proposals have been made for new machinery of implementation.

With respect to the Covenant on Economic, Social and Cultural Rights, early proposals reflected the general expectation that, since achievement is to be "progressive" over a period of time, implementation will be sought, not by complaints and hearings, but rather by an elaborate series of reports and comments, with performance being sanctioned by the attendant publicity. Provisions to this effect were included in Articles 17-25 of the draft Covenant as finally submitted for approval in 1954 by the Commission on Human Rights to the Third Committee of the General Assembly.

With respect to the Covenant on Civil and Political Rights, the proposals made involve a more radical break with traditional reliance upon the initiative of nation states, and include provision for complaints, investigation, hearings, and agreement to abide by decisions in particular instances of international authority. A brief survey of the various proposals reveals a gradual shift in attitude from emphasis upon negotiation and conciliation to more realistic conceptions which recognize the individual

proposed, by the nation states of the world could not rationally be construed to worsen such conditions. Both Covenants provide that no provision "may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in this Covenant," and that there shall be "no restriction upon or derogation from any of the fundamental human rights recognized or existing in any contracting state pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent." See Art. 5 of both Covenants.

⁹⁹ Under the U.N. Charter, deprivations of human rights which amount to threats to peace may, of course, authorize invocation of a vast range of collective procedures. (See Arts. 10, 11, 14 and 39-42 of the Charter; also General Assembly Res. 377 (V) *Uniting for Peace*, 5th Sess., Official Records, Resolutions, p. 10 (1950); 45 A.J.I.L. Supp. 1 (1951).)

¹⁰⁰ Docs. A/C.3/SR.407, pp. 368, 372, 373; A/C.3/SR.394, p. 280; A/C.3/SR.565, p. 110.

human being as a formal "subject" of international law, as well as an effective participant in the world power process, and seek to confer upon him the competency effectively to claim his own rights.¹⁰¹

The most far-reaching of early proposals was made by Australia. This was submitted while the Universal Declaration of Human Rights was being formulated and was made in connection with the Paris Peace Conference of 1946 and the Peace Treaties of the Allied and Associated Powers with Bulgaria, Finland, Hungary, Italy, and Rumania.¹⁰² The proposal envisaged the protection of human rights by strictly judicial procedures, and sought to confer original and appellate jurisdiction on an international court in all disputes concerning the application and interpretation of the Universal Declaration, the Peace Treaties, and any other international treaties or conventions in the same field.¹⁰³ It extended a right of access to the court not only to states but also to individuals and groups of individuals. The effectiveness of proceedings was to be guaranteed by a commitment of the states, parties to the undertaking, to enforce orders or judgments by the court in favor of a complainant within their jurisdiction.

The United States Delegation, reacting to the Australian proposal, put forth a preliminary plan for implementation based on negotiations between states, with assistance from the Secretary General and from special small committees appointed by the Human Rights Commission to facilitate a settlement.¹⁰⁴ This was followed up by a revised draft, submitted by the United States and the United Kingdom,¹⁰⁵ which determined, among other things, a time limit for submission by accused states of observations in response to complaints, and offered details for replacing the proposed small committees by a Special Human Rights Committee.

A more elaborate joint proposal of France, India, the United Kingdom,

¹⁰¹ For general discussion, see MacChesney, "International Protection of Human Rights in the United Nations," 47 *Northwestern U. Law Rev.* 198-223 (1952); U.N. Secretary General, Memorandum, Draft International Covenant on Human Rights, Measures of Implementation, Docs. E/CN.4/530 and E/CN.4/530, Add. 1 (March 18, 17, 1952). A particularly incisive analysis appears in Holcombe, "The Covenant on Human Rights," 14 *Law and Contemporary Problems* 413 (1949). See also the Secretary General's explanatory paper cited in note 27 above.

¹⁰² The original Australian proposal (Doc. E/CN.4/15, Feb. 5, 1947) suggested jurisdiction of the proposed international court only in disputes concerning human rights and freedoms as formulated by the Declaration. For further discussion and arguments, see Working Group on Implementation of the Commission on Human Rights, Report (Doc. E/CN.4/53), pars. 25-33, 31-32; Annex C of the Report of the Second Session of the Commission on Human Rights, Doc. E/600.

¹⁰³ The original Australian proposal was further elaborated in Australia's Draft Statute of an International Court of Human Rights (Doc. E/CN.4/AC.1/27, May 10, 1948); see especially Art. 19. Cf. also the Secretary General's Note: International Court of Human Rights (Doc. E/CN.4/521).

¹⁰⁴ Doc. E/CN.4/37 (Nov. 26, 1947).

¹⁰⁵ Doc. E/CN.4/274; see, however, the French proposal (Doc. E/CN.4/82, Add. 10/Rev. 1) suggesting a special committee competent also to receive petitions from individuals and non-governmental organizations; for further elaboration, see Doc. E/CN.4/147.

and the United States, on May 9, 1950,¹⁰⁶ strongly influenced the final form of certain draft proposals for measures of implementation tentatively agreed upon by the Human Rights Commission at its Sixth Session. These tentatively accepted proposals, which also appear in the final draft of the Covenant on Political and Civil Rights, establish a Human Rights Committee, composed of nine members to be selected by the International Court of Justice from a panel of specially qualified nominees, and authorize one ratifying state to invoke the good offices of the Committee against another ratifying state after the failure of prescribed direct negotiations as to an alleged violation of the Covenant.¹⁰⁷ The Committee is empowered, "when available domestic remedies have been invoked and exhausted in the case," to "call upon the States concerned to supply any relevant information," to ask the Economic and Social Council to "request the International Court of Justice to give an advisory opinion on any legal question," and to "ascertain the facts and make available its good offices to the States concerned with a view to the friendly solution of the matter." The Committee is ordered to make a report, not later than eighteen months after receiving notice of violation, to the states concerned and to the Secretary General, for publication. If a solution is reached, the Committee is to confine its report "to a brief statement of the facts and of the solution reached." If a solution is not reached, the Committee shall state "its conclusions on the facts and attach thereto the statements made by the parties to the case." The powers of the Committee for investigation and for making recommendations are obviously most limited and the only sanction proposed is that of world opinion.

These tentative proposals, after their first formulation, were sharply criticized in many official and unofficial quarters for denying the right of complaint to individuals, groups of individuals, and various associations;¹⁰⁸ and, finally, during its Fifth Session, the General Assembly, in Resolution 421 (V), proposed recognition of this right of individuals and associations, and requested the Economic and Social Council and the Human Rights Commission to draft appropriate provisions for insertion either in the Covenant itself or in a separate protocol.

The United States Delegation, in response to this resolution, proposed a separate protocol (later withdrawn), granting the Human Rights Committee jurisdiction to receive written petitions from individuals and certain non-governmental international associations.¹⁰⁹ The Committee was

¹⁰⁶ Doc. E/CN.4/474.

¹⁰⁷ Commission on Human Rights, Report of the Eighth Session, cited note 53 above, at 50-54.

¹⁰⁸ See, for instance, Doc. A/C.3/SR.406, pp. 361-362; Lauterpacht, note 1 above, p. 287; Cassin, "L'Homme, Sujet de Droit International et la Protection des Droits de l'Homme dans la Société Universelle," in *La Technique et les Principes du Droit Public—Etudes en l'Honneur de G. Scelle* 87 *et seq.* (1950).

For an historical survey of the right of petition on the international level, see U.N. Secretary General's Report: The Right of Petition (Doc. E/CN.4/419).

¹⁰⁹ Doc. E/CN.4/557; see also draft proposals of Chile (Doc. A/C.3/L.81); Ethiopia

to "determine which of the petitions received warrant detailed examination," and with respect to these it was to have substantially the same powers it has with respect to complaints from ratifying states.

For strengthening the protocol proposed by the United States, Uruguay offered an amendment, for which much can be said, creating an "office of the United Nations Attorney-General for Human Rights."¹¹⁰ The proposed Attorney General would be entitled

to appear before the Human Rights Committee in connection with any case which, in his opinion, raises a problem of grave public interest, and to put to the Committee, either orally or in writing, the arguments in defense of such public interest.

He would also be empowered to "request the Committee to summon and hear witnesses and to ask for the communication" of relevant documents and to appear before the International Court of Justice in appropriate cases.¹¹¹

An earlier proposal by Uruguay, representing the greatest concessions yet offered from nation state sovereignty, would confer even greater powers upon a United Nations Attorney General (or High Commissioner) for Human Rights.¹¹² According to this proposal, the Attorney General would be authorized, as part of a comprehensive and carefully worked out plan, to collect and examine all information relevant to the enforcement of human rights, to conduct, prior to any violation and with the consent of the state, studies and inquiries on the spot, and to initiate consultation with states concerned on situations likely to conflict with their commitments. With the occurrence of an alleged violation of human rights, he would be further authorized "to conduct an inquiry within the territory under the jurisdiction of the State Party concerned" and "to summon and hear witnesses and to call for the production of documents and other objects pertaining to the case."

The final proposal made in the Commission on Human Rights was introduced by France at the Tenth Session. It reflected the growing recognition in the Commission that a general unconditional provision on the right of petition was not likely to be approved at that time, and it thus sought at least to make some provision for the eventual realization of that right. The proposal stipulated that no provision in the Covenant

and France (Doc. A/C.3/L.78); Israel (Doc. A/C.3/L.91 (Dec. 1)); and Uruguay (Doc. A/C.3/L. 93).

¹¹⁰ Doc. E/CN.4/606/Rev. 1; see, however, U. S. objection, Doc. A/C.3/SR. 407, p. 369; also Doc. A/AC.3/564. For a comparative table of various proposals on measures of implementation and Protocol on Petitions, see Docs. E/CN.4/617 and Add. 1.

¹¹¹ See also, however, the later proposal submitted jointly by Uruguay, Chile, Egypt, and the Philippines (Docs. E/CN.4/L.341 and E/CN.4/L.341/Rev. 1), which does not provide for an office of U.N. Attorney General, but does secure to individuals and organizations the right of petition.

¹¹² Doc. E/CN.4/549. See also Commission on Human Rights, Report on its Tenth Session to the Economic and Social Council, 18th Sess., Official Records, Supp. No. 7 (U.N. Docs. E/2573; E/CN.4/705), pp. 74-76.

shall prevent the Committee from dealing with any matter concerning the alleged violation of human rights by a State which is a party to international instruments other than the present Covenant, which recognize the competence of the Committee to examine complaints from the States Parties to the said instrument or from sources other than States.¹¹³

Of the various enforcement proposals briefly discussed, the least satisfactory one, which confines the proposed Human Rights Committee largely to the function of "good offices" between contending nation states, was, with a few changes, incorporated in Articles 27-48 of the draft Covenant as finally adopted by the Commission. The proposed Committee, deprived of the authority to receive petitions from individuals and from non-governmental organizations, could scarcely be expected to achieve an effective enforcement of human rights. In addition, the Commission, in Article 49, provided for a system of reports similar to that found in Articles 17-25 of the Covenant on Economic, Social, and Cultural Rights. The inclusion of Article 49 has been criticized by several delegates as detracting from the immediacy of the obligations which the Covenant imposed and as introducing an element of progressive application not appropriate in the Covenant on Civil and Political Rights.¹¹⁴

The Third Committee of the General Assembly has not yet had the opportunity to consider the enforcement articles drafted by the Commission on Human Rights. It is to be hoped that when it does so, amendments will be made to provide for the right of petition by individuals and non-governmental organizations. When the draft Covenants were first submitted to the Third Committee in 1954 for preliminary, general discussion, the question of the right of petition was one of the most hotly debated.¹¹⁵ At that time, the delegate from Egypt made an especially incisive point when he remarked that:

It was also something of a paradox that nearly all the delegations which objected to the right of individual petition were those which were opposed to Article one of both draft covenants on the ground that it concerned a collective right; it would appear that the argument changed according to circumstances.¹¹⁶

It needs no emphasis that the difficulties inherent in the problem of enforcement will not be easily resolved. The establishment of effective procedures would mean substantial changes in the distribution of power between Member states and the United Nations, and, within Member states, between active decision-makers and the individual human being. Changes of such magnitude are seldom quickly achieved, as is further evidenced

¹¹³ Doc. E/CN.4/L.342/Rev. 1.

¹¹⁴ See, for example, the comment of the British delegate (Doc. A/C.3/SR.562, p. 96).

¹¹⁵ See, for example, the statements made by the delegates from the U.S.S.R. (Doc. A/C.3/SR.565, p. 10), India (Doc. A/C.3/SR.569, pp. 131-132), Sweden (Doc. A/C.3/SR.571, p. 143), and Uruguay (Docs. A/C.3/573, pp. 154-155, and A/C.3/SR.578, p. 179).

¹¹⁶ Doc. A/C.3/SR.571, p. 140.

by the United States policy announced in 1953, that it does not intend to become a party to the proposed draft Covenants or to any other conventions on human rights.¹¹⁷ The maintenance of this position by one of the world's most powerful and influential nations has tended to diminish the enthusiasm and hopefulness with which delegates of other nations have approached the task of drafting the two Covenants¹¹⁸ and has resulted in the United States' relatively passive rôle in the discussion of the Covenants and its general policy of abstention from voting on the articles.¹¹⁹

It should be noted, however, that, simultaneously with this announcement, the United States delegates proposed to the Commission on Human Rights that it undertake three new major activities.¹²⁰ This proposal was later adopted by resolutions of the Economic and Social Council¹²¹ and approved in part by the General Assembly,¹²² thus establishing three new programs, which have added a different and important dimension to the United Nations' work on human rights.¹²³ The first of these provides for triennial reports by Member states to provide the Commission with information as to the progress achieved and the difficulties encountered

¹¹⁷ See statement by Secretary of State Dulles before the Senate Judiciary Committee, April 6, 1953, reprinted in *Review of the United Nations Charter: A Collection of Documents*, 83rd Cong., 2d Sess., Senate Doc. No. 87 (Washington, Government Printing Office, 1954), p. 295. See also *New York Times*, Jan. 24, 1954, p. 9.

¹¹⁸ See, for example, the statement of the Saudi Arabian delegate in 1954 (Doc. A/C.3/SR.563, p. 99). See also relevant comment in Gross, *The United Nations: Structure for Peace* 106 (1962).

¹¹⁹ See Docs. E/ON.4/340, A/C.3/SR.646, p. 109, and E/CONF.24/SR.3.

Reference may now be made to: (a) the "Explanatory paper on measures of implementation" prepared by the Secretary General, U.N. Doc. A/5411, April 29, 1963, and (b) to the fact that the General Assembly, on the recommendation of the Third Committee, has adopted a resolution on implementation in which it, *inter alia*, reaffirms its belief that final adoption of the draft International Covenants on Human Rights is urgent and essential for the universal protection and promotion of human rights; requests the Secretary General to transmit to Member states the text of the articles which were adopted at the tenth to eighteenth sessions of the General Assembly, with related documents; and invites Member states to consider these texts and the measures of implementation elaborated by the Commission on Human Rights, in order that they may be in a position to decide on the measures of implementation and on the final clauses. The General Assembly also decided to make a special effort at its Nineteenth Session, i.e. in 1964, to complete the adoption of the entire text of the draft Covenants.

¹²⁰ See letter of Secretary of State Dulles to U. S. representative on the Commission on Human Rights, April 3, 1953, reprinted in *Review of the United Nations Charter: A Collection of Documents*, cited note 117 above, p. 262. For text of U. S. proposals, see U.N. Doc. E/2447, pars. 263, 269, 271.

¹²¹ ECOSOC Res. 624/XXII/BI and II (1956).

¹²² General Assembly, Res. 729 (VIII), 730 (VIII), 839 (IX), and 926 (X).

¹²³ For more comprehensive discussion of these new programs, see: Humphrey, "Human Rights: New Directions in the Human Rights Program," *New York Law Forum* 391 (1958); Higgins, "Technical Assistance for Human Rights," *The World Today* 174, 219 (1963); Lin Mousheng, note 41 above, at 107-118; United Nations Work for Human Rights, *op. cit.* note 1 above, at 25-30; Simsarian, "Human Rights Among Diverse World Orders," 1959 *Proceedings, Am. Soc. Int. Law* 245.

in each country in the matter of human rights. The second program entails a series of comprehensive global studies of specific rights enumerated in the Universal Declaration of Human Rights.¹²⁴ The third and perhaps most successful of the new programs established advisory services for the implementation of human rights. The services offered take essentially three different forms: the organization of seminars on various specific human rights; the provision of expert advice for countries which request aid in the solution of problems involving human rights;¹²⁵ and provision of fellowships for responsible representatives of countries to visit other member countries for the purpose of studying the techniques used there for the protection of human rights.¹²⁶ Of these, the organization of seminars for participation by representatives experienced in the subjects considered has been given the greatest emphasis.¹²⁷ To date, eighteen such seminars have been held,¹²⁸ and it has been the consensus of most participants and commentators that they provide a most valuable opportunity for expert representatives to exchange experiences and then use acquired insights to improve conditions in their own countries upon their return.

EXPERIENCE IN THE APPLICATION OF HUMAN RIGHTS PRINCIPLES

The experience of the United Nations thus far in securing application of its human rights principles offers little cause for optimism. Though its various organs have been courageous and consistent in asserting international concern and in denouncing notorious deprivations of human rights as violations of the Charter, offending nation states have—in the absence of effective enforcement procedures—paid little attention to the collective condemnations.

Two well-known instances of failure may be recalled:¹²⁹

Although the question of the treatment of persons of Indian and Pakistani origin in South Africa has been before the General Assembly since 1946, and the whole racial situation in South Africa since 1952, and although the Security Council has also taken action in the matter, the grievances are still unredressed.¹³⁰ A series of discussions, resolutions and

¹²⁴ The first two studies undertaken by the subcommittee appointed for this purpose have been on "the right of everyone to be free from arbitrary arrest, detention and exile" and "the right of arrested persons to communicate with those whom it is necessary for them to consult in order to ensure their defense or to protect their essential interests." See United Nations Work for Human Rights, cited note 1 above, at 26-28.

¹²⁵ See especially Higgins, *loc. cit.* note 123 above, at 220-221.

¹²⁶ *Ibid.* 219-220.

¹²⁷ *Ibid.* 221-223.

¹²⁸ For a list of these seminars, their topics, dates and locations, see Lin Mousheng, note 41 above, at 109-110.

¹²⁹ For more detailed review, see Martin, "Human Rights and World Politics," 5 Yearbook of World Affairs 37, 62 (1951).

¹³⁰ General Assembly, Res. 44 (I), 267 (III), 395 (V), 511 (VI); "Assembly's Action on Question of Indians in South Africa," 13 U.N. Bulletin 537 (1952). See also more recently, General Assembly, Res. 1875 (XIV), 1598 (XV), 1881 (XVIII) and 1978 (XVIII); and Security Council, Docs. S/4300 (1960), S/5386 and S/5471 (1963)

recommendations do not seem to have shaken South Africa in her insistence that the matter is not of United Nations concern and in her resolution to continue the challenged practices.

The governments of Hungary, Bulgaria, and Rumania were accused by the Western Powers, parties to the Paris Peace Treaties of 1947, of having not lived up to their obligations in regard to human rights which they had undertaken in the treaties. The General Assembly repeatedly expressed its concern at the grave accusations made against the three states.¹⁸¹ Their governments refused, however, to co-operate even in the efforts to examine the charges, in spite of a ruling by the International Court of Justice that it was their treaty obligation to do so and to appoint their representatives to the Treaty Commissions which are competent to settle the disputes.¹⁸²

¹⁸¹ General Assembly, Res. 385 (V), 5th Sess., Official Records, Resolutions, p. 17 (1950). Concerning the Hungarian Revolution specifically see: General Assembly, Res. 1004 (ES-II), 1005 (ES-II), 1006 (ES-II), 1007 (ES-II), 1008 (ES-II), 2nd Spec. Sess., Official Records, Resolutions (1956); and General Assembly, Res. 1127 (XI), 1128 (XI), 1129 (XI), 1130 (XI), 1131 (XI), 1132 (XI), 11th Sess., Official Records, Resolutions (1956), pp. 63-64.

¹⁸² See Interpretation of Peace Treaties, Advisory Opinions, [1950] I.C.J. Rep. 65, 221; 44 A.J.I.L. 742, 752 (1950).

Contrasting reference may now be made to the General Assembly's consideration of the item "The Violation of Human Rights in South Viet-Nam." During the consideration of this item at the 1232nd, 1234th and 1239th meetings of the General Assembly (October, 1963), the President read to the Assembly a letter from the Special Mission of South Viet-Nam extending an invitation to the representatives of several Member states to visit South Viet-Nam in order that they might see for themselves what the real situation was as regards relations between the Government and the Buddhist community of Viet-Nam. In the letter Viet-Nam invited the President to lend his good offices in helping to establish this mission. Later in the proceedings the President asked: "Am I to take it that the Assembly wishes to act in accordance with the aforesaid letter . . . ? Since there are no objections I shall do so. The debate on item 77 is therefore suspended."

Subsequently the President announced the appointment of the mission with Ambassador Pazhwak of Afghanistan as chairman. Mr. Pazhwak was also the chairman of the Commission of Human Rights. The Principal Secretary of the Mission was the Director of the Division of Human Rights. The mission adopted its rules of procedure (Annex II, Doc. A/5680), which contained a Paragraph 12 reading as follows: "The Mission is an *ad hoc* fact-finding body and has been established to ascertain the facts of the situation as regards the alleged violations of human rights by the Government of the Republic of Viet-Nam in its relations with the Buddhist community of that country." Paragraph 13 reads: "The Mission shall seek factual evidence. The Mission shall collect information, conduct on-the-spot investigations, receive petitions and hear witnesses. The impartiality of the Mission shall be demonstrated at all times."

The Mission reported to the General Assembly in a comprehensive document, A/5680, of Dec. 7, 1963. The *coup d'état* of Nov. 1, 1963, changed the situation fundamentally. As a consequence the General Assembly did not take any action on the report. The President announced on Dec. 13 (Doc. A/P.V. 1280) that he had been informed by the sponsors of the item that "in the light of recent events that took place in Viet-Nam . . . they do not think it useful to discuss this item at this time." It was decided that no further action was required.

With respect to non-self-governing and trust territories, the United Nations has had, in contrast, some opportunity to put its principles into practice. The approving of trusteeship agreements,¹³³ the consideration of reports submitted by administering authorities, the examination of individual petitions, and the sending of missions into the territories, all offer opportunities for the exercise of control.¹³⁴ The trusteeship agreement with Italy for the temporary administration of Somaliland, for example, prescribes that the administering authority accept the Universal Declaration "as a standard of achievement for the Territory."¹³⁵ It may be added, furthermore, that the principles of the Universal Declaration of Human Rights have already had a very considerable influence both upon the resolutions and recommendations of the General Assembly and upon many new prescriptions of formal authority in other arenas.¹³⁶ On every appropriate occasion, whether concerned with general issues about Members' responsibilities for the promotion of human rights and maintenance of peace¹³⁷ or with specific problems about freedom of information,¹³⁸ discrimination against foreign labor,¹³⁹ racial discrimination,¹⁴⁰ the granting of independence to colonial countries,¹⁴¹ and so on, the General Assembly has invoked the Universal Declaration and its fundamental policies. Other important occasions which illustrate the widespread invocation of the Declaration's principles include the Caracas Conference of American States of 1954¹⁴² and the Bandung Conference of Asian-African States of 1955.¹⁴³

¹³³ Art. 85 of the Charter.

¹³⁴ Art. 87 of the Charter. See also General Assembly, Res. 446(V), Information on Human Rights in Non-Self-Governing Territories, 5th Sess., Official Records, Resolutions, p. 54 (1950); Res. 552 (VI), Examination of Petitions, *ibid.*, 6th Sess., p. 55 (1951/52).

¹³⁵ Art. 10 of the Declaration of Constitutional Principles of the Trusteeship Agreement for the Territory of Somaliland under Italian Administration, General Assembly, 5th Sess., Official Records, Supp. No. 10, p. 11 (A/1294). See also General Assembly, Res. 442(V).

¹³⁶ For more detailed analysis of the Declaration's influence, see Schwelb, "The Influence of the Universal Declaration of Human Rights on International and National Law," 1959 Proceedings, Am. Soc. Int. Law 217; A Standard of Achievement, *op. cit.* note 1 above, at 24-30.

¹³⁷ Res. 250(IV) (6), Essentials of Peace, General Assembly, 4th Sess., Official Records, Resolutions, p. 13 (1949); Res. 540 (VI), General Assembly, 6th Sess., Official Records, Resolutions, p. 85 (1951/52).

¹³⁸ General Assembly, Res. 424(V), *ibid.*, 5th Sess., p. 44 (1950).

¹³⁹ General Assembly, Res. 315 (IV), *ibid.*, 4th Sess., p. 32 (1945).

¹⁴⁰ General Assembly, Res. 324 (IV), *ibid.*, p. 39; Res. 644 (VII), *ibid.*, 7th Sess., p. 32 (1952).

¹⁴¹ General Assembly, Res. 1514 (XV), *ibid.*, 15th Sess., Supp. No. 16 (A/4684), p. 66 (1960).

¹⁴² Resolutions of the Tenth Inter-American Conference at Caracas, Venezuela, March 1-28, 1954, 1954 Yearbook on Human Rights 394; 48 A.J.I.L. Supp. 123 (1954).

¹⁴³ Final Communiqué of the Asian-African Conference, Bandung, Indonesia, April 18-24, 1955, 1955 Yearbook on Human Rights 339. See also Charter of Organization of African Unity, Addis Ababa, May, 1963, reprinted below, p. 873.

Even at a more formal level of authoritative prescription, the influence of the Declaration has been by no means negligible. The Special Statute for Trieste of 1954¹⁴⁴ and the Franco-Tunisian Conventions of 1955¹⁴⁵ incorporated the whole Declaration as part of their substantive law. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, which undoubtedly has set up the most advanced international system to date for the protection of human rights, reflects in its provisions the impact of the Universal Declaration.¹⁴⁶ The Preamble of the Peace Treaty with Japan of 1951 declares Japan's intention "to strive to realize the objectives of the Universal Declaration of Human Rights."¹⁴⁷ It should be noted, moreover, that the preambles of many of the limited international conventions completed under the auspices of the United Nations and its specialized agencies¹⁴⁸ either quote from, or expressly refer to, the principles of the Declaration.¹⁴⁹

In more recent years a number of declarations on various subjects, bearing upon human rights questions, have been adopted by the General Assembly. Two especially reflect the growing authoritative status of the Universal Declaration of 1948. The Declaration on the Granting of Independence to Colonial Countries and Peoples of Dec. 14, 1960, Res. 1514 (XV), includes a paragraph 7, which reads:

"All States *shall observe faithfully and strictly* the provisions of the Charter of the United Nations, *the Universal Declaration of Human Rights* and the present Declaration on the basis of equality. . . ." (Italics supplied.)

The United Nations Declaration on the Elimination of All Forms of Racial Discrimination of Nov. 20, 1963, Res. 1904 (XVIII), has an Article 11 which reads as follows:

"Every State *shall promote* respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations, and *shall fully and faithfully observe* the provisions of the present Declaration, *the Universal Declaration of Human Rights* and the Declaration on the granting of independence to colonial countries and peoples." (Italics supplied.)

¹⁴⁴ See U.N. Docs. S/3301 and Add. 1, S/3305; 31 Dept. of State Bulletin 556 (1954); 1954 Yearbook on Human Rights 398-400. See also Schwelb, "The Trieste Settlement and Human Rights," 49 A.J.I.L. 240 (1955). See, however, Agnello v. Renko and Editoriale Stampa Triestina, Clunet (1962), p. 220.

¹⁴⁵ See 1955 Yearbook on Human Rights 340, 342.

¹⁴⁶ For reference to relevant literature on the European Convention, see Schwelb, "International Conventions on Human Rights," 9 Int. and Comp. Law Q. 654, at 655, note 2 (1960); Vols. I and IV of the Yearbook of the European Convention on Human Rights; and Weil, The European Convention on Human Rights (Leiden, 1963); 57 A.J.I.L. 804 (1963). A recent significant instrument in this regard is the European Social Charter, signed at Turin, Oct. 18, 1961. See Security in Freedom: The European Social Charter, Council of Europe Directorate of Information, Strasbourg, 1962.

In 1963 three protocols to the European Convention on Human Rights were signed. See 58 A.J.I.L. 331-336 (1964), and Schwelb, "Documentation on the Working of the European Human Rights Machinery," *ibid.* 442.

¹⁴⁷ Conference for the Conclusion and Signature of the Treaty of Peace with Japan, Record of Proceedings, San Francisco, Sept. 4-8, 1951, p. 313 (Dept. of State Pub. 4392, Int. Org. and Conf. Ser. II, Far Eastern 3); 1951 Yearbook on Human Rights 489.

¹⁴⁸ See p. 616 above.

¹⁴⁹ For preliminary analysis of the significance of these preamble references, see Schwelb, "The Influence of the Universal Declaration of Human Rights on International and National Law," 1959 Proceedings, Am. Soc. Int. Law 217, 220-222.

The impact of the Declaration on the internal law of many states further reflects the broadening scope of its influence. Explicit reference is made to the Declaration in the Constitutions of such recently emerging states as the Republics of Guinea,¹⁶⁰ Ivory Coast,¹⁶¹ Dahomey,¹⁶² Gabon,¹⁶³ Madagascar,¹⁶⁴ Senegal,¹⁶⁵ Mali,¹⁶⁶ and Somalia.¹⁶⁷ Not to be forgotten, moreover, are the Statute of Togoland under French Administration of 1956¹⁶⁸ and the Statutes of the Cameroons of 1957 and 1959,¹⁶⁹ which stipulated that the laws of these territories must be in conformity with the Universal Declaration of Human Rights. The principles of the Declaration are also reflected, though not specifically referred to, in the new Constitutions of France and the Federal Republic of Germany,¹⁶⁰ India,¹⁶¹ Libya,¹⁶² Eritrea,¹⁶³ the United States of Indonesia,¹⁶⁴ El Salvador,¹⁶⁵ Costa Rica, Syria, Cameroun, the Central African Republic, Chad, Congo (Brazzaville), Mauritania, Niger, Sudan, Togo, and Upper Volta.¹⁶⁶ In addition to this already impressive and rapidly growing list, the legislatures of Paraguay,¹⁶⁷ Canada,¹⁶⁸ Guatemala,¹⁶⁹ Argentina,¹⁷⁰ Bolivia,¹⁷¹ and Panama¹⁷² have enacted statutes which expressly refer to the Declaration as a standard of achievement. Finally, the Universal Declaration or its individual

¹⁶⁰ See the preamble and Art. 10 of its Constitution, 1958 Yearbook on Human Rights 90.

¹⁶¹ See the preamble of its Constitution, 1959, *ibid.* 186.

¹⁶² See the preamble of its Constitution, *ibid.* 83.

¹⁶³ See the preamble of its Constitution, *ibid.* 119.

¹⁶⁴ See the preamble of its Constitution, *ibid.* 193.

¹⁶⁵ See the preamble of its Constitution, *ibid.* 258.

¹⁶⁶ See the preamble of its Constitution, *ibid.* 275.

¹⁶⁷ See Art. 7 of its Constitution (1960).

¹⁶⁸ See Journal Officiel de la République Française, Aug. 26, 1956, Decree No. 56-847; 1956 Yearbook on Human Rights 267-268.

¹⁶⁹ See Journal Officiel de la République Française, April 18, 1957, Decree No. 57-301; 1957 Yearbook on Human Rights 273-274; Ordinance No. 58-1375, Dec. 30, 1958; Annex II to the Report of the U.N. Visiting Mission to Trust Territories in West Africa, 1958, Doc. T/1427, Art. 5.

¹⁶⁰ See discussion in Schwelb, "The Influence of the Universal Declaration of Human Rights on International and National Law," *loc. cit.* note 41 above, at 224-225, and "Die Kodifikationsarbeiten der Vereinten Nationen auf dem Gebiete der Menschenrechte," *loc. cit. ibid.* at 40-42.

¹⁶¹ 1949 Yearbook on Human Rights 99-111.

¹⁶² 1951 *ibid.* 226.

¹⁶³ 1952 *ibid.* 62.

¹⁶⁴ 1949 *ibid.* 113-117.

¹⁶⁵ 1950 *ibid.* 245, 250.

¹⁶⁶ See Lin Mousheng, note 41 above.

¹⁶⁷ See Act No. 94 of July 5, 1951, 1951 Yearbook on Human Rights 281.

¹⁶⁸ See Ontario Fair Employment Practices Act of 1951, *ibid.* 88, and Fair Accommodation Practices Act of 1954, 1954 *ibid.* 44.

¹⁶⁹ See *ibid.* 121.

¹⁷⁰ See Legislative Decree No. 1664 of Oct. 22, 1955, 1955 Yearbook on Human Rights 5.

¹⁷¹ See Legislative Decree No. 3937 of Jan. 20, 1955, *ibid.* 18.

¹⁷² See Act No. 25 of Feb. 9, 1956, 1956 *ibid.* 184.

articles have been cited as authoritative prescriptions in the judicial decisions of numerous courts, both national and international.¹⁷³

CONCLUSION

As grand as is the vision which inspires the United Nations human rights program and as indispensable as such vision may be to the achievement of a free, peaceful, and abundant world society, it is improbable in the present world context of bipolarized and other bloc power and of imminent expectations of violence, that startling new progress can be quickly effected on a global scale either in the acceptance of new authoritative prescriptions about human rights or in the establishment of workable enforcement measures. The degree to which the Universal Declaration of Human Rights, with its broad prescriptions of the essential rights of a free society, has captured the loyalties and imagination of peoples and decision-makers offers, however, a certain opportunity. Persuasive argument has been made that the early decision that the existing Commission on Human Rights is not authorized¹⁷⁴ to act upon specific complaints from individuals and groups not only is not required by the provisions of the United Nations Charter but is even in contravention of such provisions.¹⁷⁵ This decision could be reversed by the General Assembly. The Commission on Human Rights might then hear some, or as many as possible, of the numerous complaints submitted to it each year, investigate the complaints to the extent it can or that the offending state will permit, and make recommendations in terms of the policies described in the Universal Declaration.¹⁷⁶ The cumulative impact of a series of investigations and recommendations, publicized for the sanction of world opinion and any other sanctions that may eventually be made available, might not be wholly

¹⁷³ For citation to and discussion of such decisions, see Schwelb, "The Influence of the Universal Declaration of Human Rights . . .," note 41 above, at 226-228, and A Standard of Achievement, note 1 above, at 28-30.

An especially interesting decision is that in the case of *Soc. Roy Export et Charlie Chaplin v. Soc. Le Film Rayée Richebé* by the Court of Appeal in Paris, 87 *Journal du Droit International* 129-137 (1960). Considering the scope of application of the Geneva Universal Convention on Copyright, the Court of Appeal stated on page 137:

"Whereas, in fact, a foreigner being assimilated to a citizen, by virtue of the Geneva Convention, he is entitled to the same right in France as a French author and there is no valid reason, even on the grounds of want of reciprocity, for limiting this assimilation to the financial protection of Copyright;

"Whereas, moreover, the Universal Declaration of Human Rights, voted by the Assembly of the United Nations on December 10th, 1948 and published in the *Journal officiel* on 19 February 1949, which gives it the force of French law, stipulates in Article 17 that . . ." [Emphasis added.]

¹⁷⁴ Economic and Social Council, Res. 75 (V), Fifth Sess., Resolutions, p. 20 (1947); Res. 728/F/XXVIII (1959).

¹⁷⁵ A full statement of this interpretation appears in Lauterpacht, note 1 above, at 223-233.

¹⁷⁶ Commission on Human Rights, Report of the Eighth Session, note 53 above, at 42, par. 292.

without effect, and certainly such activity could serve only to enhance the loyalties of freedom-demanding peoples to the Organization.¹⁷⁷

Similarly, though the prospects for effective promotion of human rights on a global scale are dim, the very factors that cause these prospects to be dim make imperative even more intensified efforts on half-world and regional bases by peoples who cherish the values of a free, peaceful, and abundant world society. The clarification to the peoples of the world of what such society may mean in contrast with totalitarian oppression, and the continued demonstration that all rational efforts are being made to establish and maintain such a society, are indispensable from sheer power perspectives. Such clarification and demonstration are necessary to sustain peoples' hopes and expectations that such society can be established and maintained despite all the forces against it, to fortify their beliefs that they can best maximize their own personal values in such society, to cement their loyalties to such society and to further the increasing identifications of all free peoples with each other, and, in sum to maintain that continuing consensus about goals and means which will promote the most effective political co-operation. It is for this reason that the Western democracies and peoples of similar values should bring new enthusiasms and energies, rather than timid hesitation, to the task of improving, completing, and ratifying the proposed Covenants on Human Rights. Though the free peoples may not be able immediately to achieve universality in the acceptance and application of their human rights principles, they can, by perfecting and promulgating their statement of these principles as authoritative community goals within the areas accessible to them, assume a potentially world-encompassing moral leadership about which they can build the power indispensable to survival.

¹⁷⁷ The Chicago lawyer who proposed an international writ of habeas corpus for the release of William Oatis could be prophetic of rational future development. See 98 Cong. Rec., 82nd Cong., 2nd Sess., 5034 (May 8, 1952). In this regard, see also Kutner, *World Habeas Corpus* (2nd ed., 1962); "The Case for an International Writ of Habeas Corpus: A Reply," 37 U. Detroit Law J. 605 (1960); Kutner and Carl, "International Writ of Habeas Corpus: Protection of Personal Liberty in a World of Diverse Systems of Public Order," 22 U. Pittsburgh Law Rev. 469 (1961).

THE NUCLEAR TEST BAN TREATY AND INTERNATIONAL LAW

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The Test Ban Treaty of August 5, 1963,¹ prohibits nuclear weapon tests or other nuclear explosions in the atmosphere, in outer space, or under water, *i.e.*, in the environments where detection from outside the territory of the testing state is possible. Underground nuclear explosions are not prohibited as long as they do not cause radioactive debris to be present outside the territorial limits of the state under whose jurisdiction or control such explosions are conducted.² The parties to the treaty also undertake to refrain from "causing, encouraging, or in any way participating in" the carrying out of explosions anywhere which have any of the prohibited effects.³ The treaty is, as President Kennedy pointed out in his

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¹ 57 A.J.I.L. 1026 (1963); Cmd. 2118, Misc. No. 10 (1963); U.N. Doc. ENDC/100, Rev.1, Annex to Doc. A/5488. By the time the treaty entered into force on Oct. 10, 1963, 105 governments or authorities claiming to be governments had signed it, in addition to the three original parties (U.S.S.R., U.K. and U.S.A.). As of Feb. 20, 1964, 28 of the signatories other than the original parties had deposited instruments of ratification and one state had deposited an instrument of accession. Among the 108 signatories there were the following seven non-Members of the United Nations: Federal Republic of Germany, East Germany, San Marino, Switzerland, Republic of Korea, Republic of South Viet-Nam and Western Samoa (Western Samoa is a former Trust Territory under New Zealand administration, which became independent on Jan. 1, 1962; see General Assembly Res. 1626 (XVI)). Of the then 111 Members of the United Nations (Kenya and Zanzibar were admitted only in December, 1963) the following ten did not sign: three European states: France, Albania and Cyprus; two Asian states: Cambodia and Saudi Arabia; four African states: South Africa, which subsequently acceded to the treaty, the Central African Republic, Congo (Brazzaville), and Guinea; one Latin American state: Cuba.

Legal literature on the treaty: P. Chandrasekhara Rao, "The Test Ban Treaty, 1963: Form and Content," 3 Indian J.I.L. 315 (July, 1963); Andrew Martin, "Legal Aspects of Disarmament," Int. and Comp. Law Q., Supp. Pub. No. 7 (1963), p. 75; Wilhelm Cornides, "Das Moskauer Moratorium und die Bundesrepublik. Inhalt und Tragweite des Vertrages über die teilweise Einstellung der Kernwaffenversuche," 18 Europa Archiv 583 (Aug. 25, 1963); Giorgio Gaja, "Il Trattato di Mosca e l'Uso in Guerra delle Armi Nucleari," 46 Rivista di Diritto Internazionale 397 (1963). For an analysis of Art. I of the treaty from the point of view of the "modern use of logic in law," see Layman E. Allen, "Automation: Substitute and Supplement in Legal Practice. The Logic of the Test-Ban Treaty," 7 The American Behavioral Scientist at 41 *et seq.* (December, 1963).

² For a report on fallout from underground tests, see E. A. Martell, in 143 "Science" (American Association for the Advancement of Science) 126 (No. 3602, Jan. 10, 1964).

³ Art. I of the treaty reads as follows:

message to the Senate,⁴ "the first concrete result of 18 years of effort by the United States to impose limits on the nuclear arms race." Similarly Lord Home, as he then was, said as Secretary of State for Foreign Affairs of the United Kingdom, that the limited test ban in three environments was "a good thing in itself not only first, because it reduces the danger of pollution of the atmosphere, but, secondly, because it makes the first agreement of substance which we have been able to make with the Russians for a very long time."⁵ Mr. Khrushchev, on his part, praised the treaty as a "document of great international significance" and said that "its conclusion means a major success for all people of goodwill who for many years have been actively fighting for the discontinuance of nuclear tests, for disarmament, for peace and international friendship."⁶ It is stated in the Preamble to the treaty that the parties seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and are determined to continue negotiations to this end.

Since July, 1963, an examination and analysis of the treaty has been taking place in this and in other countries, particularly of its political, strategic and nuclear-scientific aspects. In the present article it is proposed to present, first, comments on some of the substantive provisions of the treaty and, second, to discuss the constitutional, organizational and procedural questions which arise in connection with it.

I. SELECTED QUESTIONS OF SUBSTANTIVE LAW

Nuclear Explosions in Time of War

The treaty prohibits "any nuclear weapon test explosion, or any other nuclear explosion" in the environments covered by it. In connection with

"1. Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:

(a) in the atmosphere; beyond its limits, including outer space; or underwater, including territorial waters or high seas; or

(b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the state under whose jurisdiction or control such explosion is conducted. It is understood in this connection that the provisions of this subparagraph are without prejudice to the conclusion of a treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground, the conclusion of which, as the Parties have stated in the Preamble to this Treaty, they seek to achieve.

"2. Each of the Parties to this Treaty undertakes furthermore to refrain from causing, encouraging, or in any way participating in, the carrying out of any nuclear weapon test explosion, or any other nuclear explosion, anywhere which would take place in any of the environments described, or have the effect referred to, in paragraph 1 of this article."

⁴ Nuclear Test Ban Treaty. Message from the President of the United States transmitting the Treaty (hereinafter referred to as "Message"), Sen. Exec. M, 88th Cong., 1st Sess., Aug. 8, 1963; 49 Dept. of State Bulletin 316 (1963).

⁵ Parl. Deb. (Hansard), House of Lords, Vol. 252, No. 123, July 26, 1963, col. 914.

⁶ Statement at signing ceremony, Moscow, Aug. 5, 1963. New York Times, Aug. 6, 1963.

this provision the question has been raised in various quarters whether nuclear explosions are prohibited also when brought about "in anger rather than in curiosity,"⁷ i.e., whether the underlined words imply the prohibition of the use of nuclear weapons in war. In spite of the ambiguity of the language, there appears to be a consensus that the answer to this question is in the negative. The addition of the words "any other nuclear explosion" has its origin in the fact that an earlier draft proposed by the United Kingdom and the United States on August 27, 1962,⁸ contained a special provision on "explosions for peaceful purposes," which would have authorized otherwise prohibited explosions of nuclear devices for peaceful purposes if unanimously agreed to by the original parties. This limited exception was unacceptable to the Soviet Union. The words "or any other nuclear explosions" were accordingly inserted for the purpose of banning peaceful-use explosions as well as test explosions in the three environments. The title of the treaty speaks of nuclear weapons tests; according to the Preamble the parties seek to achieve the discontinuance of test explosions. If it had been intended to prohibit the use of nuclear weapons in wartime, some mention of that important purpose would certainly be found in the title and in the Preamble. The general scheme of the treaty is inconsistent with an interpretation of the words referred to, to cover wartime use of nuclear weapons.⁹

This conclusion is corroborated by the contemporaneous interpretation given to the treaty by the United States and by the Soviet Union: by President Kennedy in his speech of July 26, 1963, by the United States' chief negotiator, Mr. Averell Harriman, at a press conference on July 27, 1963 (both before the signing of the treaty); by Secretary of State Rusk at the signing ceremony in Moscow on August 5, 1963; in the State Department's report to the President of August 8, 1963; in the President's Message transmitting the treaty to the Senate on the same day; in Mr. Rusk's testimony before the Senate Committee on Foreign Relations on August 12, 1963; in the testimony by Secretary of Defense McNamara before the same Committee; in that Committee's report to the Senate of September 3, 1963, and in President Kennedy's letter to Senators Mansfield and

⁷ Professor Leon Lipson in an unpublished address.

⁸ Text in: The Nuclear Test Ban Treaty, Report of the Committee on Foreign Relations (hereinafter referred to as "Committee Report"), U. S. Senate, 88th Cong., 1st Sess., Exec. Rep. No. 8, Sept. 8, 1963, Appendix II, p. 29. For a comparison by Mr. Arthur H. Dean between the texts of the U. S.-U. K. draft proposed at Geneva on Aug. 27, 1962, and that of the treaty as signed at Moscow on Aug. 5, 1963, see Nuclear Test Ban Treaty, Hearings before the Committee on Foreign Relations (hereinafter referred to as "Hearings"), U. S. Senate, 88th Cong., 1st Sess., Aug. 12 to 27, 1963, at 814.

⁹ The interpretation of the words "any other nuclear explosion" as developed in the text is based on the Committee Report (*op. cit.* note 8, p. 5); the Opinion of the General Counsel of the U. S. Department of Defense, Hearings, *op. cit.* note 8, p. 177; and the Opinion of the Legal Adviser of the State Department, Committee Report, *op. cit.* note 8, Appendix I, p. 27; 58 A.J.I.L. 176-179 (1964).

Dirksen of September 11, 1963. Statements to the same effect were also made by and on behalf of the Soviet Government.¹⁰

Resolutions adopted by the General Assembly both before¹¹ and after¹² the signing of the treaty, and the Secretary General, in his address at the signing of the treaty,¹³ asked for the convening of a conference for signing a convention on the prohibition of the use of nuclear and thermo-nuclear weapons for war purposes, which conference, as the Legal Adviser of the U. S. Department of State has pointed out, would be obviously unnecessary if the Test Ban Treaty itself outlawed the use of such weapons in war.^{13a} Thus, there seems to be agreement between the principal parties to the treaty, concurred in by United Nations organs, that the treaty does not provide for the outlawing of the employment of nuclear weapons in war.

The question of fundamental principle, with its far-reaching moral, philosophical and political implications, whether the international law of our day—independently of and apart from the treaty—prohibits such use is outside the scope of this article.¹⁴ An observation on one recent development in this field is, however, in order at this stage.

In its "Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons" of November 24, 1961,¹⁵ the General Assembly declared that the use of such weapons was a violation of the Charter and contrary to the rules of international law and to the rules of humanity. The question arises, therefore, whether this Declaration by the General Assembly can be considered an authoritative determination of international law on the subject.

This writer is not of the opinion that the General Assembly is constitutionally incapable of issuing authoritative pronouncements on questions of international law. A recent example, but by no means the only one, of such an authoritative pronouncement is the "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space" of December 13, 1963.¹⁶ This Declaration was adopted unanimously ("by acclamation") and many delegations, including those

¹⁰ *E.g.*, the statement by the Soviet Government of Aug. 21, 1963, reproduced in Committee Report 5. Apart from statements made on July 26, 1963, after the initialing and before the signing of the treaty (see note 5 above), there has been no discussion of the substance of the treaty in either House of the British Parliament.

¹¹ Res. 1653 (XVI) of Nov. 24, 1961, entitled "Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons." U.N. General Assembly, 16th Sess., Official Records, Supp. No. 17 (A/5100), p. 4.

¹² Res. 1909 (XVIII) of Nov. 27, 1963, on the "Question of Convening a Conference for the Purpose of Signing a Convention on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons." U.N. General Assembly, 18th Sess., Official Records, Supp. No. 15 (A/5515), p. 14.

¹³ See note 6 above.

^{13a} Giorgio Gaja, *loc. cit.* note 1 above, p. 400, comes to the conclusion that the employment of weapons in war is not regulated by the treaty.

¹⁴ See Schwarzenberger, *The Legality of Nuclear Weapons* (London, 1958); Menzel, *Legalität oder Illegalität der Anwendung von Atomwaffen* (Tübingen, 1960), reviewed by Hink in 57 A.J.I.L. 472 (1963).

¹⁵ See note 11 above.

¹⁶ Res. 1962 (XVIII) of Dec. 13, 1963. U.N. General Assembly, 18th Sess., Official Records, Supp. No. 15 (A/5515), p. 15; 58 A.J.I.L. 477 (1964).

of the United States, the United Kingdom and the Soviet Union, solemnly declared that the principles which it proclaims reflect international law as it is accepted by the Members of the United Nations, that they will respect them and that they believe that the conduct they enjoin will become the practice of every state.¹⁷ The Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons of 1961, on the other hand, does not, in this writer's view, come within the category of authoritative declarations of a rule of international law by the General Assembly. It was adopted by majority vote only, against substantial opposition of twenty states (including France, the United Kingdom and the United States). It cannot, therefore, be considered as having created the kind of community expectation which an agreed or virtually unanimous statement can generate.¹⁸

The Peaceful Use of Atomic Energy and the Treaty

The British-American draft of August 27, 1962,¹⁹ contained in its Article II an express saving clause entitled "Explosions for Peaceful Purposes" in the following terms:

The explosion of any nuclear device for peaceful purposes which would take place in any of the environments described, or would have the effect proscribed, in paragraph 1 of Article I may be conducted only: (1) if unanimously agreed to by the Original Parties; or (2) if carried out in accordance with an Annex hereto, which Annex shall constitute an integral part of this Treaty.

The Soviet Union did not agree to this provision and it was therefore deleted. What is the effect of this deletion and of the consequential insertion in Article I of the words "or any other nuclear explosion" on the legality of the use of nuclear explosions for peaceful purposes, *e.g.*, on the "Plowshare Program," which includes their application in projects such as excavation, mining, the recovery of oil and gas, the development of water resources, in civil engineering projects such as digging canals, harbors, or passes through mountains? The Chairman of the United States Atomic Energy Commission, Dr. Glenn T. Seaborg, stated that the development of devices and the scientific studies planned under the Plowshare Program can clearly proceed under the terms of the treaty. This, he said, was also true of applications for mining and water resource developments, which would be carried out deep underground and involve the release of very little, if any, radioactivity. "In the excavation application, how-

¹⁷ U.N. Docs. A/C. 1/P.V. 1342 to 1346; A/5656 (Report of the First Committee). It should be noted, however, that the representative of France declared that his delegation, while subscribing to the principles contained in the Declaration, could not, for the moment give this Declaration more value than that of a declaration of intention. France does not consider that a resolution of the General Assembly, even though adopted unanimously, can in this case create, *stricto sensu*, juridical obligations incumbent upon Member states (U.N. Doc. A/C.1/P.V. 1345).

¹⁸ U.N. Docs. A/4942, Add. 3 (Report of the First Committee (Part IV), Nov. 18, 1961); A/P.V. 1068, Nov. 24, 1961.

¹⁹ See note 8 above.

ever, some radioactivity will reach the atmosphere and a careful determination will have to be made that a given project is permissible." He went on to say that excavation experiments or projects which have a downwind distance of several hundred miles from any international boundary probably can be conducted and that these experiments will be sufficient to develop the excavation technology. He expressed the hope that at some future time when the benefits of the use of nuclear energy for these purposes are clearly demonstrated, the parties would seek ways of modifying the treaty so that the technology could be put to more widespread application.²⁰ Secretary of Defense McNamara indicated that the treaty might prevent the application of nuclear force in a project such as an Isthmian Canal across the Isthmus of Panama and that, with regard to the harbor project in Alaska which is contemplated, the permissibility will depend upon circumstances, *i.e.*, whether the explosions would be underground and whether the fallout or other radiation or debris would pass beyond the territorial limits of the United States.²¹

The Scope of the Prohibition Ratione Loci

Another clause which creates difficulties of interpretation is that part of Article I (1) whereby each party undertakes to prohibit, to prevent, and not to carry out nuclear explosions:

at any place under its jurisdiction or control: (a) in the atmosphere; beyond its limits, including outer space; or underwater, including territorial waters or high seas . . .

The question is: Does the treaty provide or imply that parts of outer space or of the high seas can be "places" under the "jurisdiction or control" of a state? It is submitted that the awkward wording means, for the purposes of the treaty, exactly that.²²

The phrase "including outer space" was, as reported by the Legal Adviser of the State Department, inserted to prevent any implication that there was an area which was neither "atmosphere" nor "outer space."²³ The words "including . . . the high seas" were inserted to remove any

²⁰ Hearings 211. Dr. Edward Teller (*ibid.* 433) was of the opinion that the utility of the Plowshare Program inside the United States may not be completely cut off, that the use of nuclear explosions in making harbors might be excluded and that "the utility outside the United States where the greatest field lies is very severely endangered." See also Finney, "A Second Canal?" 150 *The New Republic* 21 (No. 13, March 28, 1964).

²¹ Hearings 181-182.

²² *Cf.* the Opinion of the Legal Adviser of the U. S. Department of State in Hearings 61-62; 58 *A.J.I.L.* 175-176 (1964).

²³ In Res. 1884 (XVIII), unanimously adopted on Oct. 17, 1963, the General Assembly of the United Nations welcomed the expressions by the U.S.S.R. and the U.S.A. of their intention not to station in outer space any objects carrying nuclear weapons, and solemnly called upon all states to refrain from placing in orbit any objects carrying nuclear weapons, installing them on celestial bodies or stationing them in outer space in any other manner. U.N. General Assembly, 18th Sess., Official Records, Supp. No. 15 (A/5515), p. 13.

doubt that tests on the high seas were prohibited and that a party conducting such tests would be considered to have at least temporary control of the area in which the test is conducted. This was, perhaps, an excess of caution: Under Article I (2) each party undertakes "furthermore to refrain from causing, encouraging, or in any way participating in the carrying out" of any explosion, et cetera "anywhere." While it is the specific purpose of this provision to prohibit State Party A to cause, encourage or participate in explosions to be set in motion by State B, and thereby to prevent the proliferation of nuclear weapons, it appears also to cover explosions "caused" directly by State A or "participated in" by it.²⁴

The words "under its jurisdiction or control" in Art. I (2) have, of course, also the more obvious meaning that the prohibition extends as well to trust and non-self-governing territories administered by states parties²⁵ and territories under their military occupation, belligerent or otherwise, such as Berlin.²⁶

Inland Lakes

Does the treaty, by using the words "underwater, including territorial waters or high seas," include in its prohibition internal waters and inland lakes such as the Caspian Sea, Lake Baikal or the Great Lakes? This writer believes that an affirmative answer to this question is not open to doubt. The word "including" shows, it is submitted, that the enumeration of territorial waters and of the high seas is not exhaustive. It is, as the Legal Adviser of the State Department put it, "illustrative and not limiting."²⁷ Articles 1 and 5 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, and Article 1 of the Convention on the High Seas between them show that a part of the sea can be one of three things: the high seas, the territorial sea or internal waters.²⁸ There is no doubt that all parts of the sea are covered by the phrase. Nor is there any reason why the term "underwater" should, contrary to its natural and ordinary meaning, not be understood to cover also waters which do not form part of the sea, such as the lakes just mentioned. What happens under the waters of such a lake is clearly above ground, not under ground. Only the ban of underground explosions is reserved, by the Preamble and Article I (2) (b) for regulation in a later treaty, while what happens above ground is already covered by this treaty.

²⁴ On the interpretation of the verbs "to cause," "to encourage" and "to participate in," see Martin, *op. cit.* 78.

²⁵ P. Chandrasekhara Rao, *loc. cit.* note 1 above, p. 317.

²⁶ For the application of the West German Ratification Bill to West Berlin, see p. 658 below.

²⁷ *Loc. cit.* note 22 above.

²⁸ 52 A.J.I.L. 830 *et seq.* (1958). The "contiguous zone" is a zone of the high seas contiguous to the territorial sea of a state (Art. 24 of the Convention on the Territorial Sea and the Contiguous Zone). On the terms used in the text in general, see McDougal and Burke, *The Public Order of the Oceans* 3, note 7 (1962).

II. CONSTITUTIONAL, ORGANIZATIONAL AND PROCEDURAL QUESTIONS: THE LAW OF TREATIES

The Privileges of the "Original Parties"

Like the Charter of the United Nations and, before it, the Covenant of the League of Nations, like the Constitutions of some of the Specialized Agencies, the International Atomic Energy Agency and the former UNRRA, the treaty provides for a privileged category of states parties, the "Original Parties," namely, the U.S.S.R., the United Kingdom and the United States. The privileges of the original parties are threefold: *First*, they have had a special position in regard to the coming into force of the treaty. *Second*, their influence on the amending process is stronger than that of the other parties. *Third*, the original parties are also the "Depositary Governments."

The Entry into Force

Under its Article III (3) the treaty entered into force on October 10, 1963, "after its ratification by all the Original Parties and the deposit of their instruments of ratification." The coming into force was completely independent of the ratification by any states other than the original parties. By way of comparison, reference may be made to Article 110 (3) of the Charter of the United Nations, which came into force (on October 24, 1945) upon the deposit of ratifications by China, France, the U.S.S.R., the U.K. and the U.S.A., *and by a majority of the other signatory states.*

The Amending Process

Any party may propose amendments to the treaty. The text of any proposed amendment shall be submitted to the depositary governments, which shall circulate it to all parties to the treaty. Thereafter, if requested to do so by one third or more of the parties, the depositary governments shall convene a conference, to which they shall invite all the parties, to consider such amendment (Article II (1)). Any amendment must be approved by a majority of the votes of all the parties to the treaty, *including the votes of all of the original parties.* In contrast, in the first stage of the process of amending or altering the United Nations Charter (Articles 108, 109), the permanent Members of the Security Council do not have a veto; their privileged position comes into play only in the second (ratification) stage of the process. This is why, on December 17, 1963, after many years of hesitation, the General Assembly could adopt amendments to Articles 23, 27 and 61 of the Charter increasing the number of the non-permanent Members of the Security Council and of the Members of the Economic and Social Council in spite of the negative votes of two permanent Members (France, U.S.S.R.) and the abstention of two others (U.K., U.S.A.).²⁹ At the ratification stage the original parties to the

²⁹ General Assembly Res. 1991 A (XVIII) (Security Council) and 1991 B (XVIII) (Economic and Social Council), U.N. General Assembly, 18th Sess., Official Records,

treaty (like the permanent Members of the Security Council in the case of the Charter) can prevent the coming into force of an amendment by mere passivity: the refraining of an original party from ratification is a veto. The amendment requires ratification by a majority of all the parties, including ratification by all the original parties.

In regulating the amending process, the treaty does not say when and where the conference is to be held, nor does it provide expressly who is entitled to decide these questions. The corresponding provision of Article 109 (1) of the Charter is to the effect that the date and place of the General Conference are fixed by a two-thirds vote of the Members of the General Assembly and by a vote of any seven Members of the Security Council. The treaty seems to imply that the right to decide on time and venue of the conference is vested in the original parties because they "convene" the conference and "invite" its participants. As we shall see later, the treaty is silent on the question, however, of what is to happen if the three Powers are not in agreement on these and other questions.

When an amendment to the treaty has been adopted, and ratified by a majority of the parties, including all three original parties, then it enters into force for all parties, including those which have voted against it or have not ratified it, excepting, of course, the original parties which, owing to their right of veto, cannot find themselves in this situation. In other words, parties other than the three original parties have vested the right to legislate for them in what one might call the "amending power" of the community of parties to the treaty. They are bound by the result of such legislation as long as they remain parties. The prerequisites for withdrawal from the treaty and other ways to terminate membership in this community are dealt with below.³⁰

In the course of the hearings on the treaty before the Committee on Foreign Relations of the United States Senate, Secretary of State Rusk said that if the Soviet Union, the United Kingdom and the United States were agreed on an amendment, they would find the amending process possible without a conference. He added that this would be the most expeditious and simplest way to deal with a problem.³¹ Similarly, the Report of the Committee on Foreign Relations to the Senate states that the conference is not a necessary part of the amending procedure.³²

If these statements mean that the three original parties, without the participation of the more than one hundred other (actual or potential) parties, can amend the treaty by agreeing among themselves on an amendment, they are hardly compatible with the provision of Article II (2) that *any* amendment to this treaty *must* be approved by a majority of the

Supp. No. 15 (A/5515), p. 21; Doc. A/P.V. 1285. In the vote on the Charter amendment relating to the composition of the Economic and Social Council, the representative of China also abstained, so that it was carried without the support of any permanent Member of the Security Council. By the end of March, 1964, these amendments to the Charter had been ratified by three Member States (Algeria, Jamaica and Thailand).

³⁰ See p. 660 below.

³¹ Hearings 34.

³² Committee Report 6.

votes of all the parties. If the statements only intend to indicate that the actual physical presence of the representatives of the more than one hundred governments in a conference room is not absolutely necessary, and that they could possibly cast their "votes" of approval by correspondence, then they do not necessarily appear to be contrary to the treaty. In general, one would assume that the non-nuclear Powers will hardly oppose an amendment to the treaty on which the United States, Britain and the Soviet Union are in agreement. This is almost certain if the amendment introduces additional limitations on the employment of nuclear energy. It is quite conceivable, however, that less powerful or non-aligned states would not be prepared to assent to an amendment which is less restrictive of the freedom of the nuclear Powers than the original terms of the treaty. It is also conceivable that a majority of small states might have reasons of their own to block an amendment on which the three original parties agree, *e.g.*, an amendment to give France a status equal to that of the original parties, an amendment which might eventually become necessary to procure France's accession to the treaty. It is not probable that France, under its present or, for that matter, any other government, would be prepared to accept the position of a second-class party even if the present power-political and ideological obstacles to her acceding to the treaty were removed. It is, indeed, surprising that the Nationalist Government of China, the government of a permanent Member of the Security Council, has signed without reservation³³ or protest a treaty which gives China a status inferior to that of the three original parties.

The "Original Parties" as "Depositary Governments"

The third of the privileges of the original parties is that they are also the "Depositary Governments." As such they are invested with functions which go beyond those of the depositary, usually one government or an international organization. Under the treaty the "Depositary Governments" are a kind of executive organ of the community of the states which are parties to the treaty, a "Security Council" without non-permanent members. In addition to the traditional technical and ministerial functions of a depositary, such as informing signatory and acceding states of the date of each signature, the date of deposit of each instrument of ratification and accession, et cetera (Article III (5)), they circulate proposed amendments and convene the amendment conference (Article II). These functions require decisions of controversial questions, especially as a consequence of the participation clause (Article III (1)), according to which the treaty is open to "*all States*" for signature and for accession, a clause which will be discussed presently. For the purpose of circulating proposed amendments to all parties to the treaty, the depositaries must

³³ In saying this, this writer does not wish to express an opinion on the question whether, the treaty being silent on the question of the admissibility of reservations and their effect, a unilateral reservation by China or any other signatory would have been admissible.

decide the preliminary question of which entity or state is and which entity or state is not a party. For the purpose of convening or refusing to convene an amendment conference, they must decide the preliminary question whether one third or more of the parties have requested it. The depositary governments decide whom to invite to the amendment conference.

The treaty does not say how the depositary governments exercise these functions and how they arrive at the necessary decisions. Does the "Troika" decide by unanimous vote only? Can it act by majority decision? Can each of the depositaries act independently of the other two? The text is silent on these questions, and *travaux préparatoires*, which could assist in their solution, are not accessible. The previous draft of August 27, 1962,⁸⁴ contemplated one depositary government so that the question of the voting of a board of depositaries did not arise under it. It will be mainly the parties' subsequent conduct which will throw light upon their intentions. The practice followed in connection with the signature of the treaty by states other than the original parties⁸⁵ seems to point towards the third of the three alternatives outlined above, i.e., that it is intended that each depositary can act independently of the other two. This, however, offers no complete answer to all the problems created by a plurality of depositaries. In his testimony before the Committee on Foreign Relations of the United States Senate, Secretary of State Rusk said that "No depositary need accept a signature or an instrument of accession from authorities in a territory it does not recognize as a state."⁸⁶ This leaves the question undecided whether a signature or instrument of ratification or accession accepted by one or two of the depositary governments, but not by all, is a valid signature or accession.

The decision whether a government is entitled to be seated at the amendment conference probably comes within the jurisdiction of that conference, which seems to follow from the treaty by necessary implication under the principle of the *Reparation for Injuries*⁸⁷ and *Effect of Awards of Compensation*⁸⁸ cases, where it was held that

⁸⁴ Note 8 above.

⁸⁵ Of the 105 signatories (other than the original parties)—see note 1 above—80 signed in Washington, London and Moscow; six signed in Washington and London: Cameroon, Korea, Niger, Portugal, Spain and Uganda; two in Washington and Moscow: Somalia and Yemen; one in London and Moscow: the Mongolian People's Republic; thirteen signed only in Washington: Burundi, Chad, China, Gabon, Guatemala, Haiti, Ivory Coast, Madagascar, Panama, Rwanda, Togo, Upper Volta and South Viet-Nam. The Byelorussian and Ukrainian Soviet Socialist Republics and East Germany signed only in Moscow. So did, of course, the original parties. South Africa deposited her instrument of accession in Washington and London. The sources for the data contained in this footnote are, in part, the German Parliamentary paper referred to in note 47 below and, in part, information kindly furnished to the writer by the Treaty Section of the United Nations Office of Legal Affairs.

⁸⁶ Hearings 18.

⁸⁷ *Reparation for Injuries Suffered in the Service of the United Nations*, [1949] I.C.J. Rep. at 182.

⁸⁸ *Effect of Awards of Compensation made by the United Nations Administrative Tribunal*, [1954] I.C.J. Rep. at 57.

Under international law the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.

The conference can, under the same principle, adopt its own rules of procedure.

The Participation Clause

The treaty is open to "all states" for signature or accession (Article III (1)).³⁰ This clause differs from those which have become usual in the post-World-War II period and, in particular, from those inserted in conventions concluded within, or under the auspices of, the United Nations. The latter usually stipulate that only states meeting certain requirements can become parties to the particular convention, such as states Members of the United Nations, Members of a Specialized Agency, parties to the Statute of the International Court of Justice, states invited to the conference which drew up the convention, or states invited to become a party by resolution of the General Assembly or of the Economic and Social

³⁰ In the course of the proceedings of the Three-Power Geneva Conference on the Discontinuance of Nuclear Weapon Tests, and with regard to the far more ambitious project of a draft treaty by which an international organization to control the prohibition would have been established, the United States, supported by the United Kingdom, proposed a "parties article," i.e., a participation clause under which, in addition to the U.S.S.R., the U.K. and the U.S.A., "any other state or authority" meeting certain requirements would have been eligible to be invited or admitted to membership by the preparatory commission or by the control commission of the contemplated organization (Doc. GEN/DNT/102, July 26, 1960). This text, as explained by Mr. Wadsworth as American representative, attempted to by-pass every political test for accession to the treaty. The words "state" and "authority" were suggested because they cover any conceivable political situation and can apply even to regimes not enjoying wide *de jure* recognition (Doc. GEN/DNT/P.V. 234, July 26, 1960). The U. S. proposal also contemplated a functional review of applications for membership by the control commission. The Soviet Union rejected the proposal as "incorrect," "reactionary," and as being at variance with the standards of international law (Doc. GEN/DNT/P.V. 238, Aug. 4, 1960). The Soviet Union proposed that "the Treaty shall be open for adherence by all other States which assume the obligations contained therein. . . ." (Doc. GEN/DNT/103, Aug. 4, 1960).

On April 18, 1961, the American and British delegations to the Geneva Conference submitted to it the text of a new draft treaty, Art. 19 of which ("Parties to the Treaty") no longer contained the words "or authorities" (Doc. GEN/DNT/110, April 18, 1961; also printed in Documents on Disarmament, 1961 (U. S. Arms Control and Disarmament Agency, Pub. 5, August, 1962), p. 62). Mr. Dean (U.S.A.) explained that the sponsors had decided that it was not juridically essential for the draft article to contain both of the two descriptive words "state" and "authority." In an effort to meet the Soviet point of view, they were prepared to drop the latter term, but they were satisfied that the use of "state" alone need not itself create any implication of political *de facto* or *de jure* recognition between two political entities which both become parties to the treaty but do not recognize each other bilaterally. Having met the U.S.S.R. in regard to this definition, the sponsors found all the more reason to hold the view that no state should be able automatically to become a party to the treaty (Doc. GEN/DNT/P.V. 297, April 25, 1961).

Council.⁴⁰ The rationale of these provisions has been not to burden the Secretary General with the task of deciding whether an entity which wishes to accede to a convention is a "state," a task which is delicate and politically explosive when the entity concerned is not recognized as a state by a group of Member states. A case of this type is, of course, the status of Eastern Germany which, according to a speaker's or writer's political preference, is designated as "the Soviet Zone of Occupation," as "Central Germany," as "Eastern Germany," or as "the Democratic Republic of Germany." Another case, although legally of a somewhat different character, is mainland China. The clause which provides for three depositary governments is designed to avoid, or to evade, the embarrassment which is caused by the differences among the original parties as to the status of East Germany and of the Chinese Communist Government. The difficulties arise in both camps. While, as we shall see, the Western Powers took great pains to assure the Government of the Federal Republic of Germany that the treaty does not imply the recognition of East Germany as a state, the representative of Albania in the General Assembly charged that the Government of the Soviet Union "has even recognized the signature of the Chiang Kai-shek clique on the Moscow Treaty."⁴¹

The Treaty and the Status of East Germany

United States and British Pronouncements

In his message to the Senate of August 8, 1963, with which he presented the treaty with a view to receiving the advice and consent to ratification, President Kennedy stated:

⁴⁰ For examples and their analysis, see Handbook of Final Clauses, U.N. Doc. ST/LEG/1, Aug. 28, 1951, pp. 80 *et seq.* ("Clauses establishing which States may become parties to the Convention"). More recent examples are the Conventions on the Status of Refugees (1951) and of Stateless Persons (1954), on the Political Rights of Women and on the International Right of Correction (1952), on the Abolition of Slavery etc. (1956), the Nationality of Married Women (1957); the four Conventions on the Law of the Sea (1958); the Conventions on the Reduction of Statelessness and on Diplomatic Relations (1961), on Consent to Marriage (1962) and on Consular Relations (1963).

In the resolution on "Participation in General Multilateral Treaties Concluded under the Auspices of the League of Nations," Res. 1903 (XVIII), Nov. 18, 1963 (U.N. General Assembly, 18th Sess., Official Records, Supp. No. 15 (A/5515), p. 69), the General Assembly invited to accede to the League of Nations conventions concerned any state "which is a Member of the United Nations or member of a specialized agency or a party to the Statute of the International Court of Justice, or has been designated for this purpose by the General Assembly." The Antarctic Treaty, Washington, Dec. 1, 1959, 54 A.J.I.L. 477 (1960), an instrument which politically has features comparable to those of the Test Ban Treaty of 1963 and which, like the latter, was concluded outside the United Nations, provides in its Art. XIII that it shall be open for accession by any state which is a Member of the United Nations, or by any other state which may be invited to accede to the treaty *with the consent of all the (original) Contracting Parties*, each one of which has thus a right of veto against the admission of any state which is not a Member of the United Nations.

⁴¹ U.N. Doc. A/P.V. 1285 (Provisional), p. 67, Dec. 17, 1963.

This treaty does not alter the status of unrecognized regimes. The provisions relating to ratification by others, and the precedents of international law, make it clear that our adherence to this treaty, and the adherence of any other party, can in no way accord or even imply recognition by the United States or any other nation of any regime which is not now accorded such recognition.⁴²

In the course of his testimony before the Senate Committee on Foreign Relations,⁴³ Secretary of State Rusk, in reply to suggestions that a regime might, by the act of subscribing to the treaty, gain recognition by parties to the treaty that do not now recognize it, stated that

No such effect can occur. In International Law the governing criterion of recognition is intent. We do not recognize, and we do not intend to recognize, the Soviet occupation zone of East Germany as a state or as an entity possessing national sovereignty, or to recognize the local authorities as a government. These authorities cannot alter these facts by the act of subscribing to the Test Ban Treaty.

The Secretary further said:

All this would necessarily follow from the general rule of international law that participation in a multilateral treaty does not affect the recognition status of any authority or regime. But this treaty contains additional safeguards. Treaties typically provide for a single depositary. Article III, however, provides that each of the three original parties will be a depositary of the treaty. No depositary need accept a signature or an instrument of accession from authorities in a territory it does not recognize as a state. The East German authorities will subscribe to the Treaty in Moscow. The Soviet Union may notify us of that act. We are under no obligation to accept that notification, and we have no intention of doing so, but the East German regime would have committed itself to abide by the provisions of the treaty. By this arrangement, we not only assure that no implication of recognition may arise, but we preserve our right to object if later the East German regime would seek to assert privileges under the treaty such as voting or participating in a conference called under Article II.⁴⁴

⁴² Message, *loc. cit.* note 4 above.

⁴³ Hearings 14 and 18.

⁴⁴ This statement is also repeated in the Committee Report 6-7. With regard to the Secretary of State's remark that, while the United States is under no obligation to accept a notification that the East German authorities have subscribed to the treaty, "the East German regime would [nevertheless] have committed itself to abide by [its] provisions," attention is drawn to Schwarzenberger's comments in "The Misery and Grandeur of International Law" (Inaugural Lecture, London, 1964, p. 11), which became available to the writer only after this article had been printed. Schwarzenberger's observation also applies to the precedent of the United States' reply to the notification that the "German Democratic Republic" had purported to accede to the 1949 Geneva Conventions for the Protection of War Victims, which the Legal Adviser invoked in Hearings, p. 17, summary in 58 A.J.I.L. 173 (1964). Then the American reply had been that the Government of the United States did not recognize the "German Democratic Republic." Bearing in mind, however, the purpose of the Geneva Conventions, it noted that the "Government of the German Democratic Republic" had accepted their provisions and indicated its intention to apply them.

Professor Schwarzenberger says:

"While no unilateral qualification by one depositary government can commit either

The Secretary of State's opinion was supported by an elaborate Opinion of the Legal Adviser of the State Department, which is documented by references to leading authorities and to the practice of the United States and other states. It also lists precedents from American and British practice showing that both governments considered that, when acting as depositary of a multilateral treaty, they could receive and circulate communications from regimes they did not recognize, without thereby extending recognition.⁴⁵ The Legal Adviser added that, in the case of the Test Ban Treaty, it was understood among the original parties that no depositary need accept a signature or communications from a regime that it does not recognize. He concluded:

Thus the contacts between the United States as depositary and unrecognized regimes will be kept to an absolute minimum, and below the level which the general rules of international law would permit in a depositary without implying any change in recognition status of unrecognized subscribers to the Treaty.

In a statement of August 3, 1963, the United Kingdom Foreign Office said that the signature of the treaty will not bring about any change in the relations between the United Kingdom and East Germany and that Her Majesty's Government did not intend to recognize the East German regime. Nor will the deposit with the Soviet Government of an instrument of accession by East Germany bring about any change. The position of Her Majesty's Government was in every respect the same as that explained by President Kennedy. In a joint communiqué issued on August 15, 1963, after a conference on the subject between the British and West German Foreign Ministers, the British statement was repeated. The United Kingdom Foreign Secretary pointed out that the British Government would have the right to oppose any attempt by the East German authorities to exercise rights based on the treaty and will not accept a Soviet notification of the East German signature. He added that the East German regime had, nevertheless, pledged itself to abide by the provisions of the treaty.⁴⁶

of the other two, they cannot have it both ways. Each depositary government may decide for itself whether it is prepared to regard an entity as a State. Yet, if a depositary government refuses to treat any particular entity as a State for purposes of the Treaty, it must accept the implication of its own decision and cannot claim that the Treaty imposes any obligations on such a 'non-State.' It is entitled to take this line, but it does so at the risk of jeopardizing the objects of the Treaty. If, however, it intends such an entity to be bound by the Treaty, it treats the 'non-State'—at least for purposes of the Treaty—as a direct addressee of rights and duties under international law, that is to say, as a subject of international law. This applies as much to the attitude taken over this Treaty by the two Western depositary governments towards the so-called German Democratic Republic (East Germany) as to that of the Soviet Union towards the so-called National Republic of China (Formosa).''

⁴⁵ Hearings 15-17; reprinted in 58 A.J.I.L. 171 (1964).

⁴⁶ The Times (London), Aug. 4 and 16, 1963.

The Position of the Federal Republic of Germany

When the Moscow Treaty was signed on behalf of the Federal Government of Germany on August 19, 1963, that government made a statement in which it said, in part:

The Federal Government whose duty it is to take care of the interests of the whole German nation, declares that by signing, ratifying and implementing the Treaty, the Federal Republic of Germany does not recognize any territory as a state or any regime as a government unless it has already recognized them previously. By stating this the Federal Republic emphasizes that it continues not to recognize the Soviet Zone of Occupation as a State and the agencies which have been established there as a government. Within the framework of this Treaty no contractual relations will therefore arise for the Federal Government with the Soviet Zone of Occupation or with the agencies which have been established there.⁴⁷

In its Memorandum on the Bill to consent to the treaty which the Federal Government presented to the Federal legislative authorities,⁴⁸ the Federal Government stated that "by making it possible for the Soviet Zone of Occupation to assume the obligations contained in the Treaty, the Treaty raises special problems for the Federal Republic of Germany." The Memorandum continues:

The Soviet Zone of Occupation is not a State, but a part of Germany where the Soviet Union by military force and with the assistance of the Socialist Unity Party which is dependent on it wields in fact power. The Soviet Zone of Occupation has not been recognized as a state by the community of nations; such recognition has been given to it only by States with Communist governments, i.e., only by a small minority of the Members of the community of nations. The Soviet Zone of Occupation was able to use the provision of Article III of the Treaty to sign in Moscow the copy of the Treaty which is deposited there with the Soviet Government; it is certain that the USSR as one of the Depositary Governments of the Treaty will make it possible to the Soviet Zone of Occupation to deposit in Moscow an instrument of ratification. The Federal Government has thoroughly considered which will be the international legal and the political consequences arising therefrom for the status of the Soviet Zone of Occupation and for the unity, in law, of Germany.

The Memorandum goes on to quote statements made on the non-recognition of Eastern Germany by President Kennedy at his press conference on August 1, 1963, and by a spokesman of the Department of State on August 2, 1963,⁴⁹ by President Kennedy in his message to the Senate, by Secretary of State Rusk before the Committee on Foreign Relations, and by President Kennedy in his letter to Senators Mansfield and Dirksen read in the Senate on September 11, 1963.⁵⁰ The Memorandum quotes also the

⁴⁷ Annex to the Memorandum accompanying the Bill to consent to the Moscow Treaty, presented by the Federal Government to the Federal Council (*Bundesrat*) on Oct. 25, 1963, Parliamentary print (*Drucksache*) 390/63, p. 11.

⁴⁸ *Ibid.* 6.

⁴⁹ Hearings 14-15.

⁵⁰ New York Times, Sept. 12, 1963.

statement to the same effect by the British Foreign Office of August 3, 1963, and the communiqué on a meeting between Lord Home as United Kingdom Secretary of State for Foreign Affairs and Federal Foreign Minister Dr. Schröder, held on August 14, 1963, already referred to. The American, British and West German governments have notified all governments with which they maintain diplomatic relations that no contractual relationship between them and East Germany will arise out of the treaty.⁵¹

The Treaty and West Berlin

The German Bill expressing parliamentary approval of the treaty provides that the Bill shall also apply to the *Land* Berlin, i.e., West Berlin, while due regard will be had to the rights and responsibilities of the Allied authorities and the jurisdiction vested in them in the fields of disarmament and demilitarization. According to an explanatory statement, this provision intends to clarify that, to the extent the treaty applies to nuclear test explosions for military purposes, the Allied reservations will not be affected.⁵² Treaties to which the Federal Republic is a party or statements made in relation to them often define whether and to what extent they apply to West Berlin.⁵³

THE QUESTION OF CHINA

There are important differences, political and legal, between the status of East Germany and that of the Communist Government of China. One stems from the fact that the United Kingdom recognizes and the United States does not recognize the Communist authorities as the government of China, while there is agreement between the two Western Powers on their attitude towards East Germany. In general, the Peking authorities have received more widespread recognition than those residing in East

⁵¹ Parliamentary print, note 47 above, p. 8.

⁵² *Ibid.* 1. See the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, Paris, Oct. 23, 1954, Art. 2, 49 A.J.I.L. Supp. 55 (1955); Protocol No. III on the Control of Armaments with Annexes, *ibid.* 134; and Declaration by the Federal Chancellor in Annex I thereto, *ibid.* 187.

⁵³ For example: When depositing on Nov. 13, 1952, its instrument of ratification of the European Convention on Human Rights of 1950, the Federal Government of Germany declared that the convention also applied to West Berlin; an analogous declaration was made on March 28, 1957, when the Federal Republic ratified the Protocol to the Convention of 1952 (European Commission on Human Rights, Documents and Decisions, 1955-1956-1957, pp. 41 and 52). At the time of signing the Treaty establishing the European Economic Community, and the Treaty establishing the European Atomic Energy Community, Rome, March 25, 1957, the parties to the Common Market and Euratom Treaties also adopted a "Common Declaration relating to Berlin" and took note of a Declaration by the Government of the Federal Republic of Germany concerning the application of the treaties to Berlin. The Federal Act expressing Parliamentary approval of the Franco-German Treaty of Co-operation of Jan. 22, 1963, provides that "This Act also applies in the *Land* Berlin provided the *Land* Berlin so determines." (Federal Act of June 15, 1963, B.G. Bl. II, p. 705.)

Berlin. The degree of outside interference in the establishment and maintenance in power of the two regimes has been and is different. The territory now under the domination of the East German authorities was incontestably part of pre-Munich and pre-World-War II Germany. Different views are held by different governments on the legal status of Formosa.⁵⁴ From the point of view of those who consider East Germany a state, it is a new state which exists in addition to the Federal Republic of Germany. Mainland China, on the other hand, according to the prevailing view, does not pose the problem of the recognition of a (new) state, but the problem of the recognition of the government of a state whose character as a state is not in doubt. A different opinion is also possible and often expressed considering the fundamental transformation of the Chinese body politic which the Communist revolution has wrought.⁵⁵ The prevailing opinion is, however, in accordance with international usage which, to list only a few examples, did not contest the identity of the international *persona* of pre- and post-Trianon Hungary; of the Kaiser's Germany, the Weimar Republic and of Hitler's Third Reich; of Italy under the constitutional monarchy, under Fascism and under the Republic; of Spain under the Bourbon Kings, under the Republic and under Generalissimo Franco, or of Cuba under Batista and under Castro. The prevailing view is also that of the General Assembly of the United Nations which, in a resolution on the "Representation of China, in the United Nations" sponsored by Australia, Colombia, Italy, Japan and the United States, and adopted in 1961, noted "that a serious divergence of views exists among Member States concerning the representation of a founder Member who is named in the Charter of the United Nations"; recalled "that this matter has been described repeatedly in the General Assembly . . . as vital and crucial and that on numerous occasions its inclusion in the agenda has been requested . . . as an item of an important and urgent character"; and decided, "in accordance with Article 18 of the Charter of the United Nations, that any proposal to change the representation of China is an

⁵⁴ See J. P. Jain, "The Legal Status of Formosa," 57 A.J.I.L. 25 (1963).

⁵⁵ For recent discussions of the legal status of the Peking authorities, see Jain, *loc. cit.*; Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* 152 (1963); Arthur Steiner, "Communist China in the World Community," *International Conciliation*, May, 1961, p. 448; "The International Position of Communist China," *The Hammaraskjold Forums, The Association of the Bar of the City of New York*, Dec. 2, 1963, where Eustace Seligman argued that the possible substitution of Communist China for Nationalist China would not involve the admission of a new Member but only a decision on credentials (*ibid.* 45). Professor McDougal, on the other hand, held that this was a case of succession of states rather than of the succession of governments, that the Peking authorities themselves are said to have claimed to be the organs of a new state and to have repudiated the treaties binding on the pre-1949 state of China. The distinction between "change of state" and "change of government," he said, has in the past varied with many different issues, and many of the past issues have, in contrast with the present conflict, been relatively trivial (Recorded statement of Dec. 2, 1963).

important question.”⁵⁶ This resolution would be meaningless if the admission of a new Member and not the change in the representation were involved, as “the admission of new Members to the United Nations” is by virtue of Article 18 (2) *ipso jure* an important question requiring a two-thirds majority and there is no room for applying Article 18 (3).

Replying to a question whether there was not going to be retaliation against the Western attitude to East Germany in regard to other countries that may sign the treaty in Washington, Secretary of State Rusk indicated that this was a problem which created some complications for both sides, *i.e.*, for the Soviet Union on the one side and Britain and the United States on the other. He added that, on the other hand, it was in the very nature of the treaty that it ought to have universal application, if possible.

Indeed, it will be a major object of policy from the point of view of the United States that the authorities in Peiping would consider themselves to be bound by this treaty if we could bring this about in some way.⁵⁷

Other Statements Reserving a Negative Attitude of States Parties vis-a-vis Non-Recognized States

In transmitting its instrument of ratification on January 10, 1964, the Government of the United Arab Republic stated that the ratification does not mean or imply any recognition of Israel or any treaty relations with Israel. The Government of Guatemala declared in its instrument of ratification of January 6, 1964, that the signature, approval, ratification and application of the treaty do not imply the recognition by Guatemala of any territory as a sovereign state or of any régime as a legal government which is not already recognized by her as such.⁵⁸

The Duration of the Treaty

Article IV of the treaty provides that it shall be of unlimited duration. This rule is qualified by a provision which says, in effect, that in certain circumstances, to be discussed presently, each party may denounce the treaty by giving notice of withdrawal three months in advance. This is a provision which is not extraordinary, nor does it give rise to any particular problems of interpretation. This is, simply, a treaty which, as countless others, contains provisions on its own duration and termination. Contrary to what has been said by political commentators, the rule *pacta sunt servanda* is not involved in and certainly not validated by Article IV. The right of withdrawal is part of the *pactum* and its exercise therefore not contrary to it.

Secretary of State Rusk informed the Senate Committee on Foreign Relations that the withdrawal clause was inserted on the insistence of the

⁵⁶ Res. 1668 (XVI), Dec. 15, 1961, U.N. General Assembly, 16th Sess., Official Records, Supp. No. 17 (A/5100), p. 66.

⁵⁷ Hearings 34.

⁵⁸ Information received from the Treaty Section, United Nations Office of Legal Affairs.

United States. The Soviet Union, he said, originally did not want a withdrawal clause, on the thesis that sovereignty permits the denunciation of a treaty in any event. The Western Powers were not at all satisfied with that view "because it gives too little respect to international law and to the obligations of a treaty and this is why the admittedly flexible withdrawal clause was inserted."⁵⁹

The somewhat disconcerting theory expounded by the Soviet negotiators to which the Secretary of State referred is not the one which Soviet lawyers usually support in their capacities as writers and legal scholars. On the contrary, they always stress the predominant rôle international treaties play in comparison with other sources of international law. While challenging the validity of "unequal" or "leonine" treaties and while making liberal use of a real or alleged fundamental change of circumstances or of the real or alleged violation of a treaty by another party as the basis for denouncing a treaty, the Soviet Government has hardly ever publicly proclaimed so radical a view as that which it apparently held in the course of the negotiations on the Moscow Treaty.⁶⁰ Whatever the state of co-ordination on this question among Soviet statesmen and lawyers may be, the doctrine of "national sovereignty" allegedly overriding treaty commitments is, unfortunately, reflected in the phraseology of Article IV when it says that each party has the right to withdraw from the treaty "in exercising its national sovereignty." The normative content of Article IV and its practical effect on the duration of *this particular treaty* would be exactly the same if these words were not in it. Each party can withdraw by virtue of the terms of the treaty without having to fall back upon "national sovereignty" as a justification. However, as an effect of these words, the idea may be read into the treaty that the more than one hundred governments which eventually will become parties to it have accepted the principle that the peremptory right to withdraw from any treaty of unlimited duration or, for that matter, also of limited duration flows from "national sovereignty." The danger of this use or abuse of these words does not arise in connection with the treaty itself but in what might be deduced from it as some novel principle of general application, a principle which would be destructive of international law.⁶¹ This danger is not too serious,

⁵⁹ Secretary of State Rusk, in Hearings 27-28 and 50.

⁶⁰ Krylov, "Les Notions Principales du Droit des Gens (La Doctrine Soviétique du Droit International)," 70 *Hague Academy Recueil des Cours* at 429 and 439 (1947, I); Tunkin "Co-existence and International Law," 95 *ibid.* 71 *et passim* (1958, III), and *idem* at the 1963 session of the International Law Commission, U.N. Doc. A/CN.4/SR.689, para. 65 and 66, May 29, 1963. See also: Shurshalov, "The Legal Contents of the Principle *Pacta Sunt Servanda* in International Relations" (German translation in *Gegenwartsprobleme des Völkerrechts*, Berlin (East), 1962), 132 *et seq.* (Selection of Contributions to the Soviet Yearbooks of International Law, 1958 and 1959); Triska and Slusser, *The Theory, Law, and Policy of Soviet Treaties* 118 *et seq.* (Stanford University Press, 1962); and McWhinney, "Peaceful Co-existence and Soviet-Western International Law," 56 *A.J.I.L.* 951 (1962).

⁶¹ P. Chandrasekhara Rao, *loc. cit.* note 1 above, p. 319, considers it possible that the reference to "national sovereignty" in Art. IV "may have far reaching effects on the general problem of withdrawal from international instruments."

however. In the absence of a binding and conclusive statement emanating from an international authority on the subject of the termination of treaties which contain no provisions regarding their termination (a category to which the Moscow Treaty does *not* belong), this writer believes that guidance on this question can be derived from the draft article dealing with the subject which was adopted at the 1963 session of the International Law Commission. It reads as follows:

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is *not* subject to denunciation or withdrawal *unless* it appears from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal.⁶²

To return to the unfortunate phrasing of Article IV of the treaty: In the light of all this it cannot have been, and has not been, the intention of the parties to throw the principle *pacta sunt servanda* overboard in favor of the anarchic idea of the unfettered right of a sovereign state to free itself unilaterally from a treaty obligation.

A German commentator suggests a different and, from his point of view, more sinister explanation for the reference in Article IV to "national sovereignty." He suspects that this phrase, in connection with the participation clause which has made it possible for East Germany to sign and to become a party to the treaty, may be invoked to support the view that East Germany is endowed with "national sovereignty."⁶³

The right to withdraw from the Moscow Treaty is not unlimited. The exercise of this right presupposes the existence of "extraordinary events, related to the subject matter of this Treaty" which "have jeopardized the supreme interests" of the withdrawing country. The existence of these extraordinary events is decided by the withdrawing country itself; the

⁶² I.L.C. Report on Work of Its 15th Sess. (1963), U.N. Doc. A/5509, p. 13, Art. 39 of the draft articles on the law of treaties; also in 58 A.J.I.L. 269 (1964) (emphasis added). The Commission's text was adopted by 14 votes to 2, but there was unanimous agreement on the proposition that a treaty cannot be unilaterally terminated unless at least the conditions stipulated in the draft are met (U.N. Docs. A/CN.4/SR.689, 709 and 717). There was no trace of any dissent from this basic proposition of draft Art. 39 in the course of the preliminary consideration of the draft articles in the General Assembly. For a summary of the preliminary discussion of draft Art. 39 by the Legal Committee of the General Assembly at the latter's 18th session in September/October, 1963, see the Report of the Sixth Committee, U.N. Doc. A/5601 (Nov. 6, 1963), par. 20, and U.N. Docs. A/C.6/SR. 783, 784. Draft Art. 39 was generally considered to be *lex lata*.

⁶³ Cornides, *loc. cit.* note 1 above, p. 590, commenting on Art. IV, says that if "one recalls the careful distinction between 'state' and 'authority' contained in the first American draft and the reasons given for it by Mr. Wadsworth in July, 1960, it is not quite easy to believe that the Americans and the British completely overlooked the political implication of the notion of 'national sovereignty' in the relationship between Bonn and Pankow. The Russians, in any case, must have had it in mind." The "first American draft" to which Mr. Cornides refers is Doc. GEN/DNT/102 of July 26, 1960, mentioned in note 39 above. "Pankow" designates the seat of the East German authorities.

right of "auto-interpretation"⁶⁴ is expressly stipulated.⁶⁵ The decision must nevertheless be made in good faith. An example of an "extraordinary event, related to the subject matter of the Treaty" which was mentioned in the proceedings of the Committee on Foreign Relations of the U. S. Senate would be nuclear testing by non-parties to the treaty.⁶⁶ However, the fact that testing in the prohibited environments has taken place is not the only basis for withdrawal. It is not desirable, it was said, to try to find "the exact boundaries on these extraordinary events related to the subject-matter" in advance. "This flexibility was something which we wanted and which the other side also wanted."⁶⁷ Important new technical developments in the fields of nuclear or conventional weapons, or the coming into force of an amendment to the treaty in spite of the opposition and vote of a party which wishes to withdraw, would, in this writer's view, be reasons justifying withdrawal by that party. A party withdrawing for reasons of this type would not be acting contrary to either the text or the spirit of the treaty.

It is not a necessary condition for the exercise of the right to withdraw from the treaty that the "extraordinary events" have their origin in a violation of the treaty by one of the other parties, although this might often be the case. It is necessary, however, to distinguish clearly between two different bases for the termination of the treaty relationship: "extraordinary events" which justify withdrawal under Article IV of the treaty on the one side, and, on the other, a material breach by a party which can be invoked as a ground for the suspension or termination of the treaty under the general provisions of the law of treaties. These will now be examined.

The Termination of an International Convention as a Consequence of Its Breach

Secretary of State Rusk stated the following about the effect of a violation of the Test Ban Treaty by a state party:

⁶⁴ The term was coined by Leo Gross in the *Festschrift for Kelsen, Law and Politics in the World Community* 76 (Lipsky, ed., 1953).

⁶⁵ "We need answer to no tribunal and to no authority other than our own conscience and requirements. . . . Certainly no President of the United States would hesitate to exercise the right of withdrawal if the national security interest requires it." Secretary of State Rusk, in Hearings 18. This statement is, of course, well founded as far as the application of Art. IV is concerned. It is also correct that, as Chandrasekhara Rao (*loc. cit.* 321) and Martin (*op. cit.* 79) have pointed out, the treaty itself does not contain a provision for dealing with differences as to its interpretation or application or for third-party adjudication. This does not mean, however, that there exists no applicable provision for the settlement of disputes concerning questions other than those relating to Art. IV. Many states parties have accepted, and others may accept, the compulsory jurisdiction of the International Court of Justice. Failing that, the parties are under the obligation to seek a solution "by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement," etc. (Art. 33 of the Charter). Both the Security Council and the General Assembly (Arts. 10 and 14) can be seized of disputes in this area.

⁶⁶ Hearings 180 (Secretary of Defense McNamara).

⁶⁷ *Ibid.* 51 (Secretary of State Rusk).

If the Soviet Union were to test in violation of the Treaty, the fundamental obligation that is the consideration for our adherence would disappear. In that case, the United States could, if it chose, consider itself released *from its reciprocal obligation and could resume testing without delay.*

He also said:

It is our view that we would not have to wait 90 days, because the obligation of the Soviet Union not to test in the prohibited environments is central to the very purposes and existence of this agreement, and it is clearly established through precedents of American practice and international law over many decades that where the essential consideration in a treaty or agreement fails through violation on the other side that we ourselves are freed from those limitations.

He added that "where the gut of the treaty collapses, we are not limited just by the withdrawal clause."⁶⁸

In this writer's opinion the Secretary of State's conclusion is well founded. However, in order to arrive at this conclusion it is necessary to dispose of an obvious difficulty which arises, in law, for the innocent party to a *multilateral* treaty which has been violated by another party. This difficulty is implied in the Secretary's reference to the *reciprocity of the obligation*. The problem is this: If, in the hypothetical situation of a fundamental or material Soviet violation of the treaty, the United States acquires the right to suspend the performance of its own reciprocal obligations under the treaty vis-à-vis the Soviet Union, it is by no means a self-evident consequence that the United States is also freed from its undertaking under the treaty vis-à-vis other innocent parties, say, India, Ghana, or Mexico. However, if, in the hypothetical case, the United States continued to be bound by the prohibitions of the treaty for at least three months (Article IV) vis-à-vis India, Ghana, or Mexico, then its right to suspend the operation of the treaty in its relationship with the Soviet Union would be a shell. The situation would, of course, be the same if the United States were the defaulting party and the Soviet Union the innocent party. As it has been so well said: "Good sense and equity rebel at the idea of a State being held to the performance of its obligation under a treaty which the other contracting party is refusing to respect."⁶⁹ The Legal Adviser of the U. S. Department of State based his argument in support of the Secretary of State's conclusion on this point on the work of the International Law Commission's previous Special Rapporteur on the Law of Treaties, Sir Gerald Fitzmaurice, now a Judge of the International Court of Justice.⁷⁰ A central feature of Sir Gerald's Second Report on the Law of Treaties was, to summarize his elaborate argument, to distinguish, in regard to the effect of a violation of a multilateral treaty

⁶⁸ *Ibid.* 18. Cf. 58 A.J.I.L. 179 (1964).

⁶⁹ Sir Humphrey Waldock, Second Report on the Law of Treaties, U.N. Doc. A/CN.4/156, Add.1 (mimeographed), April 10, 1963, p. 37.

⁷⁰ Sir Gerald Fitzmaurice, Second Report on the Law of Treaties, U.N. Doc. A/CN.4/107, March 15, 1957, 2 I.L.C. Yearbook (1957) 54.

by one party, between two categories of treaties. To one category belong treaties where neither juridically nor from the practical point of view the obligation of any party is dependent on a corresponding performance by the others. In these cases the obligation has an absolute rather than a reciprocal character; it is, so to speak, an obligation towards all the world rather than towards particular parties. If such a treaty is violated by one party, the other parties, according to Sir Gerald, continue to be bound. From these treaties he distinguished a second category, viz., treaties which create obligations which are not absolute.

He said, speaking of treaties in the *first* category, that

Thus, a fundamental breach by one party of a treaty on human rights could not justify termination of the treaty . . . even in respect of nationals of the offending party. The same would apply as regards the obligation of any country to maintain certain standards of working conditions or to prohibit certain practices in consequence of the conventions of the International Labour Organization; or again under maritime conventions as regards safety at sea.

As an example and illustration of the *second* category of treaties Sir Gerald mentioned treaties on disarmament. He stated:

In the latter case, and unless the contrary is expressed by the treaty, the obligation of each party to disarm . . . is necessarily dependent on a corresponding performance of the same thing by all the other parties, since it is of the essence of such a treaty that the undertaking of each party is given in return for a similar undertaking by the others.

It is not surprising that the Legal Adviser of the Department of State adduced Sir Gerald Fitzmaurice's example of a disarmament treaty to argue that the nuclear test ban is of the same character as a disarmament treaty and that the undertaking of each party to refrain from testing nuclear weapons was given "in return for a similar undertaking by each of the other parties."⁷¹ This writer has already stated that he agrees with the result at which the Secretary of State and the Legal Adviser have arrived. He is not sure, however, that the combination of the arguments of Sir Gerald Fitzmaurice and of the Legal Adviser dispels all doubt about that conclusion. There is doubt whether the two categories of treaties and treaty obligations defined by Sir Gerald Fitzmaurice are as distinct and as watertight as appears on first sight. On the one hand, there is an element of reciprocity, *e.g.*, in the very idea of international labor legislation as witnessed by the Preamble to the Constitution of the International Labor Organization (Part XIII of the Peace Treaty of Versailles) according to which the parties were moved to establish the Organization not only "by sentiments of justice and humanity" but also by the consideration that "the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries." If—in an entirely hypothetical case—after 1919 a major industrial Power had repealed its hours of work legislation and a

⁷¹Hearings 40; see 58 A.J.I.L. 179 (1964).

working week of, say, 72 or more hours had been introduced, it is debatable, to say the least, whether the parties to the Hours of Work (Industry) Convention, 1919, could have been expected to continue to observe it. On the other side, it could conceivably be claimed that a treaty concluded by parties "desiring to put an end to the contamination of man's environment by radioactive substances" is nearer to a human rights, world health or safety at sea convention than to a disarmament convention, particularly as the Moscow Treaty, as we have seen, does not prohibit underground testing, stockpiling and even the use in war of nuclear weapons. This writer believes therefore, that the argument used by the Legal Adviser and based on Sir Gerald's Report of 1957 requires strengthening in order to carry full conviction, and an attempt to present additional considerations pointing in this direction will now be made.

Sir Gerald Fitzmaurice's successor as Special Rapporteur on the law of treaties of the International Law Commission, Professor Sir Humphrey Waldock, did not take as the basis of his work his predecessor's division of multilateral treaties into different categories by reference to the nature of their obligations. He doubted whether, as the law stands today, they can be said to be of decisive importance in the present connection, and stressed that, however true it may be that certain types of treaty may establish obligations of an objective character, there remains a contractual element in the legal relation created by the treaty between *any two parties*. "No doubt," he said, "if one party violates a [multilateral] treaty, another innocent party cannot, *as a rule*, individually release itself on that account from its obligations under the treaty because of its undertakings to the remaining contracting parties."⁷² Later in his Report Sir Humphrey said:

It is conceivable, however, that because of the key position held by the defaulting State in the whole régime of the treaty . . . the general body of the parties to the treaty might wish to terminate or suspend the whole treaty. . . . But in cases such as these, where the defaults of a key State or of a number of States go far to *undermine the whole treaty régime*, it seems desirable that individual parties should also have the right not merely of terminating their treaty-relation with the defaulting State but of withdrawing altogether from the treaty.⁷³

He therefore proposed the insertion in the draft article concerned of a proviso that

if a material breach of a treaty by one or more parties is of such a kind as to frustrate the object and purpose of the treaty also in the relations between the other parties not involved in the breach, any such other party may, if it thinks fit, withdraw from the treaty.⁷⁴

⁷² Waldock, *op. cit.* 47.

⁷³ *Ibid.* Emphasis added.

⁷⁴ *Ibid.* 86. It is of interest to note that the Harvard Research in International Law (29 A.J.I.L. Supp. 1077, 1089-1090 (1935)) does not recognize a similar right of the innocent party. Nor does the American Law Institute Restatement of the Foreign Relations Law of the United States (Tentative Draft No. 3, 1959, Sec. 143, text in Bishop, *International Law Cases and Materials* 196-197, 2nd ed., 1962), afford protection to the aggrieved party in the hypothetical circumstances which have been the starting point for our investigation.

This writer believes that Professor Waldock's approach is apt to lead to an equitable solution of the complex problem which occupies us here. It must be added, however, that his proposal for a proviso as just cited is not embodied in the draft article (Article 42) as adopted by the International Law Commission. Nor is his idea reflected in the Commission's commentary on its own draft.⁷⁵

The International Law Commission, in accordance with most of the writers and studies of the subject, including Sir Humphrey Waldock's Report, distinguishes in regard to our problem between bilateral treaties on the one hand, and multilateral treaties on the other. Under its draft Article 42, a material breach of a *bilateral* treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. On the other hand, a material breach of a *multilateral* treaty by one of the parties entitles:

(a) Any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part *in the relation between itself and the defaulting State*; (b) The other parties *by common agreement* either: (i) To apply to the defaulting State the suspension provided for in subparagraph (a) above; or (ii) To terminate the treaty or to suspend its operation in whole or in part.⁷⁶

Article 42 of the Commission's draft, as distinct from Article 39 which we have considered earlier, contains much which is "progressive development" of international law rather than "codification," i.e., suggestions *de lege ferenda* which do not, at least not in the opinion of all concerned, represent the law as it is. Such new rules would, as the representative of the United Kingdom pointed out, require very careful study and must be subjected to constructive criticism before they could be accepted as part of present-day international law.⁷⁷ The representative of Ghana drew attention to the very problem which is occupying us here. He said:

Although the suggested provision of article 42 . . . gave rise to no difficulty in the case of bilateral treaties, an injured State party to a multilateral treaty might be unable to persuade all the other parties to terminate it. The injured State would then theoretically remain a party to the treaty and could do no more than suspend its application.⁷⁸

The representative of the United States⁷⁹ stated that paragraph 2 of draft

⁷⁵ The records of the session do not show why no action was taken on this particular suggestion by the Special Rapporteur. It appears that some members were of the opinion that the definition of a "material breach" in par. 3(b) of draft Art. 42: "The violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty," takes care of Sir Humphrey's point which, in this writer's opinion, is hardly the case. ⁷⁶ I.L.C., *op. cit.* 16-17.

⁷⁷ Miss Gutteridge, in U.N. Doc. A/C. 6/SR.786, Oct. 8, 1963.

⁷⁸ Mr. Dadzie, in U.N. Doc. A/C. 6/SR.791, Oct. 14, 1963. The summary record does not show whether, by the last sentence quoted in the text, the representative meant "suspend the application" *erga omnes* or only in the state's relationship with the offending state. He must have meant the former, as the latter is covered by the Commission's draft.

⁷⁹ Mr. Plimpton, in A/C. 6/SR.784, Oct. 4, 1963.

Article 42, i.e., the part dealing with multilateral treaties, "appeared to some extent to disregard the varied nature of multilateral treaties." It could be applied to what he called a "law-making treaty" on such a subject as disarmament, whose observance by all parties was essential to its effectiveness, but his delegation doubted that the paragraph should apply equally to a multilateral treaty like the Vienna Convention on Consular Relations, which was essentially bilateral in application. It is true that a disarmament convention is a "law-making treaty" in the sense that by being an international convention it "makes law." It is equally true, however, that if in discussions of problems of this type one speaks of "law-making treaties," one has in mind treaties of an objective character such as treaties in the human rights, labor, health, and safety-at-sea fields as distinct from, and opposed to, treaties which, according to, e.g., Sir Gerald Fitzmaurice⁸⁰ and the Legal Adviser of the State Department,⁸¹ create only reciprocal rights between the parties, and which for this very reason are *not* "law-making" treaties. Of those a disarmament treaty was given as an example. What the representative must have meant was that paragraph 2 of draft Article 42, under which an innocent party would have to remain a party to a multilateral convention in spite of its breach (except in its relationship to the guilty party), should *not* be applied to a disarmament convention, but that it *could* be applied to a consular convention as essentially bilateral in application, with the effect that State A, whose rights under the Vienna Convention on Consular Relations had been violated by State B, would be entitled to invoke this violation as a ground for suspending the operation of the convention between itself (A) and State B, but would remain bound by the convention vis-à-vis the other parties. In the same intervention the representative of the United States made suggestions which have a bearing on the problem we are here investigating. According to these suggestions (the changes suggested by the United States are underlined), a material breach of a multilateral treaty by one of the parties would entitle:

(a) *Any other party whose rights or obligations are adversely affected by the breach* to invoke the breach as a ground for suspending the operation of the treaty . . . between itself and the defaulting State.

It will be noted that this text does *not* afford a remedy for the situation in which the United States would find itself in the hypothetical case repeatedly referred to if, following upon a violation of the Test Ban Treaty, it remained obligated to abstain from testing vis-à-vis third parties. Such a breach would, under the U. S. suggestion, further entitle "(b) the other parties *whose rights or obligations are adversely affected by the breach*" either to apply the suspension or to terminate the treaty. This right would be vested in "the other parties," and not, as it would be according to the Commission's draft, in "the other parties by common agreement." The deletion of the words "by common agreement" without more would

⁸⁰ See Sir Gerald Fitzmaurice's distinction, summarized above at note 70.

⁸¹ See at note 71 above.

not, in this writer's view, necessarily give the right to withdraw from the treaty to any other, *i.e.*, innocent, party individually.

This is how the Report of the Sixth Committee sums up the relevant part of the preliminary discussion of draft Article 42:

Some representatives held the view that, in the case of multilateral treaties, the International Law Commission had not taken account of the fact that many multilateral treaties are essentially bilateral in application and that, therefore, the rules applicable to bilateral treaties should apply in the event of a breach of multilateral treaties.⁸²

If it is true that every multilateral convention has bilateral features and that, beyond that, many multilateral treaties are essentially bilateral in application, then it must be said that in regard to the obligations undertaken in Article I (the substantive article of the treaty) the bilateral or, if one does not consider America and Britain as one party in the same interest, trilateral elements are so preponderant that one could possibly say without fear of being accused of exaggeration that Article I is a bilateral or trilateral treaty provision in disguise, that it is, at present at least, bilateral or trilateral in substance, and multilateral in form only. If this is so, then considerations of equity not only permit but require the piercing of the veil of the multilateral character of Article I of the treaty and its treatment, as far as the consequences of a material breach are concerned, as a treaty provision among the three original parties. What the law in this regard would be if other nuclear Powers acceded to the treaty, or if some of the present signatories or parties became nuclear Powers, need not occupy us here. The organizational, procedural and final clauses of the treaty (Articles II to V) are, of course, genuinely multilateral provisions of which it cannot be said that they are bilateral in application.

The conclusion which this writer submits is therefore that a material breach of Article I of the treaty by the Soviet Union would entitle the United States and the United Kingdom to suspend or to terminate the treaty. In such a situation they would not have to give three months' notice in advance as stipulated in Article IV. A breach by the United States would, of course, give to the Soviet Union a corresponding right. In that hypothetical case it would probably be inequitable to hold the Soviet Union to its commitment towards the United Kingdom, if the United Kingdom were an innocent party. The preceding statement applies, of course, only to the situation as it exists at the beginning of 1964. It would no longer apply if France or the Communist Chinese Government were to ratify the treaty or if one or more of the present signatories or parties were to enter into the nuclear field.

*Fundamental Change of Circumstances (the Question of the
Clause Rebus Sic Stantibus)*

What rôle, if any, has the doctrine of a fundamental change of circumstances, generally known as the clause *rebus sic stantibus*, to play in this

⁸² U.N. Doc. A/5601 (note 62 above), par. 22.

scheme of things? As the International Law Commission has stated,

many authorities have in the past limited the principle [of the clause *rebus sic stantibus*] to so-called perpetual treaties, that is, to treaties not making any provision for their termination. The reasoning by which this limitation of the principle was supported by these authorities did not, however, appear to the Commission to be convincing. When a treaty had been given a duration of ten, twenty, fifty or ninety-nine years, it could not be excluded, that a fundamental change of circumstances might occur which radically affected the basis of the Treaty. The cataclysmic events of the present century showed how fundamentally circumstances may change within a period of only ten or twenty years. . . . The Commission accordingly decided that the rule should be framed . . . as one of general application, though for obvious reasons it would seldom or never have relevance for treaties of limited duration or which are terminable upon notice.⁸³

The Special Rapporteur was of the view that "when a treaty is for a brief term or is terminable upon notice, the application of the doctrine is clearly without any utility."⁸⁴ The periods involved in the Moscow Treaty, which provides for three months' notice, are in a category different from those contemplated by the Commission, but as the present treaty is at the very center of the potentially cataclysmic developments to which the Commission has alluded, one would not wish to consider recourse to the *clausula* completely impractical, while agreeing with the Commission and its Special Rapporteur that the probability of its invocation is infinitesimal.

⁸³ I.L.C., *op. cit.*, Commentary on draft Art. 44, par. 8, p. 22; 58 A.J.I.L. 288-289 (1964).

⁸⁴ Sir Humphrey Waldock, *op. cit.* note 69 above, Commentary on his draft Art. 22, par. 10, pp. 67-68.

DISPUTE SETTLEMENT: THE CHICKEN WAR

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"Chicken War" is a quip for a long-festering controversy that in the summer of 1963 bristled with menace of a possible trade war between the United States and the European Economic Community. Actually, no outbreak of hostilities eventuated; for, in good time, basis for a détente was found. This entailed resort to a dispute-resolution machinery, made possible because of the existence of an organized international forum in which countries have gained experience in the tasks of harmonizing trade interests. How the controversy started, burgeoned and was disposed of illustrates the complications arising from the creation of the Common Market and the ways devised for coping with these and other complications afflicting international trade.

I. BACKGROUND

In the latter 1950's, the American poultry industry discovered and began exploiting a thriving outlet in Germany. The phenomenal advances made in the United States in rationalizing the raising, processing and distribution of poultry into a low-cost mass-production business enabled American exporters to land chickens in German profitably, even after payment of shipping and handling charges and the German import duty of 15% c.i.f. (the average equivalent of about 4½¢ per pound). The main brake on market expansion, in step with the rapidly developing demand for the attractively priced American product, was an administrative restriction enforced by the German authorities. As this restriction was progressively relaxed, in compliance with Germany's international obligations, sales grew apace: in 1958, \$2.5 million; in 1959, \$12.5 million; in 1960, \$23.0 million; in 1961, \$35.5 million; and by 1962, fair prospect of soon passing an annual rate of \$50 million. But on July 1 of 1962, the E.E.C.'s import regime for poultry came into effect, whereunder Germany's national tariff was replaced by an import fee of approximately 13½¢ per pound.¹ In face of this, American shipments fell off sharply to a level of about \$20 million annually.

This curbing of its poultry trade was understandably quite objectionable to the United States. However, the degree of indignant sternness that suf-

¹ This tripling of rate, it may be noted, reflected only in part an increase in protective incidence (designed to offset local production costs, e.g., grain prices and the state of technology). In part, the increase represented commutation of the national subsidy theretofore paid local producers but discontinued under the E.E.C. regulations. Note: trade statistics cited in this paragraph are on a German-import basis, converted from marks to dollars, rounded.

fused the American reaction is hard to explain in terms of chickens alone. The over-all balance and trend of United States trade with E.E.C. is very satisfactory. Total exports have been rising year by year, to a volume now approaching \$4 billion annually; and the United States has been selling more to E.E.C. than buying from it in the profitable ratio of 3:2. In the restless kaleidoscope of foreign trade, some items inevitably fall off and others rise, one year to the next; but to the E.E.C., the rises have been more than the drops.² In this perspective, the loss of a few million chickens was hardly catastrophic—when account is taken additionally of the fact that the reduced volume is still above the 1958–1961 average; that the German market is of peripheral importance to the American poultry industry as a whole;³ and that the long-range outlook there was not rosy, even had the old duty regime continued, considering the likelihood that the Europeans would soon master the technology and reacquire a competitive edge on their own side of the Atlantic.⁴ It may be presumed, therefore, that the stakes were probably bigger.

Chickens are one of an inter-related group of products on which precise determination of the E.E.C.'s import-regulation system had been delayed, awaiting agreement within E.E.C. about its Common Agricultural Policy; and chickens were the first of that group affecting American rights on which the import fee was definitely decided and imposed. The high level at which the fee was set could be interpreted as reflecting on its face a victory for protectionist tendencies which, if they got their head, presaged later decisions prejudicial to the sale of other agricultural products to E.E.C. The more immediate concern was the rest of the group (various grains) of which the poultry trade represented a fractional part. Beyond was the larger question of policy orientation as it would otherwise affect American agricultural exports to the E.E.C., a trade amounting to \$1.2 billion in 1961/1962 but down by \$125 million in 1962/1963. In the background lay the still larger question of effective trade-promotion tactics generally: the degree of forceful diligence with which the Government ought to prosecute American trade interests wherever found, in this day of worry over the United States balance of payments.⁵ Finally, the chicken affair had

² The recent record of U. S. exports to E.E.C. has been as follows (in billions of dollars): 3.46 (1960), 3.55 (1961), 3.63 (1962), 3.77 (1963, prelim.). Imports: 2.26 (1960), 2.23 (1961), 2.45 (1962), 2.48 (1963, prelim.).

³ While Germany has been the main foreign market developed to date, the recent drop-off there amounts to the equivalent of only about 1% of total American poultry production, as measured by 1961 and 1962 statistics.

⁴ The technique efficiently combines organization, management, selective breeding and an extremely low feed-meat conversion ratio. The one "natural" advantage the Americans have, so long as agricultural policy within E.E.C. keeps grain prices high, is cheaper feed; as offset the Europeans have the advantages of propinquity and lower transportation and labor costs.

⁵ The legislative history of the current trade agreements law, the Trade Expansion Act of 1962 (76 Stat. 872), suggests Congressional desire for a stiffening of the Government's posture in dealing with foreign harassments of American trade. Accordingly, the President's retaliatory authority, as previously set out in Sec. 350 (a)

precedent-making legal implications; the dispute, stripped of its politico-economic underlay and its tactical overlay, was about issues of legal right and obligation, with roots reaching back into the formative origins of the European Economic Community.

II. DEVELOPMENT OF THE DISPUTE

The E.E.C., being in its commercial aspect a Customs Union, merges four separate customs territories (France, Germany, Italy and the Benelux), each with its own distinctive tariff structure, into a single customs territory with a different tariff structure. Obviously this cannot be accomplished without a wholesale unmooring and re-casting of pre-existing duty rates—including rates (numbering in the thousands) as to which the E.E.C.'s constituents had theretofore contracted commitments immunizing them from tampering. These commitments had been undertaken for value received in reciprocal tariff negotiations conducted from time to time in the past with third countries; and they had been recorded as "bindings" in the schedules attached to the master multilateral instrument to which they adhered in company with numerous other countries: the General Agreement on Tariffs and Trade (GATT).⁶

Provision in principle for resolving the dilemma thus posed—of how legitimately to "unbind" the contractual rates of the E.E.C.'s members, a step indispensable to the realizing of their Customs Union, and of how practicably to do so without unraveling the whole world-wide fabric of contractually reduced tariffs into which they were interwoven—is made in Article XXIV, paragraph 6, of GATT. This paragraph asserts that the right to form a customs union, acknowledged in paragraphs 4 and 5 of the same article, carries with it the obligation to replace pre-existing rate commitments with a suitably commensurate array of new ones:

6. If, in fulfilling the requirements of sub-paragraph 5 (a) [*i.e.*, taking the tariff steps implicit in constructing a customs union], a contracting party proposes to increase any rate of duty inconsistently with the provisions of Article II [*i.e.*, breach a binding], the procedure set forth in Article XXVIII shall apply. In providing for compensatory adjustment, due account shall be taken of the compensation already afforded by the reductions brought about in the corresponding duty of the other constituents of the union.

The process is one of "compensating." The last sentence of the above-

(5) of the Tariff Act of 1930 as amended, was considerably amplified during the bill's passage (Sec. 252, as enacted). See the pertinent Committee reports: House Report No. 1818 (pp. 21-22, 42-43, 72) and Senate Report No. 2059 (pp. 2-3, 17-18), 87th Cong., 2d Sess.

⁶ The current text is reproduced in Department of State Pub. 7182 (1961), *The General Agreement on Tariffs and Trade*. The version originally signed is T.I.A.S. No. 1700, Oct. 30, 1947; for chronology of increments and revisions, see *Treaties in Force*. Members ("contracting parties") numbered 62 in April, 1964. To "bind" means to establish contractually the maximum rate permissibly chargeable on a given product (or specifically guarantee customs treatment otherwise),

quoted passage draws attention to the element of compensation inherent in the fact that some rates will be coming down at the same time others are going up, in arriving at the union's common-denominator tariff. But whether and how the obligation is discharged is not for the union and its members to decide unilaterally; affected third countries also must be satisfied.

Article XXVIII, incorporated by reference, covers generally the contingency arising when a contracting party to GATT desires for any reason to modify or cancel any binding to which it is committed.⁷ *Inter alia*, it calls for negotiation with a view to prior agreement with interested parties on the compensation owed in the way of replacement bindings; it visualizes a result that will "maintain a general level of reciprocal and mutually advantageous concessions not less favorable to trade than that provided . . . prior to such negotiations"; and it provides for the remedy available to affected parties in the event the intending party moves ahead without having reached agreement with them.

A Conference designed to afford the necessary negotiating opportunity (known as the "XXIV:6 negotiation") was convoked in Geneva on September 1, 1960.⁸ As of that date, the E.E.C.'s constituents were still applying their respective national tariffs upon trade with outside countries, awaiting completion of the first stage of the three-stage E.E.C. "transitional period" then in course.⁹ The preliminary schedule of the Conference allotted four months for the XXIV:6 negotiation, in hope that it could be finished at least in major substance by the date set for the first adjustment to the E.E.C. "common external tariff" (January 1, 1961). This was a vain hope; the agreement process, involving a tandem of bilaterally conducted negotiations, proved to be in many particulars tedious and drawn-out.¹⁰ In the case of the United States, which had nominal or real

⁷ Special contingencies are also provided for in Arts. XVIII (measures for Economic Development) and XIX (Emergency Action to deal with unforeseen serious injury or threat thereof).

⁸ The Conference agenda included also a "second phase," negotiations for reciprocal tariff reductions of the usual sort (the so-called "Dillon round").

⁹ Actually, E.E.C. is a customs union *in posse*, pending consummation of the current "transitional period." This is logged for 1972 at latest, though as of now, E.E.C. is several years ahead of schedule and may hence complete its transition to full-blown customs union *in esse* much earlier. As provided in Arts. 14 and 23 of its Charter (the Treaty of Rome, signed March 27, 1957), during the first stage its constituents reduce their tariffs *inter se* in three successive installments of 10% each; and upon thus attaining a 30% dismantling of "internal" tariffs, each makes the first adjustment in its tariff on trade with outside countries, by stepping 30% of the way toward the E.E.C. common "external" tariff, upward or downward as the case may be.

¹⁰ The E.E.C.'s constituents, nevertheless, proceeded with their first step to the common external tariff. The problem raised by so altering duty rates before completion of negotiated agreement about them was attenuated by the fact that the changes, besides being fractional, involved more lowering than raising of rates. This resulted from an E.E.C. decision (May, 1960) that this first step would as a rule be scaled as though the common external tariff (typically, an average of the national rates) had been reduced by 20%. Furthermore, the contentious "variable-fee" agricultural products were

claims of varying substantiality as to roughly half the positions in the E.E.C. tariff, the point of conclusion was reached only after eighteen months, with signature of a package of five agreements on March 7, 1962.¹¹ Even so, this did not spell definitive settlement as to positions affecting about 10% of United States trade. For this residual unsettled area, it was in effect agreed that the search for a mutually acceptable solution should be carried over. Just how this was done is described below.

The group of products carried over, few in number but large in trade volume, consisted of wheat, rice, corn, sorghum and poultry. The difficulty over them, which proved insoluble during the period of the Conference, grew out of the E.E.C.'s intention to detach their import regulation from the normal regime of the fixed rate of duty, and to place them instead under a regime of variable import fees. Because the fees were to be variable, the E.E.C. was unable to make exact, mensurable rate commitments about them. Because its internal farm policy (the Common Agricultural Policy) was still undetermined and beset by unresolved differences of opinion, the criteria correlatively applicable to foreign trade were also still to be settled. Hence, E.E.C. resisted tying its hands with other commitments about them, in lieu of fixed rates, except with respect to one sub-classification of the group (hard wheat).¹² The difficulty was compounded by the certain prospect that the import fees were going to be higher, presumably much higher, than the old fixed duties, with consequent danger of serious impairment of the market access of outside suppliers.¹³

left alone *de facto*. It was tacitly understood that the six months allowed by Art. XXVIII, for the taking of redressive action by a dissatisfied party, would not toll until the end of the Conference. (Otherwise the right of retaliation, accruing in default of agreement, would have lapsed six months following May 29, 1961, when E.E.C. officially notified the contracting parties of the "withdrawal" of the old national bindings).

¹¹ T.I.A.S. Nos. 5018, 5021, 5033, 5034 and 5035. The first two contained the lists of tariff concessions agreed in the XXIV:6 and Dillon-round phases, respectively; and these were subsequently integrated into the schedules of the multilateral instrument that consolidated the results of the Conference and brought it formally to conclusion, the Protocol to the General Agreement on Tariffs and Trade Embodying Results of the 1960-61 Tariff Conference, opened for signature at Geneva July 16, 1962 (T.I.A.S. No. 5253). The other three, to which the E.E.C.'s member states were individually party as well as E.E.C. itself, were not so integrated. For summary of the results of the XXIV:6 negotiation, as completed to this point, see Analysis of United States Negotiations, 1960-61 Tariff Conference, Vol. I, pp. ii, iii, iv-v, 1-8, 27 (Department of State Pub. 7349, released March, 1962).

¹² T.I.A.S. No. 5035. More exactly, the commodity covered is "blé de qualité," which comprehends a greater range of varieties than the American term "hard wheat," here used loosely. Correspondingly, the residual range of varieties (loosely termed "soft wheat," but more accurately designated as "blé ordinaire") cuts off at a lower point in the array of descending hardness than does American "soft wheat." E.E.C. found it feasible to single out hard wheat for a commitment because it is a type not grown in the E.E.C. area, owing to lack of proper soil and climatic conditions; hence it was expected that E.E.C. consumers would continue to be dependent on foreign sources for their requirements.

¹³ E.E.C. officials contended that this was not the intention, in the over-all; but

The E.E.C. did not fail to acknowledge an obligation to make good on valid claims founded on the old bindings of its constituents. *Arguendo*, it could contend that the commitment it was prepared to undertake with respect to hard wheat discharged its obligation regarding that commodity, on the theory that it was to all intents and purposes the equivalent of the old binding in a different form.¹⁴ With respect to the rest of the group on which the United States advanced and maintained claims, however, in default of a comparable undertaking, E.E.C. would have to contend either (1) that the claim was unfounded, or (2) that the claim should be considered to have been satisfied by the "built-in compensation" embodied in the totality of its XXIV:6 offers.¹⁵ In connection with the latter line of argument, E.E.C. could adduce a computation on the basis of net changes in percentage point of duty rate, in relation to volume of trade affected, tending to show that the composite of its offers was in excess of the composite of its obligations;¹⁶ and that the resulting "credit" was more than sufficient to offset the maximum "debit" with which it was chargeable on account of its failure to accord reparation in terms of the particular agricultural products in question.

Granted the arithmetical correctness of such computation, nevertheless, the United States was not obliged to consider that the E.E.C.'s offers vouchsafed the compensation to which it was entitled. The right of each affected party to judge for itself the adequacy and acceptability of proffered compensation is clear enough under the terms of Article XXVIII (above). Beyond the exhortation to maintain "a general level" of concessions "not less favorable to trade" than previously obtaining, there are no objective criteria or standards, particularly none regarding the component elements of the balance. Here, the United States was concerned with preserving an equitable distribution of benefits among the major sectors of the economy; and the E.E.C.'s proffered excess lay mainly in the industrial parts of the tariff nomenclature, irrelevant to the problems of

rather to put import control on the straightforward basis of a single levy which would not necessarily be more restrictive of trade merely because it was higher than the old fixed duties. A clean sweep was to be made of the tangle of surcharges, equalization fees, licensing controls, mixing regulations, etc., which had in practice tended to render the old fixed duties ineffectual in many instances.

¹⁴ The agreement in effect commits E.E.C. in a general way regarding continued access for hard wheat. The commitment is not as precise as a normal "binding," but the general aim was to work out a mutually acceptable substitute in due course that would afford equivalent protection for the trade. This was accompanied by interim assurances regarding maintenance of the established volume of trade.

¹⁵ In the run-of-the-mill Art. XXVIII case (as well as the XVIII and XIX contingencies, note 7 above), a rate is unbound precisely because it is to be raised or otherwise restrictively modified; and consequently the remedy is perforce compensation rather than restoration. This is apart from the Art. XXVIII situation arising because a country is changing over to a new tariff classification system without intent of raising general incidence, a mixed situation analogous in microcosm to that arising in the formation of a customs union.

¹⁶ An illustrative computation of the sort, prepared by U. S. technicians, may be found in the table printed on p. 7 of the Analysis cited in note 11 above.

American farmers. Insofar as the excess related to agricultural products, its sufficiency was open to serious question on qualitative grounds; the new concessions did not bid to evoke additional trade equaling the losses to be anticipated from cancellation of the old bindings.¹⁷

The poultry difficulty was compounded, moreover, by a wide difference in view as to just how much of a claim the United States was rightfully in position to espouse. So, when the two parties finally decided to put a term to their part of the Conference business by formally settling what they could and carrying over the rest, the only aspect of the poultry argument disposed of was that the United States had not been satisfied.

III. RESOLUTION

The agreement covering poultry and related commodities (T.I.A.S. No. 5034) preserved for the United States whatever "negotiating rights" it had as of the day negotiations had opened, September 1, 1960. These rights would be the basis for treating with E.E.C. when the pre-existing legal conditions governing importation were slated for change, as the consequence of decisions taken within the framework of the Common Agricultural Policy. Meanwhile, the old national rates—or, more exactly, national import systems no less advantageous to trade—would be continued by the E.E.C.'s several constituents. The poultry controversy was re-activated, accordingly, when the E.E.C. import fee was determined and Germany moved (July 1, 1962) to substitute it for its old national rate.¹⁸

Under the Article XXVIII ground rules, a claim sufficiently cognizable to establish "negotiating rights" depends on the claimant's standing as either "initial negotiator" or "principal supplier."¹⁹ The old German bound rate originated as a concession to Denmark, as part of a reciprocal bargain struck between that country and Germany in a past tariff negotiation. The case espoused by the United States, therefore, turned on its ranking as "principal supplier." Both this relative question and the absolute question of the magnitude of its cognizable trade depended on the trade statistics to be used, and how they were to be interpreted. In general, the base year used for statistical purposes in the XXIV:6 exercise was 1958, the latest for which complete and comprehensive compilations had been prepared as of the opening of negotiations.²⁰ These statistics,

¹⁷ The main new agricultural concession citable for "credit" was the alignment to zero of the Italian 6% duty on cotton, an essential industrial-use raw material not produced in Western Europe. The United States has traditionally been preponderant supplier (about \$75 million to Italy in 1958, and 63% of the E.E.C. area's total import); and suppression of the small Italian duty was unlikely to effect any visible betterment in the trade.

¹⁸ The rate then actually being applied was slightly higher (by about one percentage point) than the former bound rate of 15%, as consequence of Germany's having meanwhile taken the first step to an 18% rate originally fixed in the common external tariff and later abandoned by E.E.C. in favor of the variable import fee.

¹⁹ There is also a category of lower rank, the "substantial supplier," entitled only to "consultation," although also authorized to retaliate if dissatisfied.

²⁰ The task of up-dating these figures comprehensively during the early stages of

taken at face value, averaged out satisfactorily in the normal run of cases. But they were not satisfactory to the United States in the particular case of poultry, and the two sides were unable to settle on a mutually agreeable statistical basis.

In 1958 the United States did not show actually as the leading source of German poultry imports, by far: \$2.5 million as against \$7.5 million from Denmark. That year, however, was not representative because first, the importation of American poultry was being artificially hampered by the discriminatory administrative restrictions applied by the German authorities; and, secondly, that year did not reveal the expanding trend of the trade and the level to which it had risen by the time of the XXIV:6 negotiation. In 1959, American poultry exports to Germany moved to approximate equality with the theretofore first supplier (Denmark) and in 1960 passed beyond, despite the continuance of (modified) restrictions favoring that country; and when the United States was finally accorded equal access, by rescission of the regulations in April, 1961, it established incontestable predominance.²¹ The guidelines laid down by the GATT in the premises are simply that ascertainment should be made in light of trade performance "over a reasonable period of time prior to the negotiation," considering what might have been expected to obtain "in the absence of discriminatory quantitative restrictions."²² These guidelines, while setting a helpful general principle, leave considerable room for argument: over what constitutes a "reasonable period" and over the value to be constructively attributed to the trade occurring in that period.

In the continued failure of agreement following imposition of the import fee, the United States made known its intention of invoking the provision of Article XXVIII allowing the aggrieved party "to withdraw substantially equivalent concessions" by way of redressing the balance that had been upset by cancellation of the old poultry binding. Since the United States placed a valuation of \$46 million on its claim,²³ this would mean the unbinding of United States duty rates applicable to a like amount of E.E.C. trade; and the unbinding would mean retaliatory rate increases on that trade. To that end, the Executive set in motion the relevant domestic procedures: issuance on August 6, 1963, of a public announcement of hearings on a tentative list of products from which it was proposed that the final retaliatory selections would be made.²⁴ While these procedures were unrolling, further diplomatic discussions brought a meeting of minds

the Conference would have been extremely laborious, as it would have required the conversion of statistics collected in terms of the several and differing national nomenclatures into the nomenclature of the common external tariff.

²¹ Imports from Denmark, as against those from the U. S., were as follows (in \$ millions): 13.0 vs. 12.5 (1959), 20.0 vs. 23.0 (1960), 27.5 vs. 35.5 (1961). In the four years 1958-1961, the U. S. thus moved from \$5 million behind to \$8 million ahead.

²² Annex I of the GATT, note 4 ad Article XXVIII.

²³ This appears to have been based on a market analysis taking account of rate of growth, in light of supporting information concerning performance after September, 1960. The \$46 million happens to equal 1960 actual statistics plus 100%.

²⁴ 28 Fed. Reg. 8066. Hearings were slated to open Sept. 4, 1963.

between the two parties on concurrently requesting the Council of Representatives of GATT to appoint an impartial panel charged with giving an advisory opinion on the valuation of United States poultry exports. Pursuant to this request, transmitted in mid-October, the Council designated a five-member panel made up of the Executive Secretary of GATT (Mr. Wyndham-White), and Messrs. Montan (Sweden), Weitnauer (Switzerland), Campbell-Smith (Canada) and Donovan (Australia), sitting at Geneva under the following terms of reference:

To render an advisory opinion to the two parties concerned in order to determine:

On the basis . . . of the rules and practices under the GATT, the value (expressed in United States dollars) to be ascribed as of 1 September 1960, in the context of the unbindings concerning this product, to United States exports of poultry to the Federal Republic of Germany.²⁵

The panel promptly organized, invited submission of written briefs, heard oral argument, and handed in its opinion under date of November 21, 1963: the amount of \$26 million.²⁶ In its written statement of reasons, the panel noted that it had taken account only of information which it considered could have been known on September 1, 1960, the date on which the "books had been closed," so to speak, for purposes of the negotiation under Article XXIV:6. In the panel's view, the "practice normally followed" has been to "lay particular emphasis on the period for which the latest data were available"; hence, since the latest data "which could reasonably have been expected to be available" on a September 1 would run up to June 30 of the same year, the reference period chosen was fiscal year July, 1959 through June, 1960. The figure actually showing for this period was then adjusted upward to the constructed figure of \$26 million, inasmuch as "it was in accordance with the normal practice of the GATT for a correction to be made . . . to take account of the discriminatory quantitative restrictions."²⁷ The panel ventured no opinion on the law of the controversial claim and no action recommendation; none had been called for by its terms of reference, which by design had been framed neutrally as a question of fact, without prejudice to the juridical position of either party.

Thus, other elements of the controversy remained open: the applicability of Article XXVIII and the status of the claim under it. As noted above,²⁸

²⁵ Press release GATT/817, Oct. 30, 1963 (Information Services of the GATT, Villa le Bocage, Geneva).

²⁶ Text as released by the official spokesman of the E.E.C., Brussels, Nov. 21, 1963, No. IP(63)197; reprinted in 3 Int. Legal Materials 116.

²⁷ As guide to probability, the panel examined experience in a nearby market (Switzerland) that was free of quantitative restrictions; and generally verified its calculations by reference to experience in Germany during the twelve months following repeal of Germany's discriminatory restrictions (April, 1961). The panel did not reveal the details or mechanics of its arithmetic; but the result corresponds to the actual trade during the period July, 1959-June, 1960 (\$17.9 million) adjusted upward by roughly 45%.

²⁸ Note 11 above.

the vehicle in which poultry had been provided for in the package of agreements of March 7, 1962, was a special bilateral engagement not incorporated into the multilateral Final Protocol that formalized the conclusion of the Conference and integrated its results into the GATT framework. The package included, moreover, a United States acknowledgment of the E.E.C.'s formal "withdrawal" (i.e., cancellation) of the old German binding on poultry.²⁹ *Quaere*: Did this mean that rights and obligations with respect to poultry had been placed on an extraordinary basis detached from the GATT and the operation of its Article XXVIII?

This question gets its significance from the fact that that article, in providing for recourse to retaliation, is concerned only with the extent to which each side is legally committed—not with the material trade damage suffered by the offended party.³⁰ So, if E.E.C. releases itself without requite from a commitment covering \$26 million of U. S. trade, the corresponding redressive right of the United States is to release itself from commitments covering an equal amount of E.E.C. trade. It is irrelevant how high each side then sets its tariff, or how much constriction of the trade flow either way ensues, with respect to the products on which the parties have thus regained their freedom of action. But if this normal GATT rule is inapplicable, the alternative approach would be to focus on actual injury caused; and the purpose conceived for having the panel would be to determine what, if any, loss contrary to E.E.C.'s obligations had been inflicted on the poultry trade by E.E.C. act.³¹ Thereupon, the fact of loss having been established and its extent ascertained, the issue would be confined to repair of the damage (as measured by the loss that occurred: i.e., \$6 million, the difference between the panel's \$26 million and the \$20-million level to which the trade had fallen after the E.E.C. import fee came into effect). This could be accomplished either by \$6 million worth of indemnification or by easing the access of poultry to that extent, or a little of both, depending on what the parties could arrange after further discussion—or, if instead the United States still felt constrained to retaliate, the retaliation would be limited to the amount of the loss, a mere fraction of that allowed under the rule of Article XXVIII.

This being a case of first impression, there were no precedents from which to argue; and as the language of the agreement was cryptic, different views regarding intent, equity and purport were possible. The words used in the agreement as to carry-over of "negotiating rights" were as follows:

B. Upon adoption of the agricultural policy for corn, sorghum, ordinary wheat, rice and poultry, the Community undertakes to enter into

²⁹ T.I.A.S. No. 5018.

³⁰ Par. 8 (a) of Art. XXVIII provides that the dissatisfied party has the right to "withdraw . . . substantially equivalent concessions initially negotiated" between it and the offending party.

³¹ This is the approach visualized as being appropriate by a responsible official of the E.E.C. Commission (press conference held in Brussels, Oct. 16, 1963, for purpose of announcing the plan for the panel procedure: background notes prepared for the press, but not available for quotation).

negotiations with the United States on the situation of exports of these products by the United States.

The negotiations provided for under this paragraph will take place on the basis of the negotiating rights which the United States held under the General Agreement for these products as of September 1, 1960.

A catch-all proviso stipulated: "C. The parties signatory to this agreement in no way limit their rights under GATT or on any other basis." The text was completed by a paragraph A that pledged the Member States "not to modify their national import systems in such way as to make them more restrictive" during the interval pending implementation of the Common Agricultural Policy.

The United States considered that its right to proceed under the rule of Article XXVIII had been integrally preserved;³² and it acted accordingly, accepting the panel's advisory figure as the measure of the retaliation. A Proclamation issued December 4, 1963, suspended the trade-agreement duties on certain products on which reduced rates had theretofore been bound to the E.E.C. or its constituents,³³ and covering together imports from the E.E.C. of some \$24 million f.o.b. (the approximate equivalent of the c.i.f. figure used by the panel). Thereupon these products became dutiable at the considerably higher statutory rates; but, as already suggested, whether the resultant punishment to E.E.C. by way of trade loss (or, for that matter, to the American consumer by way of higher prices) is commensurate with the losses suffered by American poultry exporters is immaterial from the Article XXVIII viewpoint.³⁴ A further incidental feature of the action is that, being non-discriminatory (as required by international obligation, according to one of the recitals of the Proclamation), the like products of third countries are likewise subject to the changed rates, thus laying the United States open to injury complaints from them. However, the amount of the incidental injury appears to be minor; third-country trade in the products selected is less than a million dollars, dispersed among several suppliers.³⁵

The retaliatory rates came into effect on January 7, 1964, an interval after promulgation sufficient to allow compliance with the GATT require-

³² The rationale of this position would presumably involve the following considerations: that the negotiating rights preserved by B were patently those defined by the GATT; that A was calculated, in effect, to maintain unbroken the continuity of the old duty commitments; and that the caveat in C was unqualified.

³³ 28 Fed. Reg. 13247.

³⁴ The products and rate changes are: Trucks valued over \$1,000 (8½% to 25%), brandy valued over \$9 per gallon (\$1.00/1.25 to \$5.00 per gallon), potato starch (1¢ to 2½¢ per pound), dextrine (1.125¢ to 3¢ per pound). Over half the trade is in the first-named item, German-produced. On the heels of the duty increase, the price of Volkswagen trucks, delivered at East Coast ports, was raised by \$237 (Journal of Commerce, New York Times, Jan. 7, 1964). During the first four months of 1964 (a period, however, too short to be conclusive), imports of German trucks were at a level about 60% below the 1963 showing.

³⁵ A dispatch datelined London in the Herald Tribune for Jan. 13, 1964, reported a Board of Trade opinion to the effect that the small but hopeful American market for British light vans had been destroyed by the duty increase; and that the British Government therefore ought to demand recompense.

ment that the Contracting Parties be given 30 days' notice. So far, E.E.C. has not evinced intention to press disagreement with the United States action to an issue. Meanwhile, the terms of the Proclamation (reciting "until such time as the President . . . otherwise proclaims") anticipate termination of the retaliation if an adequate amelioration of the E.E.C.'s poultry fee can be agreed.³⁶ And there the matter rests.

IV. CONCLUSION

As matters stood prior to the panel, the rationale of the E.E.C.'s position was such that it could very well have felt constrained to counter-retaliate if the United States had carried through its announced intention of inflicting duty increases on \$46 million of E.E.C. trade. For, in E.E.C.'s view, this would have been either altogether unwarranted or grossly excessive; and it could have considered that the appropriate magnitude of the counter-retaliation called for was the full \$46 million.³⁷ The United States would then have been back where it started, and by the same token urged to a vigorous reaction in order to make its original point. Whether and to what extent the E.E.C. would have counter-retaliated, and how far thrust and counter-thrust would have been allowed to go, can now only be conjectured.³⁸ In any event, an unfruitful deterioration of relations, commercial and otherwise, seemed probable; each side would have

³⁶ A spokesman for a leading poultry export firm is reported to have urged that a settlement be sought on the basis of a fee rate of 10¢ per pound (Journal of Commerce, Dec. 26, 1963, p. 19, col. 3), as a compromise that would be more constructive than a retaliation which helped poultry not at all. Earlier, the E.E.C. had offered to settle on the basis of a one-tenth reduction in the fee (bringing it down to approximately 12¢ per pound), in return for an American quit-claim; but this amelioration was not sufficient to be acceptable. (AP dispatch, Washington Evening Star, Sept. 25, 1963, p. A-10, col. 2).

³⁷ Just how much would have depended on the E.E.C.'s final position regarding the law applicable. On the eve of the decision to establish the panel, the E.E.C. was willing to concede a maximum valuation of \$19 million (AP dispatch cited note 36 above; New York Times, Oct. 30, 1963, p. 53, col. 1; E.E.C. information "back-grounder" of Aug. 9, 1963)—a figure got by adding 50% to the actual trade statistics for 1959 and rounding out the resulting sum. One possibility would have been to deduct this from the amount of the counter-retaliation. Another, *inter alia*, would have been to make no deduction, on the theory that the claim had been satisfied by virtue of the fact that Germany had demonstrably been allowing entry of \$19 million and more since imposition of the E.E.C. import fee.

³⁸ Counter-retaliation would have required concurrence of all Member States. Such concurrence had readily materialized on the previous occasion when the United States had unjustifiably, in E.E.C.'s view, raised duties seriously affecting E.E.C. trade (the hike in U. S. duties on carpets and glass pursuant to an "escape-clause action," April, 1962). There the E.E.C.'s right to retaliate was unquestioned, even though the United States had offered to negotiate compensation. Here, however, scrupulous fidelity to GATT principles would have precluded further action until after appeal to the Contracting Parties under Art. XXIII (below) and their sanction. Or so it would appear. In the pre-panel period, there had been rumblings of an E.E.C. intent to counter-retaliate, if the United States carried out the threatened \$46 million retaliation; but whether, in that event, E.E.C. deemed prior resort to Art. XXIII necessary, is not clear.

had at stake its prestige, its determination to protect its rights, and its sense of justice.

The creation of the panel, to serve in an advisory capacity as expert appraiser of a market-place valuation, gave the disputants a graceful way to veer off from a collision. The panel proceeding did not purport to settle the dispute conclusively, either in whole or in part. But by offering a solicited opinion on the key question in a commercial transaction ("How Much"), backed by the moral authority stemming from the circumstances of its formation and the repute of its membership, the panel provided in fact the basis for at least heading off a crisis. The United States, while taking a considerable scaling down of what it considered its due, got a nonetheless substantial valuation and an implicit strengthening of its general legal position.³⁹ The E.E.C. got the avoidance of an excessive *ex parte* penalization of its commerce and relief from the compulsion it might have been under to take the onus of responding in kind. The objectively determined valuation provided a pole around which all concerned could rally in good conscience.

The panel was an improvisation, not explicitly provided for or implicitly envisaged by the wording of GATT and not copied from any precedent in GATT's annals. There is a dispute-settlement procedure in GATT, Article XXIII; but resort to it would evidently have been considered premature during the period of evolution of the poultry controversy here being reviewed. Basically, Article XXIII is designed to afford recourse for a party aggrieved by the action of another. Up until the point of United States retaliatory action, the aggrieved party was the United States, in the poultry affair. The retaliation it took, however, was by virtue of Article XXVIII; and there was no reason for it to invoke Article XXIII before proceeding under Article XXVIII. That article is self-sufficient in the premises: if agreeable compensation for an unbinding is not forthcoming, the right to commensurate retaliation is automatic.⁴⁰ Now that the retaliation has been taken, suitable opportunity for a recourse to Article XXIII has been opened for the E.E.C., should it choose thus to challenge the United States' action.⁴¹

³⁹ The figure found by the panel meant that the United States was clearly principal supplier in fact.

⁴⁰ There is, however, one feature that is not automatic: determination of "principal supplier." Technically this is the function of the Contracting Parties; but in practice they do not exercise it unless appealed to. Had the United States wished to bring the poultry dispute before the Contracting Parties, this path could have been taken in lieu of going to Art. XXIII. Another technicality not observed in this case, apparently by tacit consent for reasons of mutual convenience, was the six-months' limitation on taking of retaliatory action (note 10 above); otherwise the U. S. retaliatory right expired Dec. 31, 1962, at latest.

⁴¹ The E.E.C. might conceivably have gone to Art. XXIII at an earlier stage, had it wished, inasmuch as the grounds for invocation of it are stated broadly enough to have given the E.E.C. *prima facie* an appealable grievance as from the time the United States gave unmistakable evidence of an intent to retaliate in the summer of 1963. Among the considerations militating against such an E.E.C. initiative was, undoubtedly, its position that the bilateral agreement had taken the poultry matter outside the GATT.

The special panel procedure agreed to by the disputants differs in a number of respects from the Article XXIII procedure. Resort to that article makes the controversy the official business of the collectivity of GATT's membership, the CONTRACTING PARTIES.⁴² Once seized of a dispute, their duty is to get it disposed of in full; and to that end they have jurisdiction to pronounce such definitive rulings and recommendations as they see fit. The panel procedure kept the matter restricted, except for chosen professional counsel on a stipulated point; and it committed the disputants to the least possible extent.⁴³ Under Article XXIII, the aim primarily is conciliation. The endeavor thereby implied, to guide the parties, if possible, to a solution ascertainably acceptable or tolerable to both, puts emphasis on patience rather than rush.⁴⁴ The panel deliberated *in camera*, without the presence of the disputants; made the appraisal it considered objectively correct, without hint of such compromise devices as "splitting the difference"⁴⁵ or reconciling the analyses of the adversaries; moved with unhesitating dispatch; and left it to the disputants to make whatever they wished of its finding.

The situation in which the panel functioned was one in which time was running out. The United States was bent upon acting without more delay; and the immediate question was how drastically. Fortunately, there were in GATT adequate resources on which to draw for the needs of the moment, and a resiliency allowing improvisation sufficient unto the need. It is difficult to conceive where else the disputants could have been actuated to turn, or found it expedient to turn. Anyhow, the dispute was GATT-related, having stemmed from a tariff concession which the United States had not negotiated but to which it had acquired rights by virtue of GATT, and having then developed out of a GATT procedure (Article XXIV:6). That procedure, designed to police the formation of customs unions, had in major part worked out successfully—impressively so, considering the immensity and complexity of the novel phenomenon to which it was addressed in the E.E.C. case. Where it had not, in the particular instance of poultry, it was a hopeful test of GATT's stature and growth

⁴² The form CONTRACTING PARTIES is that used in the GATT to denote the contracting parties acting jointly for the conduct of the GATT's corporate business.

⁴³ Conversely, the terms of reference had the virtue of minimizing the extent to which the panelists might be forced into the position of seeming to take sides. This sort of consideration, as well as the corollary diffidence customarily shown by countries toward impleading or being impleaded in public view, doubtlessly tends to influence decision-making with reference to taking disputes to the Contracting Parties.

⁴⁴ References to Art. XXIII proceedings are indexed under "Conciliation" or "Complaints—conciliation" in the GATT's annual gazette, the periodic Supplements to Basic Instruments and Selected Documents. For two recent examples of the techniques employed—playing for time and concord, nudging complainee to mend its ways while urging complainant to be forbearing—see handling of U. S. complaints against Canada and France. *Ibid.*, Eleventh Supp. (1963), pp. 55, 88-95.

⁴⁵ The panel's finding was \$7 million above the figure advocated by E.E.C. and \$20 million below that espoused by the U. S., and the correction factor it used was 45% as against the 50% and 100% used respectively by the two contestants in their analyses, it will be recalled.

in effectiveness that new channels could be opened within its framework for keeping within bounds the latent destructive energies unleashed by the ensuing dispute.

The controversy at its height was rare enough, in the humdrum of international commercial intercourse, to win the attention of the general public press. This, plus the fact that these powerful antagonists should have been inspired to take their difference to the panel as well as uncomplainingly accept its facultative verdict, surely betokens advance achieved since the war in bringing a sense of orderliness into the conduct of international trade relations. For the United States, it meant yielding on 44% of its claim and also submitting to an arbitration *de facto*, if not *de jure*, on Executive responsibility—all without stirring a noticeable bobble from Congress and editorial writers.

Resort to the panel was avowedly exceptional, for this one case, in addition to being attended by cautious pre-conditions. Nevertheless, now that the experiment has been safely ventured with such creditable result, a precedent⁴⁶ has been established persuasively demonstrating the value of the arbitral method for at least some GATT-related problems. Its utility would be as a supplement to existing dispute-resolution procedures, for the feasibility of the method will undoubtedly remain limited, owing to the fact that the building of free-will collaboration in an area so heavily permeated with the demands of expediency and economic interest has necessarily led to primary emphasis on persuasion, accommodation, conciliation and individual self-discipline, rather than legalism, in the conduct of the GATT's business. Yet this pragmatism is a matter of emphasis; and as emphasis it is neither preclusive nor incompatible with progressive enlargement of the rule of law. Differences do arise, sometimes troublesome ones, that staunch pragmatists can recognize to be suited to legal decision by adjudicatory process.

GATT's architects made no provision for arbitration or judicial settlement because, with reason, they deemed that anything explicit beyond the flexible procedures of Article XXIII would be premature. But this is no bar to engrafting the arbitral method into the practices of GATT, as another step in the institutional evolution that has characterized GATT's history. The taking of the step depends merely upon the readiness of parties to accept the method as filling an appropriate rôle in the regulation of their commercial relations. Members—at least, those long habituated to associating together in their joint endeavor—may by now have become sufficiently accustomed to the idea of system and subordination to common legal rule as to have reached the point of such readiness for selected instances. This would appear to be the reading to be taken from the United States-European Economic Community experience.

⁴⁶ It should be noted that the precedent consists in the way the panel came to be created and given its terms of reference, and in its functioning arbitrarily, in direct relation to the two disputants and not intermediately. "Panels" as such have been used before, in the capacity of adjuncts to assist the Contracting Parties in acting on complaints brought under Art. XXIII; and this embryonic experience with panels may be assumed to have helped pave the way for what was done in the chicken dispute.

THE UNITED STATES-BULGARIAN CLAIMS AGREEMENT OF 1963

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After two and one-half years of negotiation,¹ an agreement settling claims of the United States against Bulgaria was signed at Sofia on July 2, 1963.² Under its terms Bulgaria will pay a lump sum of \$3,543,398 in settlement of the claims of United States nationals arising out of war damage, nationalization of property and certain financial debts.³ Together with the Rumanian lump-sum settlement of 1960,⁴ which it closely parallels, the Bulgarian agreement constitutes a unique development in postwar international claims practice, for it follows rather than precedes a unilateral adjudication of the claims by the Foreign Claims Settlement Commission,⁵ a United States national claims commission acting pursuant to domestic claims legislation.⁶ Avoiding some of the problems of its predecessor, so ably considered in an article by a former Department of State attorney,⁷ the present agreement "merits analysis, not only for the benefit of private claimants involved, but also for a general understanding of technical, concrete experience in settling international disputes in a day when the chief talk revolves about grandiose schemes of the rule of law."⁸

I. THE BACKGROUND OF THE AGREEMENT

Article 23(1) of the Treaty of Peace with Bulgaria, which entered into force on September 15, 1947, required Bulgaria to restore all legal rights and interests in Bulgaria of United Nations nationals as they existed on April 24, 1941, and to return all property in Bulgaria of United Nations nationals as it existed on February 10, 1947, the date of the treaty.⁹

¹ Negotiations began on Jan. 12, 1961. 44 Dept. of State Bulletin 150 (1961).

² Agreement with Bulgaria, July 2, 1963, 49 Dept. of State Bulletin 189 (1963), T.I.A.S. No. 5387.

³ Art. I.

⁴ Agreement with Rumania, March 30, 1960, 11 U. S. Treaties 317, T.I.A.S. No. 4451; 54 A.J.I.L. 742 (1960).

⁵ See, generally, Lillich, *International Claims: Their Adjudication by National Commissions* (1962) (hereinafter cited as Lillich).

⁶ In this case Title III of the International Claims Settlement Act of 1949, as amended, 69 Stat. 570 (1955), 22 U.S.C. §1641 (1958).

⁷ Christenson, "The United States-Rumanian Claims Settlement Agreement of March 30, 1960," 55 A.J.I.L. 617 (1961) (hereinafter cited as Christenson).

⁸ *Ibid.* at 621.

⁹ Treaty of Peace with Bulgaria, Feb. 10, 1947, 61 Stat. 1915, T.I.A.S. No. 1650; 42 A.J.I.L. Supp. 179 (1948).

When property could not be returned or when, as a result of the war, property in Bulgaria had been damaged, United Nations nationals were to receive from Bulgaria compensation "to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered."¹⁰ Claims of United States nationals clearly were covered by use of the term "United Nations nationals," defined to include

individuals who are nationals of any of the United Nations, or corporations or associations organized under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status at the date of the Armistice with Bulgaria.¹¹

Unfortunately for American claimants, Bulgaria made no effort to fulfill its Peace Treaty obligations. Moreover, at the same time it was flouting these commitments, Bulgaria also embarked upon an extensive nationalization program which culminated in the taking of most American-owned property.¹² Although the claims caused by the harsh Bulgarian measures were relatively small, both in number and amount,¹³ Bulgaria did not provide just compensation for them as required by international law.¹⁴ This failure, coupled with a general deterioration of relations between the two countries, caused the United States to suspend diplomatic relations with Bulgaria on February 20, 1950.¹⁵

¹⁰ Art. 23(4)(a).

¹¹ Art. 23(8)(a).

¹² Sipkov, "Postwar Nationalizations and Alien Property in Bulgaria," 52 A.J.I.L. 469 (1958). See also Gutteridge, "Expropriation and Nationalisation in Hungary, Bulgaria, and Roumania," 1 Int. and Comp. Law Q. 14 (1952). See, generally, Doman, "Compensation for Nationalized Property in Post-War Europe," 3 Int. Law Q. 323 (1950); *idem*, "Postwar Nationalization of Foreign Property in Europe," 48 Columbia Law Rev. 1125 (1948); Drucker, "The Nationalisation of United Nations Property in Europe," in 36 Grotius Society Transactions 75 (1951); and Herman, "War Damage and Nationalization in Eastern Europe," 16 Law and Contemporary Problems 498 (1951).

¹³ "Without any doubt, the Bulgarian nationalization acts are more unfavorable to foreign property owners than any of the other nationalization decrees discussed above. At the same time, it ought to be noted that foreign property interests are less substantial in Bulgaria than in any of the other countries of Central and Eastern Europe." Doman, note 12 above, at 1158. See text at and accompanying notes 27-33 below.

¹⁴ Rubin has argued that the Balkan nationalizations violated not only international law but also "the specific provisions of the treaties of peace with these countries, treaties which were hardly ratified when they were violated in almost every respect. These governments refused even to negotiate about compensation to the American property owner." Rubin, *Private Foreign Investment* 95 (1956). See also *idem*, "The Almost-Forgotten Claimant: American Citizens' Property Rights Violated," 40 A.B.A.J. 961, 962 (1954). Compare Sipkov, note 12 above, at 478, who contends that "the Peace Treaty with Bulgaria does not contain any clauses guaranteeing that United Nations nationals will enjoy their property rights or in case of expropriation will be paid according to international law." In any event, customary international law requires the payment of just compensation.

¹⁵ 22 Dept. of State Bulletin 351 (1950).

When Bulgaria continued to refuse compensation to Peace Treaty and nationalization claimants during the 1950's the United States responded by resort to self-help.¹⁶ Pursuant to the Trading with the Enemy Act,¹⁷ the United States already held certain Bulgarian assets blocked under Executive Order 8399 of April 10, 1940.¹⁸ It was under no international obligation to return or unblock these assets, since "the use of seized property for the satisfaction of claims is expressly recognized in the Peace Treaties of February 10, 1947."¹⁹ Proceeding on the premise that these assets were available to compensate both Peace Treaty and nationalization claimants,²⁰ Congress enacted Title II of the International Claims Settlement Act in 1955, authorizing the vesting and liquidation of assets of the Bulgarian Government and Bulgarian corporations.²¹

Simultaneously, Congress enacted Title III of the International Claims Settlement Act, which authorized the Foreign Claims Settlement Commission to adjudicate the claims of United States nationals against Bulgaria for its failure:

1. to restore or pay compensation for property of United States nationals as required by Article 23 of the Treaty of Peace;
2. to pay effective compensation for the nationalization, compulsory liquidation or other taking, prior to August 9, 1955, of property of United States nationals; and
3. to meet obligations expressed in currency of the United States arising out of contractual or other rights acquired by United States nationals prior to April 24, 1941, and which became payable prior to September 15, 1947.²²

¹⁶ As it had in the case of Yugoslavia. See Lillich 106-108.

¹⁷ Act of Oct. 6, 1917, Ch. 106, 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§1-40 (1958).

¹⁸ 5 Fed. Reg. 1400 (1940).

¹⁹ Domke, *The Control of Alien Property* 305 (1947). Art. 25(1) of the Treaty of Peace reads:

"Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which at the coming into force of the present Treaty are within its territory and belong to Bulgaria or to Bulgarian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Bulgaria or Bulgarian nationals, including debts, other than claims fully satisfied under other Articles of the present Treaty. All Bulgarian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned."

²⁰ See Rubin, note 14 above, at 1007-1008. Compare H. Rep. No. 624, 84th Cong., 1st Sess. 13 (1955).

²¹ 69 Stat. 562 (1955), 22 U.S.C. §1631 (1958). By Executive Order 10644 of Nov. 8, 1955, 20 Fed. Reg. 8363 (1955), the President authorized the Attorney General to perform the functions granted to the President by Title II.

²² See note 6 above. Titles II and III established similar procedures with respect to Hungary and Rumania. See Foreign Claims Settlement Commission, Tenth Semi-annual Rep. 15 (1959). See also Clay, "Relief for War Victims: Recent Foreign Claims Legislation," 42 A.B.A.J. 337 (1956), and Ujlaki, "Compensation for the Nationalization of American-Owned Property in Bulgaria, Hungary and Rumania," 1 N. Y. Law Forum 265 (1955).

Eligible claimants under Title III were natural persons who were United States citizens, or who owed permanent allegiance to the United States, and corporations or other legal entities which had been organized in the United States and were more than 50 percent owned by such natural persons.²³ Claims by stockholders based upon direct or indirect interests in non-national corporations²⁴ were allowed only if the corporation which directly suffered the loss was at least 25 percent owned by natural persons who were nationals of the United States.²⁵ Congress later struck out the 25 percent standard insofar as claims based upon *direct* stock ownership in *nationalized* corporations were concerned.²⁶

In a four-year period before the statutory deadline of August 9, 1959,²⁷ the Foreign Claims Settlement Commission received and determined, "in accordance with applicable substantive law, including international law,"²⁸ the validity and amount of 391 claims against Bulgaria.²⁹ It rendered 217 awards amounting to \$6,571,825,³⁰ including \$4,684,187 in principal and \$1,887,638 in interest.³¹ With \$3,143,398 available in the Bulgarian Claims Fund,³² claimants were assured of receiving payment for 47.83

²³ 69 Stat. 570 (1955), 22 U.S.C. §1641(2) (1958). Compare the eligibility requirements under the Treaty of Peace in the text at note 11 above.

²⁴ The term includes both foreign and ineligible American corporations. Since a stockholder may have a compensable claim based upon his interest in the latter, i.e., in an American corporation which fails to meet the 50 percent test, the term is more accurate than the traditional but unduly narrow one of "foreign" corporation, used erroneously by the Foreign Claims Settlement Commission in the past. See Settlement of Claims by the Foreign Claims Settlement Commission of the United States and Its Predecessors 224 (1955). But see Foreign Claims Settlement Commission, Tenth Semiannual Rep. 93 (1959).

²⁵ 69 Stat. 573 (1955), 22 U.S.C. §1641j(b) (1958). Of course, if the corporation itself was an eligible claimant, its stockholders were barred from bringing claims. 69 Stat. 573 (1955), 22 U.S.C. §1641j(a) (1958). Compare the eligibility requirements under the Treaty of Peace in the text at note 11 above.

²⁶ 72 Stat. 531 (1958), 22 U.S.C. §1641j(b) (1958). "The amendment did not affect claims based upon indirect interests in nationalized concerns." Foreign Claims Settlement Commission, Tenth Semiannual Rep. 212 (1959). Also it "related only to [nationalization] claims under Section 303(2) of the Act. Thus, where [Peace Treaty] claims under Section 303(1) of the Act were involved, the original provisions . . . applied, irrespective of whether the interests in the corporations in question were direct or indirect." *Ibid.* at 121.

²⁷ 69 Stat. 574 (1955), 22 U.S.C. §1641o (1958).

²⁸ 69 Stat. 571 (1955), 22 U.S.C. §1641b (1958).

²⁹ Foreign Claims Settlement Commission, Thirteenth Semiannual Rep. 7 (1960). The Commission's opinions in the most important Bulgarian claims may be found in its Tenth Semiannual Rep. 13-26 (1959). The jurisprudence of the Commission will be the subject of an extensive study under the new research program on Procedural Aspects of International Law to be conducted under the auspices of the International Legal Studies Program of the Syracuse University College of Law.

³⁰ Foreign Claims Settlement Commission, Thirteenth Semiannual Rep. 7 (1960). The British Foreign Compensation Commission received 138 claims against Bulgaria and rendered 106 awards. Foreign Compensation Commission, Twelfth Report, Cmnd. No. 1834, at 9 (1962).

³¹ Foreign Claims Settlement Commission, Eleventh Semiannual Rep. 1 (1959).

³² 49 Dept. of State Bulletin 138 (1963).

percent of their awards.³³ Furthermore, this partial payment was not to "extinguish such claim[s], or to be construed to have divested any claimant, or the United States on his behalf, of any rights against the appropriate foreign government or national for the unpaid balance of his claim or for restitution of his property."³⁴ Negotiations for a lump-sum settlement, based upon the Commission's unilateral determination of Bulgaria's international responsibilities, began a year and one-half later.³⁵

The adjudication of the Bulgarian claims prior to the negotiation of a lump-sum settlement with that country, however, had placed the Department of State in something of a strait jacket.³⁶ Since the United States has complete freedom in the negotiation and distribution of such settlements,³⁷ it has been suggested that, "where distribution may partially have taken place domestically from proceeds of vested assets at a time prior to a lump-sum settlement, there is no reason for a different rule."³⁸ This general statement, though, needs some qualification in view of *Seery v. United States*,³⁹ where the Court of Claims held that the part of an executive agreement which withdrew Mrs. Seery's statutory right of action against the United States was unconstitutional, since it took her property without due process of law.

Seery suggests that the Department of State, when negotiating a lump-sum settlement *after* a domestic claims program, is under some compunction to seek terms exactly like those of the statute authorizing pre-adjudication (as interpreted by the Foreign Claims Settlement Commission).⁴⁰ For if an eligible claimant who had received an award under the statute was excluded from the terms of a subsequent settlement, he could well argue that he had been deprived of a vested right under a statute within

³³ This figure is a rough one, of course, since the statute's provision calling for payment in full of the principal amount of each award of \$1000 or less and the payment in the amount of \$1000 on account of the principal of each award of more than \$1000 worked a slight distortion in the distribution picture. 69 Stat. 573 (1955), 22 U.S.C. §1641i(a) (1958). Also, 5 percent of the claims fund was deducted to cover administrative expenses. 69 Stat. 571 (1955), 22 U.S.C. §1641a (1958).

³⁴ 69 Stat. 574 (1955), 22 U.S.C. §1641l (1958).

³⁵ See note 1 above. Diplomatic relations were resumed in 1959. 41 Dept. of State Bulletin 866 (1959).

³⁶ Christenson has attested that "the liquidation and distribution of Rumanian vested assets authorized by Congress restricted and confined the subsequent diplomatic discussions regarding final settlement." Christenson 620-621.

³⁷ See, generally, Lillich 23-40.

³⁸ Christenson 625-626. Compare this general statement with his specific comments accompanying notes 36 above and 40 below.

³⁹ 127 F. Supp. 601 (Ct. Cl., 1955); 49 A.J.I.L. 410 (1955). See M. H. Cardozo, "Attempts to Transmute Indemnity into Discharge of Claims in Executive Agreements," 49 A.J.I.L. 560 (1955).

⁴⁰ In this manner Congress and the Commission, an independent administrative agency, impinge upon a traditionally executive function. Christenson has acknowledged the fact that "the Department of State in general is not necessarily influenced by the decisions of the Foreign Claims Settlement Commission, *except* when the lump-sum agreement is itself limited by antecedent determinations applying international law under a domestic claims program." Christenson 632 (emphasis added).

the doctrine of the above case.⁴¹ On the other hand, if the Commission in such a situation decided to make a further payment to the claimant, other awardees could argue with some justification that this action constituted a breach of the settlement agreement and an unlawful depletion of the additional funds received thereunder.⁴² Thus the Department of State negotiators were faced with the thorny problems of ascertaining the Commission's gloss on Title III, under which the Bulgarian claims were adjudicated, and then securing Bulgaria's consent to an agreement whose terms faithfully mirrored that gloss.

II. THE GENERAL PROVISIONS OF THE AGREEMENT

Under the terms of the settlement agreement with Bulgaria, the United States accepted a lump sum of \$3,543,398 as full and final settlement of its claims against Bulgaria, which totaled \$6,571,825.⁴³ The lump sum is made up of the proceeds from the liquidation of vested Bulgarian assets, amounting in value to \$3,143,398, plus an additional sum of \$400,000 payable in two installments of \$200,000 each on July 1, 1964, and July 1, 1965.⁴⁴ In consideration of this lump sum, the United States waived (1) all claims falling within Article 23 of the Treaty of Peace, without regard to whether all of such claims are included within the provision in the agreement specifically settling such claims;⁴⁵ and (2) all claims falling within the provisions in the agreement, without regard to whether the owners of such claims are compensated pursuant to United States legislation.⁴⁶ As a further *quid pro quo*, it agreed to unblock all remaining Bulgarian property in the United States,⁴⁷ i.e., the assets of natural persons residing in Bulgaria,⁴⁸ and to permit the transmission to payees in Bulgaria

⁴¹ See text at note 34 above. Since a claimant under such a statute consents to all its provisions, a counter-argument also might be made that he had waived his rights in view of the following provision:

"Nothing in this title shall be construed as the assumption of any liability by the United States for the payment or satisfaction, in whole or in part, of any claim on behalf of any national of the United States against any foreign government." 64 Stat. 16 (1950), 22 U.S.C. §1626(f) (1958); 69 Stat. 575 (1955), 22 U.S.C. §1641q (1958).

A literal reading of this narrow disclaimer provision seems more reasonable: namely, that if the vested assets are inadequate to pay the adjudicated claims, the United States is under no legal obligation to appropriate funds to see that awardees are fully compensated. It is unlikely that Congress intended to empower the Department of State, *deus ex machina*, to divest a claimant of either his pre-adjudicated award or his reasonable expectation to share in a future claims settlement along the lines laid down by Congress. Instead, it probably wished only to insulate itself from importuning by claimants such as followed the advisory opinions by the Court of Claims on the French Spoliation Claims. See War Claims Commission Rep., H.R. Doc. No. 67, 83d Cong., 1st Sess. 65-69 (1953).

⁴² See Christenson 624, note 41.

⁴³ Art. I (1). See note 30 above.

⁴⁴ Art. II(a)(b).

⁴⁵ Art. III(2)(a). See text at notes 54-61 below.

⁴⁶ Art. III(2)(b).

⁴⁷ Art. IV.

⁴⁸ 49 Dept. of State Bulletin 139 (1963). These assets had not been vested or liquidated. See text at note 21 above. See also Art. 25(5)(c) of the Treaty of Peace.

of United States Treasury checks.⁴⁹ The distribution of the lump sum falls within the exclusive competence of the United States "in accordance with its legislation,"⁵⁰ without any responsibility arising therefrom on Bulgaria's part.⁵¹

The three categories of claims settled and discharged by the agreement generally correspond to those claims determined under Title III.⁵² Article I(1) describes them as follows:

(a) Claims of nationals of the United States of America for the restoration of, or payment of compensation for, property, rights and interests (direct and indirect), as specified in Article 23 of the Treaty of Peace with Bulgaria which entered into force on September 15, 1947;

(b) Claims of nationals of the United States of America for the nationalization, compulsory liquidation or other taking of property and of rights and interests (direct and indirect) in and with respect to property prior to the effective date of this agreement;

(c) Claims of nationals of the United States of America predicated (directly or indirectly) upon obligations expressed in currency of the United States of America arising out of contractual or other rights acquired by nationals of the United States of America prior to April 24, 1941, and which became payable prior to September 15, 1947.

Here, as in the case of the Rumanian claims, there are several notable

⁴⁹ See the Exchange of Notes accompanying the claims agreement, 49 Dept. of State Bulletin 140 (1963). The United States also agreed to certain measures contributing to the development of expanded trade relations between the two countries. *Ibid.* at 141.

⁵⁰ Presumably this phrase refers to Title III of the International Claims Settlement Act, which authorized pre-adjudication, and to possible future legislation providing for the Commission's adjudication of nationalization claims which arose from Aug. 9, 1955, to July 2, 1963, and which were settled by the agreement. See text at notes 64-66 below. An omnibus bill authorizing the adjudication of such claims was introduced on May 29, 1961. See S. 1987, 87th Cong., 1st Sess. (1961), printed and analyzed in Foreign Claims Settlement Commission, Fourteenth Semiannual Rep. 24-26, 31-33 (1961). The same bill was introduced again on Feb. 28, 1963, as S. 947, 88th Cong., 1st Sess. (1963).

Special legislation is required to enable the Commission to handle claims against Bulgaria, since Title I of the International Claims Settlement Act does not give the Commission jurisdiction to adjudicate claims after lump-sum settlements with "governments against which the United States declared the existence of a state of war during World War II. . . ." 64 Stat. 18 (1950), 22 U.S.C. §1623(a) (1958). It is worth noting that an 1896 statute permits the Department of State to perform this function. 29 Stat. 32 (1896), 31 U.S.C. §547 (1958). See Lillich 35, note 121.

⁵¹ Unlike Art. V(A) of the Agreement with Poland, July 16, 1960, 11 U. S. Treaties 1953, T.I.A.S. No. 4545, 55 A.J.I.L. 540 (1961), the present agreement does not contain an undertaking by the foreign country to furnish all documents in its possession necessary to a just determination of the claims. While the vast majority of the claims included within the Bulgarian settlement already have been adjudicated, making such an undertaking superfluous with respect to them, it might have facilitated the task of those late nationalization claimants who still have to establish their right to an award. See text at notes 64-66 below.

⁵² See text at note 22 above.

differences between the terms of the agreement and the provisions of Title III.⁵³

Peace Treaty Claims. Under Title III, the treaty test of eligibility—possessing United Nations nationality—was ignored in favor of the requirement of United States nationality, a requirement that the Foreign Claims Settlement Commission used to deny awards to persons otherwise entitled to war damage compensation under the Treaty of Peace.⁵⁴ The arbitrary introduction in Title III of the 50 and 25 percent United States interest requirements for corporate and stockholder claims further precluded claims of persons eligible under the treaty.⁵⁵

While Articles I and II of the 1960 Rumanian Agreement closely followed Title III insofar as the above requirements are concerned,⁵⁶ the Agreement with Bulgaria fails to restate the percentage tests.⁵⁷ However, should there be any treaty claimants who were ineligible under Title III, their chances of using the agreement's *lacuna* to obtain an award at this late date appear small, since the drafters of the agreement surely had no such intention.⁵⁸ In the first place, to allow such claims would be to treat these claimants more favorably than claimants in the other two categories.⁵⁹ Secondly, under the agreement the United States specifically waives claims falling within Article 23 of the Treaty of Peace "*without regard to whether all of such claims are included*" in Article I(1)(a) above,⁶⁰ clearly implying that all claimants falling within the broad eligibility provisions of the Peace Treaty may not come within the strict requirements of the agreement, much less the even stricter requirements of United States domestic legislation.⁶¹

Another omission concerning Peace Treaty claimants occurs in the agreement. Unlike the Treaty of Peace⁶² and Title III,⁶³ it contains no provision restricting awards in such claims to two thirds of the loss or damage actually sustained. However, the reference in the agreement to claims "as specified in Article 23 of the Treaty of Peace with Bulgaria" pre-

⁵³ Christenson 623.

⁵⁴ See text at notes 11 and 23 above. Rumanian Peace Treaty claims were treated the same way. Foreign Claims Settlement Commission, Tenth Semiannual Rep. 99-104 (1959). See Christenson 624.

⁵⁵ See text at notes 23-25 above. Once again, Rumanian Peace Treaty claims were handled similarly. Christenson 628-629. He concludes that under Title III "all United States corporations having less than 50 percent United States ownership and persons who are nationals of the United States having interests in corporations with less than 25 percent direct or indirect United States ownership interest were ineligible to be compensated for treaty claims, even though both types of claimants were eligible under the treaty." *Ibid.* 629.

⁵⁶ See note 4 above. See also Christenson 629.

⁵⁷ See text at notes 91-92 and 128-133 below.

⁵⁸ See text at notes 128-133 below.

⁵⁹ Christenson 629-630. Note, however, that Peace Treaty claimants are treated less favorably insofar as damages are concerned. See text at notes 62-63 below.

⁶⁰ Art. III(2)(a) (emphasis added). ⁶¹ Art. III(a)(b).

⁶² See note 10 above.

⁶³ 69 Stat. 571 (1955), 22 U.S.C. §1641b(1) (1958).

sumably incorporates by reference the limitation on damages contained therein.

Nationalization Claims. Title III authorized the adjudication of claims of United States nationals for the nationalization, compulsory liquidation or other taking of their property in Bulgaria prior to August 9, 1955.⁶⁴ The agreement settles these claims and also similar claims which arose from August 9, 1955, to July 2, 1963, the date of the settlement. Reportedly there are very few 1955-1963 nationalization claimants,⁶⁵ the only new group of claims consciously created by the agreement.⁶⁶

Like the Rumanian Agreement, the scope of the nationalization claims settled by the Agreement with Bulgaria presents interesting questions. Under the settlement, Bulgaria's liability to compensate such claimants is based upon international law. Similarly, in pre-adjudicating these claims under a Title III provision almost identical to the clause in the agreement, the Foreign Claims Settlement Commission was instructed to make its decisions "in accordance with applicable substantive law, including international law."⁶⁷ Applying this standard, the Commission held that claims based upon debts owed by nationalized corporations, whether secured or unsecured by mortgages, were not compensable under Title III:⁶⁸

It has not been demonstrated to the Commission, and the Commission's own research has not established, that international law requires a payment of compensation to a creditor when the debtor or the debtor's property has been nationalized or otherwise taken. Quite to the contrary, the weight of authority is to the effect that such losses as a creditor may suffer as a result of a wrongful act committed against his debtor are *too remote or indirect* to sustain an award to the creditor.⁶⁹

⁶⁴ See text at note 22 above.

⁶⁵ There are very few such claimants under the Rumanian Agreement, which contained an analogous provision allowing nationalization claims that arose from 1955 to 1960. Christenson 631.

⁶⁶ Compare text at notes 73-76 below.

⁶⁷ See text at note 28 above.

⁶⁸ Foreign Claims Settlement Commission, Tenth Semiannual Rep. 72 (1959) (claim under Hungarian program but applicable law the same). See *ibid.* at 117. See also *ibid.* at 17 (claims based upon deposits in nationalized Bulgarian banks not compensable in the absence of a showing that the deposits themselves had been nationalized or otherwise taken).

⁶⁹ *Ibid.* at 75 (emphasis added). Compare the dissenting opinion of Commissioner Pace in this claim:

"It is an anachronism, in my opinion, to deny the instant claim on the basis of so-called traditional reluctance of international tribunals to look with favor upon claims based on secured creditor interests. Such decisions have always been founded on the theory that any losses sustained by the creditor were *too remote, or indirect*, and were not the proximate result of the wrongful act forming the basis of the claim. There is nothing *remote or indirect*, in my opinion, about the loss sustained by a mortgagee when the property securing his mortgage was nationalized. . . ." *Ibid.* at 79 (emphasis added).

Under Title IV of the International Claims Settlement Act, 72 Stat. 527 (1958), 22 U.S.C. §1642 (1958), providing for the pre-adjudication of claims against Czechoslovakia,

Does the Commission's position on these claims, based upon its own interpretation of a municipal law provision, create a presumption about the scope of a similar provision in a subsequent lump-sum settlement? Analyzing the Rumanian Agreement, Christenson posed the problem thus:

If, under the correct rule of international law, the mortgage and debt claims are valid international claims, for which there is substantial support, the agreement settled them and it seems incongruous that they are valid internationally while invalid under domestic interpretation. That conclusion would raise the further question whether to make some compensation available to those claimants from the proceeds of the intergovernmental lump-sum settlement. If, however, the denial of the mortgage and debt claims by the Foreign Claims Settlement Commission was correct under international law, then the lump-sum agreement did not settle those claims.⁷⁰

Noting that "the Department of State takes cognizance of the *fait accompli* without disputing the correctness of the principles of international law applied," he concluded that "the Rumanian settlement rested on the decisions of the Foreign Claims Settlement Commission,"⁷¹ i.e., that such claims were not settled by the lump-sum agreement.⁷²

The problem of the agreement's scope, outlined in the above two paragraphs, is equally present in the case of the Bulgarian settlement and once again places creditor claimants in an unenviable position. Their claims already have been denied by the Commission and apparently no new legislation will be introduced to render them compensable from the lump sum. Nor are their theoretical international remedies any more promising.

most "creditor claims" also have been denied on the theory that "such losses as a creditor may suffer as a result of a wrongful act committed against his debtor are not the proximate result of the wrongful act, and are too *remote or indirect* to sustain an award to the creditor." Foreign Claims Settlement Commission, Fourteenth Semi-annual Rep. 120 (1961) (emphasis added). However, the Commission has held that "this holding does not apply to bank deposits in pre-1945 currency, to proceeds from life insurance policies, or to any other debt claim, where such debt claim had, in fact, been confiscated by special decree, law, or administrative decision of the Czechoslovakian Government." *Ibid.* at 11. Claims based upon canceled mortgages recorded on nationalized property also were allowed. *Ibid.* at 122.

⁷⁰ Christenson 632.

⁷¹ *Ibid.*

⁷² The proposed bill to implement the agreement, note 50 above, supports this construction in that it contains no provision for compensating this class of claimants from the lump sum. If the Department considered their claims settled by the agreement, presumably it would have recommended making awards to such claimants. See text at note 70 above.

This construction finds additional support in the contemporaneous inclusion of claims for "debts owed by enterprises which have been nationalized or taken by Poland and debts which were a charge upon property which has been nationalized, appropriated or otherwise taken by Poland," in Art. II(c) of the Agreement with Poland, note 51 above. There would have been no need for this specific reference to certain creditor claims had not the Department agreed with the Commission's view that such claims did not fall under a provision providing compensation for the nationalization or other taking of property. See also Commission's Fourteenth Semiannual Rep. 121 (1961) (Department taking same attitude in pending Czech negotiations).

Assuming, *arguendo*, that the Department of State should undertake to espouse these claims, Bulgaria could admit their international validity under modern claims practice and plead their settlement by the agreement. If the Department then argued that they were not settled, perforce on the Commission's ground that the claims were not valid under international law, Bulgaria would respond that in this case its international liability never had been engaged at all. The failure to spell out in the agreement whether these claimants were included or excluded therefore places them in an unprofitable vicious circle. Even if their claims had been written out of the agreement they would have been in no worse position than they are now, since then Bulgaria would not have been able to rely upon the broad waiver clause found in Article III(2)(b).

One final point deserves mentioning with respect to these claims, both because it presents a possible, albeit slim, basis for compensating creditor claims from the lump sum, and because it demonstrates how small changes in phrasing between a statute authorizing pre-adjudication and a subsequent lump-sum agreement may beget troublesome ambiguities. Under its statutory standard, the Foreign Claims Settlement Commission denied these claims because they were too remote or *indirect*.⁷³ Article I(1)(b) of the Agreement with Bulgaria follows Title III and compensates claimants for the "nationalization, compulsory liquidation or other taking of property," but to this standard is added the following clause: "and of rights and interests (direct and *indirect*) in and with respect to property. . . ."⁷⁴ This clause was not included in the corresponding article of the Rumanian Agreement,⁷⁵ and undoubtedly it was used in its present context for reasons unconnected with creditor claims.⁷⁶ Nevertheless, a literal reading of the clause renders creditor claims compensable. Representations from these claimants for legislation enabling them to claim against the lump sum cannot be ruled out.

Financial Debt Claims. Title III specifically authorized one class of creditor claims: claims based upon obligations expressed in United States currency arising out of contractual or other rights acquired by United States nationals prior to April 24, 1941, and which became payable prior to September 15, 1947.⁷⁷ Article I(1)(c) restates the statute in identical fashion, negating any conflict about its scope. As construed by the Commission, most of these claims involved dollar bonds issued by the Govern-

⁷³ See text with accompanying note 69 above.

⁷⁴ Art. I(1)(b) (emphasis added).

⁷⁵ Art. I(1)(b) of the Agreement with Rumania, note 4 above.

⁷⁶ Since the agreement does not contain an article defining what ownership interests are compensable, see notes 91-92 below, reference to direct and indirect claims probably was inserted in Art. I(1)(b) to insure the allowance of indirect stockholder claims. This explanation is consistent with the use of the phrase in Arts. I(1)(a) and (c).

⁷⁷ See text at note 22 above.

ment of Bulgaria.⁷⁸ Claims based upon bonds of political subdivisions⁷⁹ and private banking institutions⁸⁰ were not allowed.

In applying the statute to claims based upon contractual obligations, the Commission decided that awards "may include only unpaid amounts which by the terms of the bond contract were payable prior to September 15, 1947, and may not include any amounts which became payable thereafter."⁸¹ Awards were made when there had been a default of the entire obligation, *i.e.*, when a bond had matured prior to the above date, and when there had been a default in partial performance, *i.e.*, when installments of principal and interest accruing before the above date were unpaid.⁸² Claims based upon contracts providing for the acceleration of the principal amounts of bonds were allowed if there had been a timely invocation of the acceleration provisions.⁸³ While claims based upon obligations expressed in foreign currencies were not compensable,⁸⁴ they were admitted if the bond contract provided for alternative payment in dollars.⁸⁵ The Foreign Claims Settlement Commission allowed interest on financial debt claims at the rate of 6 percent per annum from the respective due dates of the obligations to August 9, 1955, the effective date of Title III.⁸⁶

The Bulgarian settlement also included an Exchange of Notes specifically excluding "dollar bond obligations issued by the Bulgarian State, owned by American nationals and payable in the United States of America."⁸⁷ Although Bulgaria had proposed their inclusion, the United States was unable to agree in view of its traditional "practice of leaving such matters for negotiation between the debtor government and the bondholders or their representatives."⁸⁸ However, it acknowledged Bulgaria's expressed intention to settle these claims directly with the bondholders.⁸⁹

III. THE ELIGIBILITY PROVISIONS OF THE AGREEMENT

All claims settled by the Bulgarian Agreement must have been "owned by nationals of the United States of America. . . ."⁹⁰ While the agreement generally follows its Rumanian counterpart in laying down the times at which such ownership must be shown, it parts company with its predecessor by omitting the traditional article defining just what ownership interests are compensable.⁹¹ This rather startling omission, which

⁷⁸ Foreign Claims Settlement Commission, Tenth Semiannual Rep. 30 (1959) (claim under Hungarian program but applicable law the same). "The term, 'contractual or other rights' . . . is a broad term including rights acquired under bonds as well as under other types of contracts." *Ibid.* at 106.

⁷⁹ This problem did not arise in any claim against Bulgaria. *Ibid.* at 81.

⁸⁰ *Ibid.* at 46.

⁸¹ *Ibid.* at 29, 89.

⁸² *Ibid.* at 29, 106.

⁸³ *Ibid.* at 95.

⁸⁴ *Ibid.* at 27.

⁸⁵ *Ibid.* at 94.

⁸⁶ *Ibid.* at 95.

⁸⁷ 49 Dept. of State Bulletin 140 (1968).

⁸⁸ *Ibid.* Namely, the Foreign Bondholders Protective Council.

⁸⁹ *Ibid.*

⁹⁰ Art. I(2).

⁹¹ Compare Art. II of the Agreement with Rumania, note 4 above.

raises several questions concerning corporate and stockholder claims, presumably reflects the Department of State's attempt to avoid discrepancies between the statutory provisions and the agreement, such as troubled the eligibility article of the Rumanian settlement.⁹² Unfortunately, the treatment may prove worse than the malady.

Continuous Nationality. Under traditional international law the United States will not espouse a claim unless it has been continuously owned by a United States national "from the date the claim arose to the date of its settlement."⁹³ This rule was not spelled out in Title III, with the result that the Foreign Claims Settlement Commission required United States nationality to commence at a different time for each class of claims.

With regard to Peace Treaty claims, the Commission took the position that the reference in the statute to Article 23 of the Treaty of Peace with Bulgaria⁹⁴ modified "the well-settled rule of international law which requires ownership of a claim by a national or nationals of the espousing nation continuously from its inception as a condition for compensation thereof."⁹⁵ Instead of requiring nationality at the date of loss, "the more administratively feasible date of the armistice" (October 28, 1944) was used.⁹⁶ Therefore, the Commission deemed a Peace Treaty claim compensable "if the property on which it is founded or the claim arising from such ownership was owned at the time of the armistice and *continuously thereafter*" by a United States national.⁹⁷ The Bulgarian Agreement, of necessity, follows the Commission's approach and requires United States nationality on October 28, 1944, and continuously thereafter.⁹⁸

Insofar as nationalization claims are concerned, the Commission simply applied the traditional rule that

⁹² See text at notes 116-127 below.

⁹³ 5 Hackworth, Digest of International Law 804 (1943).

⁹⁴ See text at note 22 above. Art. 23(8)(a) required claimants to have been United Nations nationals at the date of the Armistice with Bulgaria (Oct. 28, 1944) and at the coming into force of the Treaty of Peace (Sept. 15, 1947). See text at note 11 above.

⁹⁵ Foreign Claims Settlement Commission, Tenth Semiannual Rep. 105 (1959).

⁹⁶ *Ibid.* at 101. "To this extent, the customary rule of international law may be regarded as having been modified by the treaty and by the International Claims Settlement Act." *Ibid.* at 102.

⁹⁷ *Ibid.* at 67 (emphasis added). Note that the Commission, while construing the statute by reference to the treaty insofar as the commencement of the requirement was concerned, did not adopt the treaty's provision regarding its duration. See text accompanying note 94 above. Continuous nationality well past Sept. 15, 1947, was required. See text at notes 108-111 below.

The liberal treaty requirements somehow managed to slip into Art. I(2)(a) of the Rumanian Agreement. *Quaere*: If the Commission had denied a claim under the statute because the claimant, although a U. S. national on the relevant dates in 1944 and 1947, had died thereafter, leaving the claim to non-American heirs, could not these heirs have argued that the agreement made the claim compensable? Compare text with accompanying notes 112-114 below.

⁹⁸ Art. I(2)(a). See the comparable article in the Rumanian Agreement, note 97 above.

the property upon which the claim is based must have been owned by a national or nationals of the United States at the time of loss, and the claim which arose from such loss must have been owned by a United States national or nationals continuously thereafter.⁹⁹

Once again the Bulgarian Agreement necessarily follows the Commission's approach.¹⁰⁰

The financial debt claims were subjected to yet a third nationality rule. The Foreign Claims Settlement Commission, construing the statute authorizing compensation to the holders of certain obligations "acquired by nationals of the United States prior to April 24, 1941,"¹⁰¹ read it to require United States nationality at the dates the rights in question were acquired, in many cases well before the time of loss.¹⁰² The Commission admitted that its

interpretation results in a nationality requirement for contractual claims which differs from the requirement for claims under Section 303(2) [Nationalization Claims] of the Act. However . . . there is a third and different requirement under Section 303(1) [Peace Treaty Claims]; and it is within the power of the legislature so to differentiate. Such a distinction is not to be regarded as unusual or surprising however, in a type of claim which is not usually cognizable under the rules of customary international law, and which, as a strictly statutory creature, became a part of the law bearing its own peculiar restrictions.¹⁰³

This view of the Commission, adopted over a strong dissent,¹⁰⁴ has been criticized severely as an unwise and unsound departure from the traditional rule.¹⁰⁵ Yet the agreement repeats this "strictly statutory creature" verbatim, permitting compensation only if the obligations were "acquired by nationals of the United States of America prior to April 24, 1941. . . ."¹⁰⁶ United States nationality must be maintained "continuously thereafter. . . ."¹⁰⁷

⁹⁹ Foreign Claims Settlement Commission, Tenth Semiannual Rep. 45 (1959).

¹⁰⁰ Art. I(2)(b).

¹⁰¹ See text at note 22 above.

¹⁰² Foreign Claims Settlement Commission, Tenth Semiannual Rep. 13, 16 (1959).

¹⁰³ *Ibid.* at 38.

¹⁰⁴ *Ibid.* at 39-40.

¹⁰⁵ Hearing on S. 706 before a Subcommittee of the Senate Committee on Foreign Relations, 86th Cong., 1st Sess. 31-32 (1959) (memorandum of Dr. Martin Domke).

¹⁰⁶ Art. I(1)(c). A possible unintentional discrepancy exists between the statute and the agreement in that Art. I(2)(c), defining when such "claims" must have been owned by United States nationals, specifically requires ownership only "on April 24, 1941 and continuously thereafter. . . ." Under this definition, claims appear compensable even if the person acquiring the underlying obligation prior to April 24, 1941, was a non-national, as long as he acquired U. S. nationality by that date. The Rumanian Agreement also rejects U. S. ownership at the time of acquisition in favor of such ownership at a specified later date. See Arts. I(1)(c) and I(2)(c) of the Agreement with Rumania, note 4 above.

As a matter of draftsmanship, it also is not technically accurate to require that "claims" predicated upon these obligations must have been owned by U. S. nationals in 1941, for in many instances claims arose only upon default or repudiation at a much later date. Ownership of the underlying obligations in 1941 should suffice. The articles of the Rumanian Agreement, above, closely follow Title III on this score and hence avoid the problem.

¹⁰⁷ Art. I(2)(c).

Contrasting with the commencement of the nationality requirement, which is a different time for each class of claims, the agreement adopts a uniform standard for the length of time that nationality must be held. It requires that all three classes of claims must have been owned by United States nationals "continuously thereafter until filed with the Government of the United States of America."¹⁰⁸ While the Foreign Claims Settlement Commission, lacking any statutory guide in Title III, had required continuous nationality until the dates of filing of the claims,¹⁰⁹ it meant nationality "to the date that the claim is filed under title III of the International Claims Settlement Act of 1949, as amended,"¹¹⁰ i.e., "to the date of filing with the Commission."¹¹¹

The agreement's liberal provision, requiring only filing with the "Government" and not necessarily the Commission, may well make some claims compensable under the agreement that were denied under Title III.¹¹² Suppose, for example, that a United States national with a valid Peace Treaty claim, filed in 1947 pursuant to the Department of State request,¹¹³ had died in 1954, leaving non-national heirs or legatees. The Commission would have denied their claim because continuous nationality had not been maintained until the date the claim was filed with it, whereas, under the agreement, the heirs or legatees could rely upon the earlier filing with the Department of State to satisfy the continuity rule. Whether there actually are any disappointed Bulgarian claimants who could take advantage of an earlier filing with the Department of State, the United States Embassy in Bulgaria or some other department or agency is not known. The problem certainly would not be an academic one should the pending Czech settlement contain similar broad language.¹¹⁴

¹⁰⁸ Art. I(2)(a)(b)(c).

¹⁰⁹ Foreign Claims Settlement Commission, Tenth Semiannual Rep. 17 (1959).

¹¹⁰ *Ibid.* at 82.

¹¹¹ *Ibid.* at 177.

¹¹² The Rumanian Agreement does not contain a provision as to duration of nationality and hence does not raise this problem.

¹¹³ 17 Dept. of State Bulletin 1270 (1947).

¹¹⁴ In a recent Czech claim, a U. S. national, whose property in Czechoslovakia was taken in 1948, died testate in 1949, leaving all of his property to his wife, also a U. S. national. She in turn died testate on Feb. 25, 1959, leaving 66 percent of her estate to non-nationals. Her executors filed a claim with the Commission on May 21, 1959, which held that its award must be limited to 84 percent of the adjudicated loss, since only that percentage had been "continuously held" by United States nationals until the date of filing with the Commission. Foreign Claims Settlement Commission, Sixteenth Semiannual Rep. 26, 28-29 (1962). See 72 Stat. 528 (1958), 22 U.S.C. §1642d (1958) (Czech program codifies the Commission's prior Balkan decisions requiring continuous nationality until the date of filing with the Commission). Should the Czech settlement follow the Bulgarian Agreement on this point, an earlier filing with the Department of State might save the balance of the claim.

It is worth noting, since Czech claims were received by the Commission from the fall of 1958 until Sept. 15, 1959, Fourteenth Semiannual Rep. 5 (1961), that the above claim was not filed until May 21, 1959. Had the claim been filed more promptly by the claimant's attorney, i.e., before Feb. 25, 1959, an additional \$191,892.37 would have been awarded to the claimant's estate. See Lillich and Christenson, International Claims: Their Preparation and Presentation 106 (1962): "Early filing is recommended,

Compensable Ownership Interests. The statute under which the Bulgarian claims were adjudicated permitted claims by individuals who were United States nationals, corporations organized in the United States which were 50 percent owned by such individuals, and stockholders when the injured or nationalized corporation was 25 percent so owned. The 25 percent test was made inapplicable later to claims based upon direct stock ownership in nationalized corporations.¹¹⁵ The Bulgarian Agreement does not include an article restating the above, and the reference in Article III(1) to the "distribution" of the lump sum in accordance with domestic "legislation" is presumably an acknowledgment of the unilateral manner in which the money is to be paid out rather than an incorporation by reference of Title III's substantive rules. The omission of an article defining compensable ownership interests represents an attempt to avoid the difficulties caused by Article II of the 1960 Rumanian Agreement. These difficulties warrant examination both because they highlight the problems generally inherent in settling claims internationally after domestic pre-adjudication, and because they provide a useful background for a consideration of the problems created by the present settlement.

Article II of the Rumanian Agreement was patterned after Title III, the same statute used to pre-adjudicate Bulgarian claims, and provided for the payment of certain claims:

- (a) directly owned by individuals who were nationals of the United States of America (for this purpose ownership through a partnership or an unincorporated association being considered direct ownership);
- (b) directly owned by a corporation or other legal entity organized under the laws of the United States of America or a constituent state or other political entity thereof, if more than fifty per centum of the outstanding capital stock or other beneficial interest in such legal entity was owned directly or indirectly by natural persons who were nationals of the United States of America; or
- (c) indirectly owned by individuals or corporations within subparagraphs (a) or (b) of this Article through interests, totalling twenty-five per centum or more, in a Rumanian legal entity.¹¹⁶

While paragraphs (a) and (b), specifying the eligibility requirements for individual and corporate claims, copy the statute and cause no problems,¹¹⁷ paragraph (c), covering stockholder claims, is a different matter.

In the first place, paragraph (c) limits stockholder claims to claims based upon interests in Rumanian corporations, while Title III allowed such claims in any corporation "which was not a national of the United States at the time of loss. . . ." ¹¹⁸ Thus claims in those non-national corpora-

especially where continuous nationality is required to the time of filing and a claimant's heirs or legatees are nonnationals."

¹¹⁵ See text at notes 23-26 above.

¹¹⁶ Agreement with Rumania, note 4 above.

¹¹⁷ 69 Stat. 570 (1955), 22 U.S.C. §1641 (1958).

¹¹⁸ 69 Stat. 573 (1955), 22 U.S.C. §1641j(b) (1958). See Graving, "Shareholder Claims against Cuba," 48 A.B.A.J. 335, 337 (1962).

tions which are not Rumanian,¹¹⁹ compensable under Title III, are excluded from the terms of the settlement.¹²⁰ This discrepancy between statute and agreement, restricting the scope of stockholder claims, contrasts with a second discrepancy which involves the composition of the 25 percent American interest. Whereas the statute required such an interest to be held by natural persons,¹²¹ the agreement is more liberal in that it also counts holdings of United States corporations. The effect of this modification is primarily to lighten the burden of demonstrating the required American interest, although in some cases the ability to add a corporation's stock holdings to the total might make the difference between the allowance or denial of a claim.

A final problem raised by paragraph (c) is the effect its 25 percent requirement has upon direct stockholder claims in nationalized corporations. Under the original provisions of Title III imposing the requirement of 25 percent ownership on these claims as well as all others,¹²² the Foreign Claims Settlement Commission refused to render awards to claimants unable to satisfy the requirement.¹²³ In 1958, when Title III was amended to provide that "in claims based upon direct interests in nationalized concerns the 25% requirement shall no longer apply,"¹²⁴ a large block of claims previously denied was reconsidered and found to be compensable.¹²⁵ Unfortunately, the Rumanian Agreement appears to be patterned after Title III's original, rather than amended, provision. Should Article II(c) be construed to apply the 25 percent rule across the board, the effect would be to reverse the Foreign Claims Settlement Commission's reconsidered decisions in many claims and, at the very least, preclude these claimants from sharing in the additional fund of \$2,000,000 acquired under the settlement.¹²⁶ In this way, home to roost would come all the

¹¹⁹ See text and accompanying note 24 above.

¹²⁰ This point was made shortly after the Rumanian Agreement was signed. See Christenson 624, note 41. See also Lillich 93, note 361.

¹²¹ 69 Stat. 578 (1955), 22 U.S.C. §1641 (1958). Cf. Foreign Claims Settlement Commission, Tenth Semiannual Rep. 84 (1959) (charitable corporation within ambit of term "natural person").

¹²² See note 26 above.

¹²³ Cf. Tenth Semiannual Rep., *op. cit.*, 211 (1959) (claim under Soviet program but applicable law the same).

¹²⁴ *Ibid.* at 212.

¹²⁵ *Ibid.* at 94, 212, 218.

¹²⁶ Christenson takes the position, with which the Department of State and the Foreign Claims Settlement Commission agree, that Title III "as amended in 1958 was incorporated in the Claims Settlement Agreement with Rumania as Art. II, secs. (a) and (c). . . ." Christenson 624, note 41. See also *ibid.* at 625, note 42. Under this view, direct stockholder claims in nationalized corporations come under paragraph (a) and are compensable without regard to the American interest in the Rumanian legal entity, while indirect stockholder claims fall within paragraph (c) and require a 25 percent American interest. *Ibid.* at 624, note 1. The present writer has accepted this view that the statute's "double standard also is contained . . . in the Rumanian Claims Agreement of 1960." Lillich and Christenson, *op. cit.* note 114 above, at 20. See also Lillich 93, note 361. Compare Graving, note 118 above. However, three reasons arguably permit the construction that all stockholder claims come under the 25 percent requirement of paragraph (c).

problems of *Seery*.¹²⁷

There is little doubt that these problems were the reason why the Department of State, in negotiating the Bulgarian settlement, omitted the traditional article defining compensable ownership interests. It is far from certain, however, what rules the Department envisaged would govern the distribution. Should all stockholder claims be allowed without regard to American ownership interest, as the Treaty of Peace provided?¹²⁸ Should indirect stockholder claims be subjected to a 25 percent requirement? Should all stockholder claims except direct claims in nationalized corporations, as was the case under the amended statute, fall within a 25 percent rule?¹²⁹ Or should all stockholder claims be so handled, as the original statute stated?¹³⁰ Presumably the penultimate alternative is to control, although claimants, attorneys and students of international law would welcome a clearer manifestation of this intent.

Similarly, must the United States corporate claimant be 50 percent American-owned as Title III specified,¹³¹ 20 percent American-owned as the Yugoslav Agreement required,¹³² or merely incorporated in the United

In the first place, the Commission has so construed the analogous predecessor of paragraph (c): "In the Yugoslav Claims Agreement of 1948 . . . claims by stockholders were specifically recognized in article 2(c) which provided for claims 'indirectly owned' by United States nationals 'through interests direct, or indirect' in a foreign juridical person or persons." Settlement of Claims by the Foreign Claims Settlement Commission of the United States and Its Predecessors 224 (1955). It is not unreasonable to assume that the Department of State, when it first drafted the Rumanian settlement, was aware of the Commission's construction of the Yugoslav Agreement and intended paragraph (c) to be similarly construed, especially since any other construction before 1958 would have meant a variance between the existing statute and the contemplated agreement.

Secondly, while Art. 2(A) of the Yugoslav Agreement allows claims directly owned by individuals without more, paragraph (a) of the Agreement with Rumania adds the proviso that ownership through a partnership or an unincorporated association is considered to be direct ownership. If stockholder claims were to be included under this paragraph, surely ownership through a corporation would have been appended to it.

Finally, bringing all stockholder claims under paragraph (c), while it does cause one discrepancy insofar as direct stockholder claims in nationalized corporations are concerned, results in one less departure from Title III than would be the case if all direct claims fell under paragraph (a). For if the latter interpretation should be accepted, stockholders claiming for war damage and financial debts as well as for nationalization would be eligible without regard to the American interest in the corporation concerned, clearly a double departure from the statute's terms. See text accompanying note 26 above.

¹²⁷ See text with accompanying notes 40-42 above.

¹²⁸ See note 11 above. Art. I(1)(a), providing for the compensation of "direct and indirect" Peace Treaty claims, supports this contention insofar as these claims are concerned. Furthermore, the same phraseology is found in those paragraphs dealing with nationalization and financial debt claims. Art. I(1)(b)(c).

¹²⁹ See text at note 26 above.

¹³⁰ See text at notes 24-25 above. And as the Rumanian Agreement so required. See text accompanying note 126 above. ¹³¹ See text at note 23 above.

¹³² Art. 2(B) of the Agreement with Yugoslavia, July 19, 1948, 62 Stat. 2659, T.I.A.S. No. 1803.

States as the Treaty of Peace provided?¹³³ Here again, while the Department's intent presumably is to follow Title III, nothing seems to have been gained by deliberately confusing the issue. Congress having laid down guidelines for corporate and stockholder claims quite consistent with customary international law, and the Foreign Claims Settlement Commission having applied these guidelines without especial difficulties, sufficient justification for omitting the all-important eligibility article appears wanting.

IV. AN EVALUATION OF THE AGREEMENT

The lump-sum settlement with Bulgaria, although long in coming,¹³⁴ is to be welcomed in most respects. While the \$400,000 to be paid in addition to the assets already liquidated appears small in contrast to the \$2,500,000 in additional funds received under the Rumanian Agreement, a closer look indicates that the present settlement is in fact more favorable. Rumanian claimants received 26 percent of their awards from vested assets and only 2.9 percent from additional funds.¹³⁵ Bulgarian claimants, who already have received 47.8 percent of their awards from the former source, will be entitled to an additional 6.1 percent from funds secured by the agreement.¹³⁶ The total payment of 53.9 percent of their awards therefore will contrast quite favorably with the 28.9 percent coming to Rumanian claimants.¹³⁷ Furthermore, British claimants under the 1955 Agreement between Bulgaria and the United Kingdom have received interim payments from the British Foreign Compensation Commission amounting to only 32.6 percent of their adjudicated awards.¹³⁸

Whether the device of pre-adjudicating claims from vested assets contributed markedly to the conclusion of this settlement remains an open question. Martin has observed that "the size of a compensation fund obtainable from an expropriating Government is determined neither exclusively nor predominantly by the particulars which can be presented of the

¹³³ See text at note 11 above. See also Graving, note 118 above.

¹³⁴ Bulgaria concluded such settlements with Switzerland in 1954, with France, Norway and the United Kingdom in 1955, and with Austria in 1962. The Agreement between Bulgaria and the United Kingdom was signed on Sept. 22, 1955, Cmd. 9025 (Treaty Series No. 79 of 1955), 222 U.N. Treaty Series 350.

¹³⁵ The \$24,526,370 lump-sum settlement with Rumania, note 4 above, of which \$22,026,370 came from vested assets, followed Commission awards of \$84,729,291 for claims against that country. Foreign Claims Settlement Commission, Thirteenth Semi-annual Rep. 7 (1960).

¹³⁶ See text at notes 43-44 above.

¹³⁷ Where the Solicitor General got the figure of "approximately 65 percent for Bulgaria" is not known. Brief for the United States as *Amicus Curiae*, p. 31, *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398 (1964), 32 U. S. Law Week 4229, 3 Int. Legal Materials Supp. 381 (March, 1964). Apparently it is just another example of the "puffing" contained in this disappointingly one-sided brief.

¹³⁸ Foreign Compensation Commission, Thirteenth Report, Cmd. No. 2175, at 8 (1963). However, the classes of claims settled by this agreement and the eligibility requirements contained therein were both wider than the United States-Bulgarian settlement, with a resultant lowering of the percentage payable on awards. Arts. 1 and 3 of the Agreement between Bulgaria and the United Kingdom, note 134 above.

claims put forward.”¹³⁹ Rather, the size is affected by a variety of factors,¹⁴⁰ not the least of which are “the crass facts of relative bargaining power.”¹⁴¹ Of the many factors present here,¹⁴² the presence of Bulgarian assets in the United States certainly counted for more when it came to settlement than did the actual pre-adjudication of the claims. While it was unreasonable to expect Bulgaria’s automatic acquiescence in the Foreign Claims Settlement Commission’s unilateral determination of its international liability, it is somewhat disappointing to see that the Department of State regards the Commission’s “judicial” determinations so lightly that it was willing to initial a settlement waiving 46.1 percent of the amount of the Commission’s adjudicated awards.¹⁴³ By this action the Department seriously undercuts its own argument for just compensation from Czechoslovakia, Hungary and the Soviet Union, other countries against which the Commission has pre-adjudicated claims from vested assets, since it demonstrates once again that the Department considers the Commission only “an effective instrument of implementing foreign policy”¹⁴⁴ rather than a quasi-judicial body whose pronouncements are entitled to substantial respect abroad.

The problems that arise when a lump-sum settlement follows rather than precedes a domestic determination of claims are not academic ones. The question of whether “it is sound politically and legally to seize and liquidate foreign-owned property by unilateral action to satisfy claims of American nationals in advance of an international settlement”¹⁴⁵ has been answered affirmatively by the United States without much thought about the consequences. The various points raised in this article, then, are not limited to the Bulgarian and the Rumanian Agreements, for they will arise in future settlements with Czechoslovakia, Hungary and the Soviet Union. Furthermore, moves afoot to have the Foreign Claims Settlement Commission pre-adjudicate claims against Cuba, considered elsewhere,¹⁴⁶ assuredly will gain momentum from the blocking of Cuban assets.¹⁴⁷ Hope-

¹³⁹ Martin, “The Distribution of Funds Under the Foreign Compensation Act, 1950,” in 44 *Grotius Society Transactions* 243, 249-250 (1959).

¹⁴⁰ See Lillich 107-109.

¹⁴¹ Rubin, *op. cit.* note 14 above, at 98.

¹⁴² See text with accompanying notes 45-51 above.

¹⁴³ The Department’s performance caused Senator Keating to introduce “legislation to require Senate ratification of any claims agreement made with foreign nations for claims adjudicated by the Foreign Claims Settlement Commission.” 109 Cong. Rec. 23958 (daily ed., Dec. 19, 1963). See S. 2405, 88th Cong., 1st Sess. (1963). The present writer will discuss the cause and effect of this proposal in *Essays on the Protection of Foreign Investment* (to be published by the Syracuse University Press in its *Procedural Aspects of International Law Series*).

¹⁴⁴ Re, “The Foreign Claims Settlement Commission: Completed Claims Programs,” 3 *Virginia Journal of Int. Law* 101, 103 (1963).

¹⁴⁵ Christenson 636.

¹⁴⁶ Lillich, “The Foreign Claims Settlement Commission and the Protection of Foreign Investment,” 48 *Iowa Law Rev.* 779 (1963). See H.R. 10327, 88th Cong., 2d Sess. (1964).

¹⁴⁷ On July 8, 1963, the United States blocked \$13,000,000 in private Cuban funds

EDITORIAL COMMENT

THE STATE DEPARTMENT AND SABBATINO—"EV'N VICTORS ARE BY VICTORIES UNDONE"

Certainly among the more important long-run goals of United States foreign policy and of those charged with specific responsibility for legal aspects of such policy are (or should be): (1) encouraging general recognition of the vitality of customary international law as law and not as just the lowest common denominator of current state practice; (2) upholding established principles of international law against positivist assertions that non-acceptance of these principles by new governments and states render them obsolete; and (3) strengthening the present admittedly imperfect institutional structure for enforcing international law.

It thus is difficult to understand why the State Department, through the Solicitor General, should have contributed, by its brief on behalf of the United States as *amicus curiae* in *Banco Nacional de Cuba v. Sabbatino*, reported on page 779 below, to a decision and opinion of the United States Supreme Court which run counter to these basic goals, and which may be liberally quoted, to our lasting national detriment, by those who oppose these goals in international tribunals, international law commissions and diplomatic negotiations.

The narrow holding of the Supreme Court was that

the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

This is serious enough since it, in effect, requires that all the force of the United States' judicial and executive agencies be utilized to protect property confiscated in violation of international law except where the confiscating government has itself expressly agreed to the principles it is violating. The writer's views in favor of judicial review of acts of state alleged to violate international law have been stated elsewhere and will not be repeated here.¹

Even more discouraging, however, from the standpoint of the policy goals set forth above, are certain of the reasons advanced by the Supreme Court in reaching this conclusion.

In the first place, the Court has taken up with a vengeance the implica-

¹ Dryden, Epistles.

² "The Sabbatino Case—Three Steps Forward and Two Steps Back," 57 A.J.I.L. 97 (1963); Report: A Reconsideration of the Act of State Doctrine in United States Courts, Committee on International Law (1959), Association of the Bar of the City of New York.

tion in the State Department's brief³ that United States courts are not appropriate fora for the resolution of controversial international law questions. While disclaiming in a footnote that "the courts of this country are broadly foreclosed from considering questions of international law," the Court would limit United States courts to cases involving a "greater . . . degree of codification or consensus concerning a particular area of international law"—to cases in which they can "focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice."

This rationale appears to ignore (understandably, perhaps, in view of the State Department's unqualified allegations of the success of our diplomacy in obtaining compensation for takings violating international law)⁴ the poverty of international remedies and of international fora for the determination of those very questions of international law most in need of judicial restatement, clarification and application. Absent a state's consent to the jurisdiction of an international tribunal to determine the alleged violation of international law, the only opportunity for a judicial determination is in domestic courts. Any foreign criticism of "parochial" determinations of international law questions by United States courts can be met by agreeing to adjudication by an international tribunal of the alleged "denial of justice" resulting from any such determination. We share Justice White's dismay that "the Court has, with one broad stroke, declared the ascertainment and application of international law beyond the competence of the courts of the United States in a large and important category of cases."

Secondly, the emphasis by the Supreme Court on general agreement as "to the relevant international law standards" as the touchstone of justiciability is unfortunate, in that it may be taken as reflecting a positivist view that current state practice rather than established principles (to changes in which the United States has not acquiesced) is determinative of the international law standards themselves. While acknowledging that there is "authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation," the Court points out that "Communist countries . . . commonly recognize no obligation on the part of

³ Brief for the United States as *amicus curiae* (September, 1963), pp. 27-28; 2 International Legal Materials 1009, 1018 (1963): "Decisions by American courts striking down foreign official acts of state which impair American property interests abroad will probably not be viewed abroad as dispassionate applications of neutral international law principles. More likely, they will be frequently seen in many other nations as reflecting merely parochial American views partisan to American national interests."

⁴ U. S. brief, cited above, at 30-31. The grossly inadequate recovery from the Soviet Union (about 7¢ on the dollar) is ignored, as well as the current difficulties in effecting adequate settlements with Czechoslovakia and Hungary.

the taking country" and that "representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them." It is only in a footnote that we learn that these and other references to the "disagreement as to relevant international law standards" are not intended to indicate "that there is no international standard" but "only that the matter is not meet for adjudication by domestic tribunals."

The problem of upholding in diplomatic negotiations and international arbitral proceedings the principle of just compensation will not be eased by the necessity of explaining away these references as having no relevance to the determination of international law standards but only to the Supreme Court's own standard for application of the self-imposed act of state doctrine.

What are the technical possibilities for dissipating this cloud that the decision may be taken to have cast on Secretary of State Hull's classic statement that

The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law support its declaration that, under every rule of law and equity, no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor. . . .

The universal acceptance of this rule of the law of nations, which, in truth, is merely a statement of common justice and fair-dealing, does not in the view of this Government admit of any divergence of opinion.⁵ . . .

The Court's decision leaves open the following situations in which United States courts (subject to ultimate review by the Supreme Court) might be permitted to determine whether a foreign government's taking of property within its own territory violates international law: (1) The foreign government at the time of suit is no longer "extant and recognized" by the United States; (2) the foreign government has by agreement expressly recognized the "controlling legal principles"; (3) the State Department has, by a letter satisfying the requirements of the so-called "Bernstein exception,"⁶ relieved the courts of any restraint on the exercise of their jurisdiction to pass on the question; and (4) Congress has

⁵ Hackworth, *Digest of International Law* 658 (1942); 32 A.J.I.L. Supp. 193 (1938).

⁶ See *Bernstein v. Van Heyghen Freres, S. A.*, 163 F. 2d 246 (1947), 42 A.J.I.L. 217 (1948); *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart Maatschappij*, 173 F. 2d 71 (1949), 44 A.J.I.L. 182 (1950); 210 F. 2d 375 (1954), 48 A.J.I.L. 499 (1954). The text of the State Department's letter submitted in the second Bernstein case was as follows:

"The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." 20 Dept. of State Bulletin 592, 593 (1949).

by statute provided that the applicable international law principles (or a statute declaratory of such principles) shall be the rule of decision in act of state cases.

Certain preliminary observations are indicated in respect of each of these possibilities of obtaining a determination by a United States court of the validity under international law of a foreign state's taking of property:

(1) In the light of the State Department's insistence on diplomacy as the more appropriate remedy for takings violating international law, the maintenance of diplomatic relations rather than recognition would seem to be the more appropriate test, if indeed the exercise of jurisdiction is to be based on the status of the taking government.

(2) The practical possibility that a case may arise involving a taking by a government which has expressly recognized by agreement the "controlling legal principles" depends, in the first instance, on the extent of treaty recognition of these principles. The United States benefits from such treaty protection principally in other Western industrialized countries and only in a relatively small number of less developed countries, including countries such as Nicaragua, Iran, Israel, Korea, Pakistan, Vietnam, Ethiopia and Nationalist China. It is to be hoped that the relative advantage in United States courts enjoyed (as a result of *Sabbatino*) by countries which have not entered into such agreements will not adversely affect the State Department's efforts to negotiate such treaties with other developing countries.

In addition to international treaties there may, of course, be other agreements by foreign states, including agreements with foreign private investors, which recognize the controlling legal principles.

(3) Justice Harlan in his majority opinion explicitly reserved judgment on the validity of the *Bernstein* exception to the act of state doctrine, finding that there had been no State Department letter expressly relieving the Court of the restraint imposed by the act of state doctrine. While the Court did not acknowledge the validity of the *Bernstein* exception, the great weight given to the State Department's views would indicate that an appropriate expression of State Department policy in favor of reviewing the international law validity of a foreign act of state would be given effect.

It may be difficult to contemplate a more appropriate case for the expression of such a policy than that of the Cuban Government's confiscations, but, in the event a reconsideration of the State Department's position in this area is undertaken, the legal means of making a new policy effective remains available.

(4) The most felicitous part of the majority decision is its conclusion that the scope of the act of state doctrine is a matter of Federal rather than State law. Surely this is a logical corollary of the commitment of foreign affairs to the national government rather than to the several States.

This conclusion, together with the Court's further determination that the act of state doctrine is judicial rather than Constitutional,⁷ suggests that an Act of Congress requiring the courts to apply international law (or a statutory declaration of the applicable principles thereof) as the rule of decision in "act of state" cases would be upheld.

JOHN R. STEVENSON

PROFESSOR MCDUGAL'S "LAW AND MINIMUM WORLD PUBLIC ORDER" *

At recurrent stages in the evolution of law as an adjunct to social development, faithful but now exhausted concepts become unsatisfactory to sustain and encourage essential progress. Accepted philosophical bases of the nature of law and its function as an implement for satisfying the needs of a burgeoning and nervous society, appear no longer capable of responding to the demands of an impatient citizenry. Indeed, these very concepts may freeze or impair the inclinations of those charged with responsibility for enlisting law in the service of human progress. The fixity of these entrenched notions may abort new approaches to issues for which the older clichés afford no remedy. And so, periodically in the history of the law new theories and philosophies are devised to meet the newer needs, to enlist the law's resources in the steady progression of man toward higher standards of dignity and decency. This is just as true of international law as of other branches of legal science. Particularly since the end of the last World War, the law of nations has, in several respects, reached the point where progress in common understanding among the world's communities has been frustrated by the inefficacy of existing methodology to produce the footings upon which statesmen and lawyers might better construct the framework of a world at peace.

To this staggering problem Professor Myres McDougal and a group of dedicated and talented associates have made an outstanding contribution. Their task has been to break down juridical "blocks" and clear the path for a fresh assault upon issues for which solutions are desperately needed. In that endeavor, four volumes have been produced, of which *Law and Minimum World Public Order* was the second. This—like the other volumes of the series—is a durable monument to the authors' prodigious industry and scholarship, and a splendid credit to American legal writing. It constitutes an application of Professor McDougal's now well-known conceptions of value-oriented jurisprudence of human dignity to the enthronement of the rule of law and the establishment of a world public order—

⁷ 376 U. S. 398,427 (U. S. Sup. Ct., March 23, 1964): "If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs."

* *Law and Minimum World Public Order*. By Myres S. McDougal and Florentino P. Feliciano. New Haven and London: Yale University Press, 1961. pp. xxviii, 872. Table of cases. Indexes. \$12.50.

minimal though that might be—through the processes, techniques and regulation of inter-state coercion, including the conduct of warfare, the punishment of war criminals and the government of territory under hostile military occupation. While it is a thorough-going study of the use of force and the conduct of hostilities by members of the family of nations, it is not merely another exegesis on the law of war or of the various techniques of constraint as reflected in practice. What McDougal and Feliciano have chosen as the object of their expertise is essentially an attainable code of conduct for evolved, responsible governments. Yet those who attach some importance to pragmatic analysis will be disturbed by the failure to take sufficient account of the upheaval in international society which has occurred since the second World War. Too little weight has been given to the devastating inroads which the myth of universality has chiseled into the very foundations of traditional international law. Some, it is true, appear to regard this as a good thing; but a complete evaluation must impeach the practice of admitting into the Society of Nations primeval entities which have no real claim to international status or the capacity to meet international obligations, and whose primary congeries of contributions consists in replacing norms serving the common interest of mankind by others releasing them from inhibitions upon irresponsible conduct. In this pursuit they have been aided and abetted by the so-called socialist camp, whose parallel objectives are motivated by a somewhat different inspiration. A further consequence has been to impair respect for that rule of law whose primacy is essential to a minimum world order of human decency. To an impartial observer—rarely encountered though he might be—it should be apparent that the development of international law as a code of responsible action in the advancement of human values has hardly been expedited by abandonment of prior standards. An undignified compulsion to admit these entities as full-blown members of the international society upon achieving “independence” has impeded, not advanced, the emergence of a mature code of conduct.

A principal fascination of the study is its unique interweaving of conceptual analysis with a synthesis of state practice so as to bridle the common tendency to enshrine a thin fabric of decision as the established rule—frequently because the principle asserted has not been cauterized by the kind of prudent restraint exhibited by the authors of the volume. If the technique itself renders more elusive the legal interpretations to be extracted, the fruit of this labor is well worth the effort.

Many images and notions, once thought impregnable, are shattered; but the work is not, for all that, iconoclastic. It rejects accepted concepts of positivism, and it is, of course, antithetical to the philosophy of Kelsen's *reine Rechtslehre*, which is hardly astounding in any admixture of those political, sociological and historical forces distilling the rule of law at a given period. If jurisprudence be viewed as a broad spectrum, the Kelsenien theory of law would polarize at one extreme with McDougal's conception at the other. For, whereas Kelsen views law in its pristine purity divorced from all political overtones, McDougal's is saturated with

a highly political thrust that must pre-determine the content of a particular norm. The philosophical *motif* is shot through with a quasi-objective politics which seeks to construct a world island system of peaceful association through a least common denominator approach; or, as Lasswell has put it in his introduction, "to consolidate at least a minimum degree of universal public order . . . by enlarging the practice of consent and reducing the occasion for coercive imposition."¹ Yet isn't this, in a certain sense, what the chancelleries of nations have been striving to attain, though perhaps inarticulately? Or if it is not, is there much hope of realizing to a substantial degree a least common denominator in any equation where one of the factors blandly designs and contrives to destroy the others, and—even worse—in which a substantial group of decision-makers has found no satisfactory means of overcoming the double standard constantly applied to international action inside and outside the United Nations?

Deserting, for the moment, these general reflections, let us examine the contents of the volume.

Chapter 1, on the Processes of Coercion, deals broadly with the various techniques and modalities (diplomatic, ideological, economic and so on) available to an initiator of constraint to induce politically significant attitudes and behavior favorable to the initiating state; and the methods by which the authoritative decision-makers seek to regulate the process of coercion (prescription of principles inhibiting certain forms of conduct), along with the limitations on the use of force characteristic in presently unlawful violence (aggression). The chapter also contains brief illustrative and introductory passages on the regulation of hostilities (the classical law of war) to be examined more fully in the later chapters, *viz.*, the problems of combatants and non-combatants, permissible areas of weapons-user, permissible character of weapons and objects of attack; reprisals, superior orders and belligerent occupation, along with some exemplary provisions of the 1949 Geneva Conventions on the Protection of War Victims.

Fundamental to the authors' dissection of the coercive process is the postulate that the more recently proposed trichotomy of peace, war and an intermediate third status of hostile attitudes—to say nothing of the hoary dichotomy of "peace" and "war" conditions—are neither comprehensive nor flexible enough to encourage rational analysis of the widening panorama of inter-state coercions—coercions which have become too complex to fit into either of the previously acceptable categories.²

In Chapter 2, "The Initiation of Coercion: A Multi-Temporal Analysis," the authors criticize the well-entrenched rigidity of thinking concerning the slippery problem of the time-point at which war begins; and the failure of prior ambiguous formulations to recognize that the initiation of coercion generates "not one unitary problem of ascertaining a precise

¹ P. xxvi.

² "Appropriate analysis of the process of coercion may make possible intellectual isolation of the major recurring types of problems which raise common identifiable issues of policy and which involve common patterns of conditioning factors." (P. 10.)

moment for the beginning of . . . a 'legal state of war', but rather a whole series of complex problems''* involving distinct legal policy issues for the decision-makers (*e.g.*, such specific issues as the effect of insurance policy war clauses, treaty commitments and claims of third states, charter party war-risk clauses, and the like).

Chapter 3 offers an enlightening review of the perennial problem of aggression (plus, of course, its definition) and self-defense with a refreshing discussion of "peaceful change" (and whatever happened to *that* favored topic of symposia?); permissible degrees of coercion in areas of self-defense; action against third states and on the high seas; and a provocative analysis of the requirements of, and limitations upon, self-defense and self-help alongside the proper rôle of a world security organization. The pressing matter of collective self-defense under Article 51 of the United Nations Charter and community policy action under Articles 43 and 39 are the object of a succinct and restrained reference. The theme throughout is that it is not only possible but imperative to clarify some kind of a rational world policy on resort to international coercion.

A lengthy chapter (4, pp. 261-384) on the "Community Sanctioning Process and Minimum Order" engrosses the authors in the problem of implementing the principle of minimum world order, once the basic community policy has been clarified. Here we are face to face with one of the most difficult of all problems in inter-polity relationships—and one of the oldest. The authors unequivocally reject the thesis of Niemeyer and Borchard, who conceived of an international order dependent upon force for its *ultima ratio* as a permanent source of international struggle rather than a promising medium of order.

Under the rubric of "Participation and Nonparticipation in Coercion" (Chapter 5), a theoretical disquisition on neutrality in its modern context is presented, liberally spiced with selected examples from World War II practice on discrimination against belligerents, neutral asylum, claims of neutrals, contraband and related questions. This chapter is a rewarding exercise in the application of McDougal's special disciplines to a topic which has not received hitherto the treatment it deserves.

So far as this appraiser's personal predilections are concerned, the blood and muscle of the volume are contained in Chapters 6 and 7, which are veritable monographs on the modern law applicable to combat situations and belligerent occupation. Practitioners and scholars will find a storehouse of information in these chapters. There the authors are at their superlative best, ranging the gamut of military necessity, lawful and unlawful combatancy, guerrilla and partisan status (omitting, however, the enormous and largely irrelevant subject of prisoners of war), legitimate and illegitimate combat zones and objectives and permissible implements of coercion (including nuclear and biological weapons). They argue persuasively that most of the considerations adduced by prior publicists to sustain the illegality of nuclear weapons fall short of the mark. To this

* P. 100.

the present writer, as one who had repeated occasion in World War II to pass upon the propriety of weapons use, appends his unqualified, albeit reluctant, concurrence. International law contains no comprehensive prohibition of nuclear warfare. The problem remains in the political realm and will not be resolved or swept aside by legalistic interpretations.⁴

In a work of such grandeur, it may seem invidious to be critical. But the distinguished authors will perhaps not object to friendly comment from a colleague who is frankly awed with the depth of probing and the brilliance of solid research marking their efforts. Whether we agree with the jural technique or are content with its often symbolical *mystique* is indifferent to an objective evaluation of this majestic study. What is important is that with its pages the legal community of mankind must inevitably profit from some of the finest original thinking of our generation in the field of international law and legal philosophy. Still, one can admire the intellectual resources brought to McDougal's scholarly conceptualism of law as an instrument of social and humanitarian will, without approving unqualifiedly the abstruse formulation of principles enunciated. The prime reservation to that formulation is perhaps that the structural idiom occasionally overpowers the living thought of which it is the skin. We are not now dealing with a matter of esoteric argot, but one of plain drafting intelligibility for a lay group not conditioned to the basic expressionism. Portions of the treatise are not easy reading, and the unwary may not grasp readily the prolix esotericism enveloping the legal submissions. Simple ideas are sometimes expressed in a framework which so cloaks the substance that the dialectic casing, the vehicle, blurs the focal points of concentration. That there is no inherent reason for the rhetoric to be quite this laborious is convincingly demonstrated by the superb lucidity of Professor Lasswell's introductory chapter, which furnishes the principal theme for the work's later contrapuntal development in the field of forceful inter-state relations.

The theory blames the "syndrome of parochialism"⁵—an atavistic xenophobia combined with a carry-over instinct to fight for tribal (state) value-interests—for the evil state of self-destruction to which all of man's scientific accomplishments have predisposed him. But does this "syndrome" unduly simplify the nature of the world society in which we live? Part of the difficulty, of which Professors McDougal and Lasswell are surely more aware than most psycho-international analysts—is that different portions of the globe experience the syndrome at different times and in different degrees because of their disparate stages of development, and for them it is respectable and very real. But that is a digression. The objective of this *avant-garde* jurisprudence is to weaken the syndrome of parochialism because it deprives statesmen of "their capacity to reach common precepts of order for a world association in the throes of con-

⁴ Nor has this situation been changed by the Nuclear Test Ban Treaty. Cf. Report of the Committee on Foreign Relations, United States Senate, Exec. M., 88th Cong., 1st Sess. (Exec. Rep. No. 3), p. 5.

⁵ Compare this with Kelsen's familiar "dogma of sovereignty."

vulsive disorder." Would it be legitimate to inquire whether the achievement of a "self-system larger than the primary ego; larger than the ego components of family, friends, profession or nation"⁶ is, at this writing, something more akin to a socialist philosophy than that of the Western World? Or whether the conceptualism may not indeed reflect varying colorations according to the personal predispositions of those advising the decision-makers?

Despite their intense preoccupation with the process of decision-making, a lingering suspicion persists that the authors personally may not have participated sufficiently in that process to radiate an abiding awareness of how international decisions are really made.⁷ This writer is therefore bemused by the further nagging thought: Could—or would—this volume, so meritorious in every major respect, possibly have been written by a decision-maker?

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⁶ Lasswell's introduction, p. xxiv.

⁷ For first-hand and first-rate reporting by two diplomats experienced in this process, see John G. Hadwen and Johan Kauffmann, *How United Nations Decisions are Made* (Leyden: A. W. Sythoff, 1960).

NOTES AND COMMENTS

OUTER SPACE CO-OPERATION IN THE UNITED NATIONS IN 1963¹

Law and order in outer space were significantly advanced by the U.N. General Assembly at its 1963 session when it unanimously approved Resolution 1962 on December 13 as a declaration of legal principles governing the activities of states in the exploration and use of outer space.² The General Assembly the same day unanimously approved Resolution 1963 to further international co-operation in the peaceful uses of outer space.³ This session heard the views of Presidents John F. Kennedy and Lyndon B. Johnson on outer space issues.

President Kennedy in his address before the General Assembly on September 20 urged exploration of the possibilities of further co-operation among countries and especially between the United States and the Soviet Union in the regulation and exploration of space, including a joint expedition to the moon.⁴ He stated:

... in a field where the United States and the Soviet Union have a special capacity—in the field of space—there is room for new co-operation, for further joint efforts in the regulation and exploration of space. I include among these possibilities a joint expedition to the moon. Space offers no problems of sovereignty; by resolution of this Assembly, the Members of the United Nations have foresworn any claim to territorial rights in outer space or on celestial bodies, and declared that international law and the United Nations Charter will apply. Why, therefore, should men's first flight to the moon be a matter of national competition? Why should the United States and the Soviet Union, in preparing for such expeditions, become involved in immense duplications of research, construction and expenditure? Surely we should explore whether the scientists and astronauts of our two countries—indeed, of all the world—cannot work together in the conquest of space, sending some day in this decade to the moon, not the representatives of a single nation, but the representatives of all of our countries.

President Johnson in his address before the General Assembly on December 17 noted that among significant achievements taking place:

¹ On U.N. discussions relating to outer space from 1958 to 1963, see Simsarian, 57 A.J.I.L. 854-867 (1963).

² Res. 1962 (XVIII), U.N. Press Release GA/2910, Dec. 17, 1963, Pt. II, p. 8. On the discussion of this resolution in the General Assembly, see U.N. Docs. A/C.1/P.V. 1342-1346, A/5656 and A/P.V. 1280. The text of the resolution is reprinted in 58 A.J.I.L. 477 (1964).

³ Res. 1963 (XVIII), U.N. Press Release, GA/2910, Dec. 17, 1963, Pt. II, p. 11. On the discussion of this resolution in the General Assembly, see U.N. Docs. A/C.1/P.V. 1342-1346, A/5656 and A/P.V. 1280. The text of the resolution is reprinted in 49 Dept. of State Bulletin 1013 (1963).

⁴ U.N. Doc. A/P.V. 1209, pp. 21-23; 49 Dept. of State Bulletin 530 (1963).

a start has been made in furthering mankind's common interest in outer space—in scientific exploration, in communications, in weather forecasting, in banning the stationing of nuclear weapons, and in establishing principles of law.⁵

Ambassador Adlai Stevenson during the discussion of international co-operation in the peaceful uses of outer space in Committee I, stated on December 2 that President Johnson had instructed him to reaffirm the offer of President Kennedy to explore with the Soviet Union opportunities for working together in the conquest of space, including the sending of men to the moon as representatives of all countries.⁶ Ambassador Stevenson quoted the statement made by President Johnson when he was a member of the Senate and appeared before Committee I of the General Assembly on November 17, 1958, to speak in support of the resolution creating the *Ad Hoc* Committee on the Peaceful Uses of Outer Space. At that time President Johnson stated:

To keep space as man has found it and to harvest the yield of peace which it promises, we of the United States see one course, and only one, which the nations of the earth may intelligently pursue. That is the course of full and complete and immediate co-operation to make the exploration of outer space a joint adventure.⁷

Two important steps were taken in 1963 to limit the arms race in outer space. One was the treaty signed by over a hundred nations, prohibiting the testing of nuclear weapons in outer space, in the atmosphere and under water.⁸ The other was the step taken by the General Assembly on October 17, when the Members by acclamation welcomed the expressions by the United States and the Soviet Union of their intention not to station in outer space any objects carrying nuclear weapons or other kinds of weapons of mass destruction, and solemnly called upon all states to refrain from stationing such weapons in outer space.⁹

I. LEGAL PRINCIPLES

Resolution 1962 approved unanimously by the General Assembly spells out several basic principles previously approved by the General Assembly, resolves certain points of conflict during the past two years in the Committee on the Peaceful Uses of Outer Space and deals with two issues in a general preliminary manner with a view to their further consideration by the Committee in 1964.¹⁰

⁵ U.N. Doc. A/P.V. 1284, pp. 36-40; 50 Dept. of State Bulletin 2 (1964).

⁶ U.N. Doc. A/C.1/P.V. 1342, pp. 6-27; 49 Dept. of State Bulletin 1005 (1963); partly reprinted in 58 A.J.I.L. 476 (1964).

⁷ 49 Dept. of State Bulletin 1009 (1963). For full text of statement, see U.N. Doc. A/C.1/P.V. 986, pp. 16-25; 39 Dept. of State Bulletin 977 (1958).

⁸ Signed at Moscow Aug. 5, 1963; in force Oct. 10, 1963; registered with the United Nations Oct. 15, 1963. 49 Dept. of State Bulletin 239 (1963); 57 A.J.I.L. 1026 (1963). Res. 1910 (XVIII) adopted by the General Assembly on Nov. 27, 1963, noted this treaty with approval and called upon all states to become parties to it and abide by its spirit and provisions.

⁹ Res. 1884 (XVIII).

¹⁰ For the report of the Committee on the Peaceful Uses of Outer Space concerning

The resolution presents nine legal principles as a declaration to guide states in the exploration and use of outer space. The first four principles elaborate on Section A of Resolution 1721 unanimously approved by the General Assembly on December 20, 1961: (1) the exploration and use of outer space shall be carried on for the benefit and in the interests of all mankind; (2) outer space and celestial bodies are free for exploration and use by all states on a basis of equality and in accordance with international law; (3) outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means; and (4) the activities of states in the exploration and use of outer space shall be carried on in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.¹¹

In elaborating the remainder of the resolution, three particularly contentious issues were resolved as follows:

(1) The Soviet Union proposed that the use of outer space for propagating war, national or racial hatred or enmity between nations be prohibited. The United States would not agree to the inclusion of such a statement as a legal principle in the resolution. This issue was resolved by including a statement in the preamble of Resolution 1962 to recall Resolution 110 (II) of November 3, 1947, which condemned propaganda designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression, and to declare that this Resolution 110 is applicable to outer space. Under Resolution 110 each state is asked to take appropriate steps relating to this subject "within its constitutional limits."

(2) The United States would not agree to the Soviet Union proposal that all activities of any kind pertaining to the exploration and use of outer space be carried out solely and exclusively by states. The fifth principle in Resolution 1962 resolves this issue by stating that states bear international responsibility for national activities in outer space, whether carried on by governmental agencies or by non-governmental entities. Authorization and continuing supervision by the state concerned over the activities of non-governmental entities is called for. In addition, under the fifth

this resolution on legal principles and the comments of members of the Committee, see U.N. Doc. A/5549/Add.1. For new drafts and revisions considered by the Legal Subcommittee of the Committee at its 1963 session, see U.N. Docs. A/AC.105/C.2/L.6 and 7. The proposals before the Subcommittee were reproduced in Annex I of its report, U.N. Doc. A/AC.105/12, and in Annex III of the report of the Committee, U.N. Doc. A/5549. For the summary records of the Subcommittee session, see U.N. Docs. A/AC.105/C.2/SR. 16-28. For statement of U. S. representative, Leonard C. Meeker, at concluding meeting of this session, see 48 Dept. of State Bulletin 923 (1963); 57 A.J.I.L. 909 (1963). See generally on Res. 1962, Richard N. Gardner, "Outer Space: A Breakthrough for International Law," 50 A.B.A.J. 80 (1964).

¹¹ Res. 1721 (XVI). General Assembly, 16th Sess., Official Records, Supp. No. 17 (Doc. A/5100), pp. 6-7; 56 A.J.I.L. 946 (1962).

principle, when space activities are carried on by an international organization, responsibility for compliance with the principles in the resolution rests with the international organization and the states participating in it.

(3) The United States would not agree to the Soviet Union proposal which would require prior discussion and agreement on any measures to be undertaken by a state "which might in any way hinder the exploration or use of outer space for peaceful purposes by other countries." This proposal would have introduced the veto into outer space. The sixth principle in Resolution 1962 resolves this issue by providing that a state which has reason to believe that an outer space activity or experiment planned by it or its nationals would cause potentially harmful interference with the activities of other states shall undertake international consultations before proceeding with any such activity or experiment. No veto, however, is provided for. The United States reiterated during the discussion of this subject that it considered the Consultative Group established by the Committee on Space Research of the International Council of Scientific Unions as an appropriate forum for such consultation.¹²

In addition, the United States continued to oppose the Soviet Union proposal that "the use of artificial satellites for the collection of intelligence information in the territory of foreign states is incompatible with the objectives of mankind in its conquest of outer space." The United States repeatedly noted that international law imposed no prohibition on the observation of the earth from outer space.¹³ No reference is made to this subject in the resolution adopted.

The seventh and ninth principles provide for assistance to and return of astronauts and space vehicles. The eighth principle in the resolution provides for liability for damage done by an object launched into outer space. Recognizing that these matters are dealt with in only general preliminary terms, the General Assembly in Resolution 1963 asks that the Committee on the Peaceful Uses of Outer Space, when it convenes in 1964, arrange in particular for the prompt preparation of draft international agreements on these subjects.

During the discussion in Committee I, Ambassador Stevenson made the following statement prior to the unanimous approval of Resolution 1962 concerning the character and status the legal principles would have when adopted by the General Assembly without dissent:

In the view of the United States, the operative paragraphs of the draft resolution contained legal principles which the General Assembly, in adopting the resolution, would declare should guide States in the exploration and use of outer space. We believe these legal principles reflect international law as it is accepted by the Members of the United Nations. The United States, for its part, intends to respect these

¹² See statement of U. S. representative, Francis T. P. Plimpton, in Committee on Peaceful Uses of Outer Space, U.N. Doc. A/5549/Add. 1, p. 7, reprinted in part in 58 A.J.I.L. 473 (1964).

¹³ On this subject, see address by Leonard C. Meeker, Deputy Legal Adviser, Department of State, entitled "Observation in Space," 48 Dept. of State Bulletin 746 (1963).

principles. We hope that the conduct which the resolution commends to nations in the exploration of outer space will become the practice of all nations.¹⁴

Immediately following Ambassador Stevenson's statement, the Soviet Union representative stated:

Let it be said in passing that one should note the statement of the delegation of the United States of America to the effect that the United States considers that these legal principles reflect international law as it is accepted by the Members of the United Nations and that, on its part, the United States intends to respect the principles. The Soviet Union, for its part, will also respect the principles contained in this declaration if it is unanimously adopted.¹⁵

II. INTERNATIONAL CO-OPERATION

Resolution 1963¹⁶ on international co-operation in the peaceful uses of outer space, approved unanimously by the General Assembly, endorses the recommendations of the Committee on the Peaceful Uses of Outer Space concerning the exchange of information, encouragement of international programs, international sounding rocket facilities, education and training and potentially harmful effects of space experiments.¹⁷

The resolution welcomes the decision of the Committee to prepare a number of background informational papers and to establish, at the request of the Government of India, a group of six scientists to visit the sounding rocket launching facility at Thumba, India, and to advise the Committee on the eligibility of this facility for United Nations sponsorship in accordance with the basic principles endorsed by the General Assembly in Resolution 1802.¹⁸ In addition the resolution invites Member States to give favorable consideration to requests of countries for training and technical assistance; notes the agreement between the Soviet Union and the United States looking towards co-operation in satellite meteorology, communications and magnetic field mapping;¹⁹ and expresses the belief that international co-operation can be beneficial in furthering the exploration of the solar system.

III. METEOROLOGICAL SATELLITES

Resolution 1963 notes with appreciation (a) the second report of the World Meteorological Organization (WMO) on the advancement of atmospheric sciences and their application in the light of developments in outer

¹⁴ *Loc. cit.* note 6 above.

¹⁵ U.N. Doc. A/C.1/P.V. 1342, pp. 27-46.

¹⁶ *Loc. cit.* note 8 above.

¹⁷ For the recommendations of the Committee, see its report dated Sept. 24, 1963, U.N. Doc. A/5549.

¹⁸ For the principles for the creation of such international facilities under U.N. sponsorship, see the Report of the Committee on the Peaceful Uses of Outer Space, U.N. Doc. A/5181, p. 12. Resolution 1802 (XVII) of Dec. 14, 1962, endorsed these principles. For two documents on the Indian sounding rocket launching facility, see U.N. Docs. A/AC.105/8 and 10.

¹⁹ For the text of this agreement, see U.N. Doc. A/5482.

space,²⁰ and (b) the organizational and financial steps taken by the Fourth Congress of the WMO in 1963 in response to Resolutions 1721 and 1802 on outer space approved by the U.N. General Assembly the previous two years. Member states were urged by Resolution 1963 (a) to extend their national and regional meteorological efforts to implement the expanded program of the WMO, (b) to co-operate in the establishment of the World Weather Watch proposed by the WMO, and (c) to increase research and training in the atmospheric sciences.²¹

The WMO second report on outer space observed that the impact of meteorological satellites on the atmospheric sciences has been, in fact, as great as was originally anticipated—perhaps even greater. Not only have new sources of data become available, but the very fact of their existence has provided a tremendous stimulus to further effort and progress in the atmospheric sciences in general.²²

TIROS VIII was launched by the United States on December 21, 1963, to join *TIROS VII* in providing weather data daily to supplement available conventional data. A new experimental camera arrangement, called Automatic Picture Transmission (APT), is being tested for the first time aboard the *TIROS VIII* meteorological satellite as part of a continuing research and development program to provide meteorologists in all parts of the world with up-to-the-minute cloud photographs.²³ Under this arrangement, any nation, with an inexpensive ground station which it may purchase at a cost of less than \$50,000 or build locally according to specifications obtainable from the National Aeronautics and Space Administration (NASA), may readout pictures of cloud formations in its area directly from *TIROS VIII* as it passes over.

IV. COMMUNICATIONS SATELLITES

Resolution 1963 welcomed the decisions of the Extraordinary Administrative Radio Conference held under the auspices of the International Tele-

²⁰ U.N. Doc. E/3794. This report was initially considered by the Economic and Social Council at its 36th session. See Res. 980 C II (XXXVI) adopted by the Council on Aug. 1, 1963, Doc. E/3816, p. 12, and Report of the Council, Doc. A/5503, pp. 48-49.

²¹ The Fourth WMO Congress in Geneva, April 1-27, 1963, initiated a comprehensive study to improve the world-wide weather system, established a WMO Advisory Committee, created a new development fund, and started a planning unit in the WMO Secretariat to assist in the development of the detailed global plan for the World Weather Watch. When finally approved by the members of the WMO, the new development fund will have \$1,500,000 for the financial period beginning Jan. 1, 1964. The fund will be financed on the same assessment basis as the regular budget of the WMO.

²² U.N. Doc. E/3794, p. 8.

²³ See NASA News Release 63-269, Dec. 18, 1963. On developments relating to meteorological satellites, see "NASA Authorization for Fiscal Year 1964," Hearings before the Senate Committee on Aeronautical and Space Sciences, 88th Cong., 1st Sess., pp. 140-141, 437-448, 693-699 and 1059; and "1964 NASA Authorization," Hearings before the Subcommittee on Applications and Tracking and Data Acquisition of the House Committee on Science and Astronautics, 88th Cong., 1st Sess., pp. 79, 3023-3025 and 3069-3125.

communication Union (ITU) in October and November, 1963, on the allocation of frequency bands for space communication.²⁴ The second report of the ITU on outer space²⁵ was noted with appreciation.

The testing of experimental communications satellites was rapidly extended by the United States through *TELSTAR II*, *RELAY I* and *II* and *SYNCOM II* to communications from North America to South America, Western Europe, Nigeria and Japan.²⁶ There was a television broadcast of the opening of the 1963 session of the U.N. General Assembly via satellite.

President Kennedy issued a statement on November 20, 1963, noting that the allocation of frequencies for communications satellites by the ITU Conference had cleared the way for the establishment of an efficient global communications system. He said:

This Government and the United States Communications Satellite Corporation can now take practical steps, in co-operation with other governments and foreign business entities, to develop a single global commercial space communications system. It continues to be the policy of the United States that all countries which wish to participate in the ownership, management, and use of this system will have an opportunity to do so.²⁷

Exploratory talks have been held with a number of countries concerning the development of an operational system of commercial communications satellites and similar talks with other countries are under way. The United States has placed special emphasis in these talks on the desirability of a single global system as opposed to competing systems developed by different nations or regional groups.²⁸

JAMES SIMSARIAN

²⁴ The decisions of the Conference are set forth in Final Acts of the Extraordinary Administrative Radio Conference to Allocate Frequency Bands for Space Radiocommunication Purposes, Geneva, 1963. See transcript of press conference held via *SYNCOM* satellite concerning the achievements of the ITU Conference, NASA News Release, Nov. 8, 1963. Frequency bands were allocated for communications, meteorological and navigational satellites, space research, radio astronomy, amateur space activities and aeronautical space services. See report by Congressman Harris in U. S. House of Representatives on Jan. 9, 1964, on "Geneva Space Radio Communication Conference and Progress made in Establishing Global Communication Satellite System," 110 Cong. Rec. (88th Cong., 2d Sess.) 159-178.

²⁵ U.N. Doc. E/3770. This report was initially considered by the Economic and Social Council at its 36th session. See Res. 980 C I (XXXVI), adopted by the Council on Aug. 1, 1963, Doc. E/3816, pp. 11-12, and Report of the Council, Doc. A/5503, pp. 48-49.

²⁶ On developments relating to communications satellites, see "NASA Authorization for Fiscal Year 1964," Hearings before the Senate Committee on Aeronautical and Space Sciences, 88th Cong., 1st Sess., pp. 141-143, 417-437 and 1059-1069; and "1964 NASA Authorization," Hearings before the Subcommittee on Applications and Tracking and Data Acquisition of the House Committee on Science and Astronautics, 88th Cong., 1st Sess., pp. 80-82, 3137-3179, 3203-3225, 3267-3294 and 3295-3333.

²⁷ White House Press Release, Nov. 20, 1963; 49 Dept. of State Bulletin 904 (1963).

²⁸ See statements by Department of State and Communications Satellite Corporation in "Communications Satellite Act of 1962—The First Year," Report of House Com-

COMMON MARKET ASSIMILATION OF LAWS AND THE OUTER WORLD

In his instructive article, "Assimilation of National Laws as a Function of European Integration," recently published in this JOURNAL,¹ Professor Eric Stein mentions the various working groups set up by the six governments forming the European Economic Community to deal with obligations imposed upon the member states by Article 220 of the Rome Treaty.² Among these obligations is one obliging the states, insofar as necessary, to engage in negotiations with each other with a view to ensuring for the benefit of their nationals the simplification of the formalities governing the reciprocal recognition and enforcement of judicial decisions and of arbitral awards.³

This provision, designed to secure recognition and enforcement in an efficient way, can be complied with by various means. The six nations can unilaterally improve their general law on recognition of foreign judgments to the extent that it is necessary; or they can conclude bilateral treaties with each other where such treaties do not yet exist;⁴ or they may try to agree on a multilateral convention covering all six states. As related by Professor Stein, the latter method is now being tried. Since 1960, a group of government experts from the six countries, assisted by the Community's staff, has been busy on the assignment.⁵ An advanced draft of a multilateral convention exists, and much of its contents has become known.⁶

Regional organizations regularly endeavor to provide for the smooth internal enforcement of judgments coming from courts of the region. Treaties on recognition of judgments exist in Latin America,⁷ among the Scandinavian countries,⁸ and between the members of the Arab League,⁹

mittee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., Rep. No. 809, Oct. 3, 1963, pp. 6 and 25-27; statement made by Chairman of U. S. Delegation on closing day of ITU Conference, Nov. 8, 1963, 49 Dept. of State Bulletin 835-837 (1963); and address by Richard N. Gardner, Deputy Assistant Secretary of State for International Organization Affairs, entitled "Space Meteorology and Communications: A Challenge to Science and Diplomacy," 48 Dept. of State Bulletin 740 (1963).

¹ 58 A.J.I.L. 1 (1964).

² *Ibid.* at 27.

³ Final part of Art. 220 of the Treaty of March 25, 1957, 51 A.J.I.L. 930 (1957).

⁴ The following treaties on Recognition of Judgments exist among the Six: France-Belgium (1899), Netherlands-Belgium (1925), France-Italy (1930), Germany-Italy (1936), Germany-Belgium (1958), Netherlands-Italy (1959), Germany-Netherlands (1962), Belgium-Italy (1963).

⁵ See Bulletin of the European Economic Community 1-60, p. 39 (29). Cf. Parliamentary Question, J. O. des Communautés Européennes, Oct. 31, 1959, No. 56, p. 1123 (59).

⁶ For discussion of parts of an early draft, see Weser, "Bases of Judicial Jurisdiction in the Common Market Countries," 10 A. J. Comp. Law 323 (1961). Cf. Graupner, "Some Recent Aspects of the Recognition and Enforcement of Foreign Judgments in Western Europe," 12 Int. and Comp. Law Q. 367 (1963).

⁷ The Montevideo Treaty on Civil Procedure of 1889, revised in 1940, 37 A.J.I.L. Supp. 149 (1943); the Bustamante Code on Private International Law, Arts. 423-433, 86 L.N. Treaty Series 120, 254; The International Conferences of American States 1889-1928, pp. 325, 433 (Scott ed., 1931).

⁸ Convention of March 16, 1932, 139 L.N. Treaty Series 181. See Philip, "The

for example. As long as interests of the outside world are not interfered with, these efforts are most desirable.

Of the six countries of the Common Market, several have provisions in their law on assumption of judicial jurisdiction which, in the diplomatic French language, are called "*exorbitantes*."¹⁰ Some may well be called outrageous, as is done in Professor Stein's paper.¹¹ For example,¹² under the notorious Article 14 of the Code Napoléon, a Frenchman may sue a foreigner in the French courts, although neither party has been in France and the cause of action has no relation to France. In addition to France, Luxembourg still has on its books such jurisdiction based on the nationality of the plaintiff. And while The Netherlands does not apply the same provision, its law allows litigation against non-residents at the Dutch domicile of the plaintiff, be he Dutch or not, whatever the cause of action.¹³ Under German law, a judgment *in personam* may be obtained against non-residents merely because of presence of assets in Germany, be the value of such property infinitesimal.¹⁴ Similarly, under Dutch¹⁵ and Belgian¹⁶ law, attachment of local assets allows litigation of the whole amount of the claim in the domestic courts.

In American legal parlance, judgments rendered under such circumstances come from courts without proper jurisdiction. If they were by an American court, they would be void because of violation of due process of law as prescribed by the Constitution of the United States.¹⁷ But even in the countries that have these "exorbitant" jurisdictional bases, their impropriety is conceded to some degree. Not only does the domestic literature call them "undesirable"¹⁸ but, generally speaking, judgments rendered abroad on such bases will not be recognized at home. When a treaty on recognition of judgments is concluded with another country, the treaty either excludes from internal use the jurisdictionally

Scandinavian Conventions on Private International Law," 96 Hague Academy Recueil des Cours 242, 326 (1959).

⁹ Convention of Sept. 14, 1952, 8 Revue Egyptienne de Droit International 333 (1952).

¹⁰ The basic study is Weser, "Les Conflits de Juridictions dans le Cadre du Marché Commun," 48 Rev. Crit. de Droit Int. Privé 613 (1959); 49 *ibid.* 21, 151, 313, 533 (1960); 50 *ibid.* 105 (1961).

¹¹ *Loc. cit.* note 1 above, at 27.

¹² References to what follows may be found in Nadelmann, "Jurisdictionally Improper Fora," in XXth Century Comparative and Conflicts Law—Legal Essays in Honor of Hessel E. Yntema 321 (Nadelmann, von Mehren, and Hazard, eds., 1961).

¹³ Code of Civil Procedure, Art. 126 (3). See Kollewijn, American-Dutch Private International Law 80 (2d ed., 1961).

¹⁴ Code of Civil Procedure, Art. 23. See Nadelmann, *loc. cit.* note 12 above, at 328.

¹⁵ Code of Civil Procedure, Art. 764. See Kollewijn, *op. cit.* note 13 above, at 32.

¹⁶ Law of March 25, 1876, Art. 52(5), as interpreted by the courts. See 2 Répertoire Pratique du Droit Belge 486, V° Compétence en Matière Civile et Commerciale, No. 1770 (1930).

¹⁷ See *Pennoy v. Neff*, 95 U. S. 714 (1878); *Leflar*, Conflict of Laws 43 (1959).

¹⁸ For references see Nadelmann, *loc. cit.* note 12 above.

improper *fora*, or judgments obtained in such *fora* are barred from recognition.¹⁹ The distaste of the improper *fora* is mutual.

The Treaty of the European Economic Community, in Article 7,²⁰ forbids any discrimination based on nationality, as far as the six member states are concerned. Thus the Article 14 privilege of the Napoleonic Code is proscribed as far as the Community is involved. And even though not based on nationality, provisions favoring nationality through the grant of privileges to residents may well come under the same prohibition by construing the non-discrimination provision in accordance with its aim.²¹

Compliance with the prohibition of discrimination can be in two ways: either the discriminatory provisions are removed, or they are made accessible to all nationals and residents of the Community. Inasmuch as all Community states are opposed to application of the discriminatory provisions against their own nationals and residents, removal of the applicability of these provisions within the Community is the only solution acceptable to the Six. In the advanced draft of a multilateral convention referred to earlier, internal use of the jurisdictionally improper *fora*, therefore, was expressly excluded for the benefit not only of nationals of the Six, but also of non-nationals (including Americans) who are residents in any one of the Six, and the bases for jurisdiction held acceptable were listed.

However, the draft is reported also to provide specifically that, against persons not residing in the Community, whoever resides in one of the member states shall have the benefits of all locally available *fora*, including, in particular, the improper *fora* excluded from internal use. Thus the range of some of these provisions is extended even beyond their statutory coverage. For example, whoever resides in France, may haul into the French courts non-resident Scandinavians, Austrians, North Americans, Latin Americans, Japanese, and so forth, for obligations entirely unrelated to France. The reader may find this scheme fantastic, but who is the non-resident brother's keeper in this type of situation?

Obviously, judgments obtained at jurisdictionally improper *fora* will not be recognized by courts outside the European Economic Community. To be recognized, foreign judgments must emanate from a court with proper jurisdiction according to the rules of the country in which recognition is sought.²² Yet this is only a partial answer to the problem

¹⁹ See the treaties listed in note 4 above. An interesting case arose in the Belgian courts in connection with the Franco-Belgian Treaty of 1899, which removes the applicability of Art. 14 (jurisdiction based on French nationality of the plaintiff). A judgment was obtained in France on the basis of Art. 14 against an Englishman. The highest court in Belgium refused to enforce the judgment. Belg. Cour de Cass., 1st Ch., July 1, 1904, *Marychurch et Cie v. La Compagnie Maritime Française*, [1904] *Pasicrisie Belge* I, 293, 319, [1904] *Belgique Judiciaire* 1329, 1346, 1 *Revue de Droit International Privé* 166 (1905), 32 *Journal du Droit International Privé* 424 (1905).

²⁰ Text in 51 A.J.I.L. 868 (1957).

²¹ A comparison may be made with the privileges and immunities clause of the American Constitution. U. S. Const., Art. IV, §2. See *Blake v. McClung*, 172 U. S. 289 (1898).

²² See Ehrenzweig, *Conflict of Laws* 160 *et seq.* (1962).

Existence of the judgment abroad can be a constant menace, even though no assets may be available in the country of rendition; and the defendant must, in the first place, decide whether to defend the suit abroad, with an appearance there possibly affecting his chances of challenging the judgment, once rendered, in the domestic courts.²³ Also, the foreign judgment may be enforceable in a third country where assets are located, either under some treaty linking the jurisdictions or because of differences in the rules on recognition. Thus judgments so secured may be a real menace, not merely a nuisance.

A draft prepared by a working group of government experts is not yet a governmental draft, but with the draft under consideration in the chancelleries, it is timely to call attention to the legitimate interests of the non-Community states. In the instant case, these interests do not clash with those of the Community, which, *qua* Community, has no exorbitant *fora*—it is the draft which makes them clash.

The draft has a comprehensive catalogue of available bases for jurisdiction for internal consumption. If, in the view of the experts, the bases listed are insufficient to deal with the problems of non-residents, the *quasi-in-rem* jurisdiction of the attachment could be added,²⁴ assuming it is thought that this jurisdiction is not provided for by the local law of all six states. But this is a far cry from sanctioning, if not imposing, jurisdictionally improper *fora* Community-wise—and this is what the draft does.

We do not know what may have inspired the belated effort to give recognition in a multilateral treaty to jurisdictionally improper *fora*. In some bilateral treaties in the past, “exorbitant” jurisdictional bases have been preserved against the outside world even when excluded from use among the treaty partners. This was bad enough, but matters take a different aspect when the Community as such, through a multilateral treaty, becomes involved in backing, if not extending, proscribed practices. Within the last decade a sustained international effort has been made to improve the law on recognition of foreign judgments. After years of work, the International Law Association produced a Model Act which was adopted unanimously at the Hamburg, 1960, Conference of the Association.²⁵ The same year, as a result of a suggestion from the Council of Europe, the Hague Conference on Private International Law decided to deal with recognition of foreign judgments. A drafting committee was

²³ See Leflar, *op. cit.* note 17 above, at 55.

²⁴ A quasi-in-rem judgment, as distinguished from an in personam judgment, “only binds the property seized or attached in the suit to the extent thereof; and is in no just sense a decree or judgment binding upon him beyond that property.” Story, *Conflict of Laws* §549 (1834). See *Restatement, Judgments* §§34–36 (1942); *Restatement, Conflict of Laws* §§106–108 (1934). *Cf.* Nadelmann, *loc. cit.* note 12 above, at 328.

²⁵ International Law Association, Report of the 49th Conference, Hamburg, 1960, p. vi; 9 A. J. Comp. Law 518 (1960); 50 *Revue Critique de Droit International Privé* 438 (1961) (trans.).

set up, and a draft has appeared,²⁶ to be considered at the October, 1964, session of the Conference. An observer from the European Economic Community was present at the meetings of the drafting committee. In the United States during the same period, work proceeded on uniform legislation. A Uniform Foreign Money-Judgments Recognition Act was adopted by the National Conference of Commissioners on Uniform State Laws in 1962²⁷ and its text, as well as a French version,²⁸ communicated immediately to the Hague Committee and the Working Group of the Community. Some of the States of the Union have already enacted the new Uniform Act.²⁹ All these instruments exclude from recognition the jurisdictionally improper *fora* here discussed. Why should a consensus of views in the world be disregarded?

General improvement of the law on recognition of foreign judgments has been blocked by the intransigent attitude of the French Government with regard to Article 14 of the Civil Code. This "exorbitant" provision, to use a mild word, reappeared in the "Niboyet" draft of the Governmental Commission appointed to revise the Civil Code³⁰ and, while the "Niboyet" draft has been withdrawn officially, information is to the effect that it reappears basically unchanged in the substitute draft not yet made available generally. As long as France sticks to its Article 14, notwithstanding constant attacks and even retaliatory legislation,³¹ other nations feel no great urge to remove unilaterally from their law jurisdictionally improper *fora* much less offensive than Article 14. And when it comes to writing a regional treaty, with France insisting on external preservation of Article 14, a dilemma is created for the other countries. They must either give a regional blessing to Article 14 or not adopt a multilateral convention.

KURT H. NADELMANN

THE INTERNATIONAL PROMOTION OF HUMAN RIGHTS:

A CURRENT ASSESSMENT

The excellent survey by Professor McDougal and Mr. Bebr of "Human Rights in the United Nations," which appears as the leading article in this issue of the JOURNAL, raises inevitably the question of what these international efforts to promote human rights add up to. Is any real progress being made in furthering human rights, or is there only paper progress? Are the measures thus far taken—declarations and conventions, studies and seminars—actually having any meaningful effect, or are they simply creating an illusion of motion when we are in fact standing still?

²⁶ Text published in 10 *Nederlands Tijdschrift voor Internationaal Recht* 328 (1963).

²⁷ Text in [1962] Handbook of the National Conference of Commissioners on Uniform State Laws 242; 11 A. J. Comp. Law 412 (1962).

²⁸ Printed in 52 *Revue Critique de Droit International Privé* 676 (1963). Spanish version in 16 *Boletín del Instituto de Derecho Comparado de México*, No. 48, p. 621 (1963).

²⁹ 1963: Illinois and Maryland. See 9B U.L.A. 1963 Pocket Part 27.

³⁰ See Nademann, *loc. cit.* note 12 above, at 327.

³¹ *Ibid.* at 330.

The increasing significance of human rights questions in the United Nations and in United States foreign policy gives these questions special relevance.

In the last few years human rights issues have assumed a prominent place in United Nations affairs, with the General Assembly showing a growing tendency to look at many issues in human rights terms and to give greater attention to this area of its responsibilities. At the Eighteenth General Assembly in the fall of 1963, such items as the question of South Africa, the Buddhist question in Viet-Nam, and the preparation of a Declaration on Racial Discrimination were of leading importance in the Assembly's negotiations and debates. And human rights issues will continue to play a major rôle at the forthcoming Nineteenth General Assembly, with the South African question again constituting a significant item, and the General Assembly, in addition, turning its attention to the preparation of a draft Convention on Racial Discrimination and to consideration of the important and controversial implementation provisions of the draft Covenants on Human Rights.

As a consequence of the developing importance of human rights questions in the international political arena, United States foreign policy has of necessity also become increasingly concerned with these issues. In contrast with the policy enunciated by Secretary Dulles in 1953, under which the United States in effect stood aloof from United Nations efforts to develop human rights conventions, United States delegations have, under the present Administration, been taking a more active part in all phases of international work in the human rights area. One evidence of this shift in position was President Kennedy's transmission in July, 1963, of three human rights conventions to the Senate for its advice and consent to ratification.¹ As a further illustration of increased State Department interest, Deputy Assistant Secretary of State Richard Gardner, in a speech in December, 1963, announced that the United States Government had both "embarked on a new policy of considering human rights conventions on their merits" and "was considering ways in which the United Nations can deal with human rights questions on a more objective and professional basis."²

¹ The three conventions are: (1) The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; (2) the Convention on the Abolition of Forced Labor; and (3) the Convention on the Political Rights of Women. See President Kennedy's letter of July 22, 1963, to Lyndon B. Johnson, President of the Senate, transmitting the three conventions (White House Press Release dated July 22, 1963; reprinted in "Contemporary Practice," 58 A.J.I.L. 184 (1964)). See also Deputy Assistant Secretary of State Richard Gardner's speech on "Human Rights—Some Next Steps," made before the Rotary Club of Ypsilanti, Michigan, on Aug. 5, 1963 (Dept of State Press Release 403 of Aug. 3, 1963; 49 Dept. of State Bulletin 320 (1963)).

² Address on "The International Promotion of Human Rights: Problems and Opportunities" to the World Jewish Congress, New York, N. Y., on Dec. 8, 1963 (U. S. Mission to the United Nations Press Release 4333 of Dec. 6, 1963). See also President Kennedy's speech before the U.N. Eighteenth General Assembly on Sept. 20, 1963, in

This new emphasis on the international promotion of human rights suggests the need for a re-examination and assessment of existing efforts in this field. Clearly we need a better idea of where we are and where we are going.

A first step in any such assessment might be the drawing up of a balance sheet summarizing what has thus far been accomplished and what still remains to be done. On the asset side, this balance sheet might show the following entries:

—The United Nations Charter, the Universal Declaration of Human Rights, and various related instruments for the first time in history provide international recognition of the promotion of human rights as a matter of appropriate and important international concern.

—More specifically, the United Nations Charter establishes the promotion of human rights as a principal objective of the United Nations, thus providing a base for the growth of international efforts in this field.

—Of particular importance, Articles 55 and 56 of the Charter, as well as various declarations and conventions prepared by the United Nations and the Specialized Agencies, evidence a clear commitment by the international community to try actually to do something to promote human rights.

—The Universal Declaration, and various related international instruments, have provided at least a broad working consensus as to what is meant by human rights, and lay the groundwork for their gradual, more detailed definition and articulation.

—A considerable number of declarations and conventions concerning human rights have been completed, establishing a surprisingly broad pattern of general norms and standards intended as guides to government action affecting human rights and capable of exercising a salutary influence on government policies in this area.

—In a number of cases, these international norms and standards concerning human rights have been embodied by states (and particularly newly-emerging states) into their internal law, thus supporting and advancing efforts to bring about the realization of these standards in practice.

—United Nations efforts have brought to many people throughout the world a new awareness that they are in fact considered as entitled to such things as human rights, thus stimulating and reinforcing a ferment for progress within many national societies.

—The continuing attention in the United Nations to human rights matters, as well as the United Nations advisory-services programs (seminars, fellowships, and expert assistance), have helped to interest and educate a number of national governmental and non-governmental leaders in human rights questions; this experience may be brought to bear in their national societies.

which he stated: "New efforts are needed if this Assembly's Declaration of Human Rights . . . is to have full meaning." 49 Dept. of State Bulletin 534 (1963).

—United Nations studies, debates, discussions and reports have cast new and valuable light on the scope and nature of human rights problems, the obstacles to their solution, and the comparative efficacy of different means of attacking them.

—New institutions, such as the European Commission and European Court of Human Rights established under the European Convention on Human Rights, and other developments, such as the special complaint procedures established by the International Labor Organization, constitute important experiments in dealing with actual cases of violations of human rights and are providing vital experience as to how such institutions and procedures can best work.

Considering the comparatively recent birth of the concept of international concern for human rights, this record of accomplishment during the last twenty years is a fairly hopeful one. Moreover, as has been the case with the growth of United Nations functions in the peace-keeping area, international action in the human rights field may, under the pressure of practical urgencies, develop faster than we now foresee.

But there is also, of course, another side to the balance sheet—the facts that cannot be ignored, the problems which are still unresolved:

—In many places in the world concern for human rights seems to be growing very slowly, if at all; indeed, the turmoil and conflict of our time have seemed often to result in net losses rather than gains in human freedom.

—The United Nations has in most cases not been able to do anything about actual violations of human rights and, as a practical matter, has frequently ignored them. Thus there are not in existence today any generally applicable and systematic international procedures or institutional machinery for actually receiving and investigating complaints of specific violations of human rights and taking appropriate steps to remedy them. Nor have any regular procedures been established capable of performing even the minimal function of exposing the facts of such situations before the international community, thus helping to bring the weight of world public opinion to bear on the governments concerned.

—Despite what has been accomplished in the Universal Declaration and other instruments, very important and fundamental differences remain between states and between peoples as to the basic meaning and content of the concept of human rights and, more particularly, as to the relative priorities which should be accorded these various rights. Such concepts as “human rights,” “freedom,” “democracy,” and even “free speech” continue to mean very different things to different people.

—While a great deal has been learned in the last several decades, we still don't know enough about the complex political, economic, social, psychological and moral factors which lie behind widespread denials of human rights. As a result, it has been difficult to develop any clear or

consistent strategy and tactics for getting at the fundamental causes of such violations.

—Many governments and people believe that the question of how a particular government treats its own people is simply not the business of any other government or any international organization, and that any expansion of international authority in this area would impinge on national sovereignty and might be used irresponsibly or even as a tool of hostile government interests.

—Experience in this field indicates that the positions of many governments on human rights questions are, and for a long time to come will continue to be, determined more in terms of potential political and propaganda value than on their intrinsic humanitarian merit. Consequently, meaningful action by governments or international organizations on such matters may for the most part be largely dependent on a coincidental parallelism with particular political objectives.

This balance sheet suggests that, while we are making some progress in the area of the international promotion of human rights, many basic problems remain to be overcome.

What, if anything, can be done to improve this situation? Are there any practical further steps that governments, private organizations and individuals concerned with such matters might consider in order to speed progress in this field? The following possibilities might be worth exploring:

1. First and most important, there is need to begin discussing the real situation, practical problems, and actual obstacles more frankly. It does little good to pretend that international efforts are really doing something about human rights if in fact they are not. Until these problems are faced squarely, practical and effective solutions cannot be developed.

2. More—much more—must be learned about what causes widespread denials of human rights and how these causes can be attacked. Moreover, such denials must be treated as what they are—as complex social problems whose solution requires a variety of social tools, rather than as Sunday-school exercises in good and evil. This is a job to which the universities and law schools can contribute more than they are now doing. It is also a job on which more government research funds might usefully be spent.

3. The focus of international efforts might be shifted from the preparation of complex and time-consuming declarations and conventions to practical grass-roots measures designed to reach real problems of real people. A way must be found to establish a more effective and meaningful link between what is done by international organizations and the actual human rights issues of everyday concern.

4. As examples of such measures, more emphasis should be given to advisory-services types of programs such as technical advice, education, and seminars; to meaningful reporting by countries; and to first-rate and realistic studies of particular country problems. More work might be

done at such elementary levels as encouraging the formation of national groups interested in human rights: promoting legal-aid programs; and helping such primary-level official agencies as local police, school teachers, village magistrates, and tribal chieftains to better understand what in practice human rights on the local level mean.

5. Greater efforts should be made to develop, even if slowly and in little ways, the procedural capacity of international institutions to obtain, examine and expose the facts of human rights violations to general view—to, in the words of Assistant Secretary of State Harlan Cleveland, place them “under the klieg light of world opinion.” Experience shows that governments are in fact sensitive to world public opinion, and it is often the only weapon at our disposal. Even rudimentary institutional developments in this field can have their own dynamic, and may, over time, help to gain acceptance for a more far-reaching international problem-solving capacity in the area of human rights.

6. Steps can be taken to make the public more aware of important national interests in the international promotion of human rights, and of the close relation between respect for human rights in other countries and a nation's own freedom and security.

7. Efforts should be made, wherever possible, to isolate human rights problems from a political context in order to enable them to be dealt with by countries on their merits and by technical and non-political means.

8. Countries should be encouraged to assign competent and well-informed people to international human rights work. International organizations can only be as effective and imaginative as the delegates participating in them. Until the human rights field is treated by governments with the importance it merits, it will be hard really to move ahead.

9. Experiments can be tried in selected fields regarding international action to promote human rights on a regional or even bilateral or trilateral basis. As the European experience has shown, standards and approaches are in such cases more similar, fears by nations of abuse of such agreements less, and meaningful agreements easier to reach.

10. The possibility of approaching human rights problems by flexible devices and in small bites should be more fully explored. We can perhaps experiment with conventions so constructed that nations may, if they wish, undertake relatively minimal obligations at first, expanding their commitments as their internal situation permits and their confidence in such instruments grows. This can be done through wider use of such devices as protocols, liberal reservation clauses, and optional clauses. Conventions which present nations with all-or-nothing choices may be dramatic, but they often ignore the realities of what many governments, as a practical political and legal matter, can really hope to do in the human rights area. The European Convention on Human Rights has demonstrated the gains that can be achieved by a judicious use of such flexible techniques.

11. We must be more willing to re-examine existing ideas and to develop and experiment with new ideas. We might, for instance, consider whether

incentives as well as sanctions might not play some rôle in achieving human rights—whether there is not some way we could mobilize for human rights the same national desire to excel that fires the Olympics and gives such significance to the Nobel Prize.

The task of developing effective and realistic international measures to assist in the promotion of human rights will clearly be a long and difficult one. But the goal is worth the effort and we should do what we can.

RICHARD B. BILDER

ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

The 58th Annual Meeting of the American Society of International Law was held at the Mayflower Hotel, Washington, D. C., from April 23 to 25, 1964. It had one of the largest attendances in its history, both at the discussion sessions and at the annual dinner.

The general theme of the meeting was "Causing Compliance with International Law," and sessions during the three days discussed various aspects of the subject. On Thursday afternoon, April 23, Professor Herbert W. Briggs of Cornell University presided over the opening session, which was devoted to the question: "What Are Appropriate Compliance Objectives?" Professor Richard A. Falk of Princeton University spoke on "Identifying and Solving the Problem of Compliance with International Law." Professor Saul Mendlovitz of Rutgers University School of Law discussed "Breaking Rules and Respecting Decisions." Professor Julius Stone, of the University of Sydney, Australia, as the final speaker on the panel, took as his subject: "Realistic Compliance Goals." Following a general discussion of the speakers' papers, an informal reception was held for the officers and members of the Society and their guests.

On Thursday evening, two simultaneous sessions were held, one a panel discussion of "Enforcing International Law against One Country through Domestic Litigation in Others," and the other a Conference on Teaching and Research, dealing with "Threats and Law." The first panel was sponsored jointly with the American Branch of the International Law Association, and was presided over by Professor Willis L. M. Reese of Columbia University School of Law. The speakers were Mr. John G. Laylin of the District of Columbia Bar, who discussed "Holding Invalid Acts Contrary to International Law—a Force toward Compliance," and the Honorable Edward D. Re, Chairman of the United States Foreign Claims Settlement Commission, who spoke on "Domestic Adjudication plus Lump-Sum Settlement as an Enforcement Technique." Professor Myres S. McDougal of Yale Law School presented comments on the addresses, and a general discussion followed.

Professor Wesley L. Gould of Northwestern University presided over the Conference on Teaching and Research, at which the speakers were Dean G. Pruitt of the University of Delaware, who spoke on "Foreign Policy De-

cisions, Threats and Compliance to International Law"; Professor Jan F. Triska, of Stanford University, who discussed "Different Perceptions of Agreements and Disagreements"; and Charles A. McClelland, of the Institute for Research on International Behavior, San Francisco State College, who presented a paper on "Teaching the Role of Law in the Cold War." The commentator on this session was Professor Brunson MacChesney of Northwestern University School of Law.

On Friday, April 24, 1964, simultaneous panels were held in the morning and afternoon. The panels on Friday morning dealt with "Compliance during Hostilities" and "Using a Country's Own Legal System to Cause It to Respect International Rights." Rear Admiral Robert D. Powers, Jr., Deputy Judge Advocate General of the Navy, presided over the discussion of "Compliance during Hostilities." The principal speaker was Richard R. Baxter of Harvard Law School, who delivered a paper on "Forces for Compliance with the Law of War." Commentators on the paper were Benjamin Forman, Assistant General Counsel, International Affairs, Department of Defense; Gordon Baldwin, Professor of International Law, Naval War College; and Colonel Howard S. Levie, of St. Louis University School of Law.

Professor Covey Oliver of the University of Pennsylvania Law School, recently appointed Ambassador to Colombia, was chairman of the panel on "Using a Country's Own Legal System to Cause It to Respect International Rights." "The Effectiveness of the Local Remedies Rule Today" was discussed by Professor Richard B. Lillich of Syracuse University College of Law. Mr. David R. Mummery of the New Zealand Bar and the University of Virginia spoke on "Increasing the Use of Local Remedies."

On Friday afternoon the subjects of the panel discussions were "Persuading Governments to Accept Procedural Solutions" and "Public Opinion as a Force toward Compliance." Mr. Edward F. Johnson of the New York Bar presided over the first panel, the members of which were Professor Roger Fisher, of Harvard Law School, who discussed "The Rôle of the Veto in Making Third-Party Settlement Acceptable"; Professor Soia Mentschikoff of the University of Chicago Law School, who spoke on "Disagreement on Substantive Standards, and What to Do about It"; Professor Louis B. Sohn of Harvard Law School, whose subject was "Step-by-Step Acceptance of the Jurisdiction of the International Court of Justice"; and Professor Stephen Gorove of the University of Denver College of Law, who spoke on "Lessons from the Control of Peaceful Uses of Atomic Energy in Euratom."

Mr. G. W. Haight of the New York Bar was chairman of the panel on "Public Opinion as a Force toward Compliance." Papers were delivered by Mr. E. Whitney Debevoise of the New York Bar, on "Lessons from Organizations like the International Commission of Jurists in Focusing Public Opinion"; Mr. H. C. L. Merillat, Executive Vice President of the Society, on "The Several Rôles of Professional Opinion"; Professor

Krzysztof Skubiszewski, of the University of Poznan, Poland, and Visiting Scholar at Columbia University, on "The United Nations General Assembly and Its Power to Influence National Action"; and by Mrs. Gabriella Lande, of the Center of International Studies, Princeton University, on "The Changing Effectiveness of United Nations Resolutions."

On Saturday afternoon, April 25, a panel session was held on "Economic Sanctions as a Means of Influencing Governments." Professor Harold D. Lasswell of Yale Law School presided. Professor Cecil J. Olmstead, of New York University School of Law, spoke on "Foreign Aid as an Effective Means of Persuasion." Professor Michael H. Cardozo presented a paper by the Honorable Winthrop G. Brown, Deputy Commandant for Foreign Affairs, National War College, and former U. S. Ambassador to Laos, on "The Use of Foreign Aid as an Instrument to Secure Compliance with International Obligations." Professor Howard Taubenfeld discussed "The 'Economic Weapon': The League and the United Nations."

All the panel discussions were followed by discussion from the floor.

Also held on Saturday afternoon was the Philip C. Jessup Student Moot Court Competition, arranged by the Association of Student International Law Societies. Judges of the competition were: James N. Hyde of the New York Bar; Monroe Leigh of the District of Columbia Bar; and Arthur S. Miller of George Washington University Law School. Finalists who participated were the Columbia Society of International Law *v.* Texas International Law Society, and Howard University School of Law *v.* University of Pittsburgh School of Law. The winning team was the Texas International Law Society. Lowell L. Garrett of the Columbia Society of International Law won the award for the best individual oral presentation and argument.

The annual dinner of the Society, which has customarily been held on Saturday evening, was held this year on Friday evening, and was unusually well attended. Professor Roger Fisher, Chairman of the Committee on Annual Meeting, presided. Mr. James Nevins Hyde delivered his presidential address following the dinner. The Honorable W. Averell Harriman, Under Secretary of State for Political Affairs, was the principal after-dinner guest speaker. Professor Maxwell Cohen, Director of the Institute of Air and Space Law of McGill University, who had been scheduled to speak, was unable to be present. His prepared address on "Canada and the United States: Framework for the Future" will appear in the printed *Proceedings* of the meeting.

At the business meeting of the Society on Saturday morning, April 25, the following officers were elected:

President: Brunson MacChesney.

Vice Presidents: David R. Deener, H. C. L. Merillat, Covey Oliver, and John R. Stevenson.

The Honorable Dean Rusk, Secretary of State, was re-elected Honorary President of the Society, and the incumbent Honorary Vice Presidents were re-elected, with the exception of Professor Philip Marshall Brown, who had submitted his resignation last fall. Mr. James N. Hyde, the outgoing President, was elected an Honorary Vice President.

New members of the Executive Council to serve until 1967 were elected as follows: Professor Ralph W. Johnson, of the University of Washington School of Law; Professor Stanley D. Metzger, of Georgetown University Law Center; Professor Soia Mentschikoff, of the University of Chicago, and Professor Jan F. Triska, of Stanford University. Re-elected to the Council to serve until 1967 were Paul Carrington of Texas, Richard A. Falk of Princeton University, Monroe Leigh, of the District of Columbia Bar, and Charles M. Spofford, of the New York Bar.

The Nominating Committee for the ensuing year was elected as follows: Carl Spaeth, Chairman; Robert Dechert, Richard A. Falk, Myres S. McDougal, and Charles M. Spofford.

Upon the recommendation of the Committee on Selection of Honorary Members, the Society elected Professor Dr. Walter Hallstein, President of the Commission of the European Economic Community, an honorary member of the Society.

The Society also voted to award its certificate of merit to Professor Hans-Jürgen Schlochauer and his associates, Drs. Herbert Krüger, Hermann Mosler and Ulrich Scheuner, as editors of the second edition of the *Wörterbuch des Völkerrechts*, which was first edited by the late Dr. Karl Strupp.

The Executive Council of the Society, which met immediately after the adjournment of the business meeting on Saturday, redesignated Mr. Merillat Executive Vice President and re-elected the Honorable Edward Dumbauld Secretary of the Society and Mr. John Stafford Assistant Treasurer. Mr. Franz Oppenheimer, of the District of Columbia Bar, was elected Treasurer of the Society for the coming year.

The Council elected Mr. John Stevenson of the New York Bar and Professor Richard Falk of Princeton University members of the Executive Committee, and re-elected Messrs. Hardy C. Dillard, James N. Hyde, and Myres S. McDougal to the committee. The other members of the committee, *ex officio*, are President Brunson MacChesney, Executive Vice President Merillat and Treasurer Oppenheimer.

The Executive Council accepted with regret the resignation of Professor Covey Oliver as a member of the Board of Editors of the JOURNAL, which he submitted in view of his appointment as Ambassador of the United States to Colombia. Professor Richard A. Falk, and Professor Stanley D. Metzger were elected to the Board, and the other incumbents were re-elected for the coming year. As presently constituted, the Board of Edi-

tors consists of the following:

William W. Bishop, Jr., *Editor-in-Chief*

Richard R. Baxter	Brunson MacChesney
Herbert W. Briggs	Myres S. McDougal
Hardy C. Dillard	Stanley D. Metzger
Richard A. Falk	Stefan A. Riesenfeld
Alwyn V. Freeman	Oscar Schachter
Leo Gross	Louis B. Sohn
John N. Hazard	Eric Stein
James Nevins Hyde	John R. Stevenson
Oliver J. Lissitzyn	Robert R. Wilson
	Richard Young

Honorary Editors

Philip Marshall Brown	Josef L. Kunz
Charles G. Fenwick	Pitman B. Potter
Hans Kelsen	John B. Whitton
	Quincy Wright

The papers delivered at the meeting, along with summaries of the discussions and of the actions taken at the business meeting, as well as selected committee reports, will appear later this year in the printed *Proceedings*. All members of the Society will receive the volume, which may also be purchased separately at \$5.00 a copy.

ELEANOR H. FINCH

REPORT OF ADVISORY COMMITTEE ON "FOREIGN RELATIONS," 1963 *

The Advisory Committee on "Foreign Relations" held its seventh annual meeting at the State Department in Washington, on November 1-2, 1963. Since its last meeting three members of the Committee (Leland M. Goodrich, Dexter Perkins, and Philip W. Thayer) have retired and have been succeeded, respectively, by Robert E. Osgood, Robert H. Ferrell, and William W. Bishop, Jr. The present composition of the Committee is as follows: *representing the American Historical Association*: Fred H. Harrington (Professor of History and President, University of Wisconsin), Richard W. Leopold (Professor of History, Northwestern University), Robert H. Ferrell (Professor of History, Indiana University); *representing the American Political Science Association*: Clarence A. Berdahl (Professor of Political Science, emeritus, University of Illinois, and Visiting Professor of Government, Southern Illinois University), Robert E. Osgood (Professor of American Foreign Policy, School of Advanced International Studies, Johns

* This report is reprinted in the JOURNAL in the belief that it will be of interest to our readers. For preceding reports, see this JOURNAL, Vol. 52 (1958), p. 510; Vol. 54 (1960), p. 402; Vol. 55 (1961), p. 969; Vol. 56 (1962), p. 518; and Vol. 57 (1963), p. 614.

Hopkins University, Washington); *representing the American Society of International Law*: Robert R. Wilson (Professor of International Law, Duke University), William W. Bishop, Jr. (Professor of Law, University of Michigan Law School, and Editor-in-Chief, *American Journal of International Law*).

All the members were present at this meeting except Mr. Harrington, who was detained because of his duties as President of the University of Wisconsin. Clarence A. Berdahl was elected Chairman to succeed Dexter Perkins, who had served as Chairman since the Committee was established in 1957. Others present at various sessions of the Committee were Raymond E. Lisle, Deputy Assistant Secretary for Public Affairs; William M. Franklin, Director of the Historical Office, the administrative personnel of that office, and the entire "Foreign Relations" staff; Arthur Marmor, Assistant Chief of the Division of Publishing Services; and the Public Affairs Officers of three of the five geographical Bureaus (Leonard R. Greenup of ARA, John A. Billings of NEA, and Milan W. Jerabek of EUR). At a luncheon given by Under Secretary George W. Ball, there were also present, in addition to Mr. Ball and the Committee, Arthur Schlesinger, Jr., White House Assistant to the President; Robert J. Manning, Assistant Secretary for Public Affairs; and Mr. Franklin. Secretary of State Dean Rusk, who last year provided a similar hospitality, was present for a short time before the luncheon.

At these various sessions the Committee reviewed the problems of the Historical Office in respect to the compilation, editing, and publication of *Foreign Relations*. Its report is submitted herewith:

Status of the Series. During the year since the last meeting of the Committee, five volumes have been released (1941.VII. The American Republics; 1942.IV. The Near East, Africa; 1942.VI. The American Republics; 1943.I. General; 1943.III. British Commonwealth, Eastern Europe, Far East). This represents some progress, although not enough to keep the series from slipping further behind currency. However, another volume (1941.VI. The American Republics) was released in late December, and its publication completed the series through 1942. In addition, the Historical Office has now a carefully worked out program for several years ahead which, if it can be carried out, will produce approximately ten volumes per year and go far towards preventing any further increase in the gap between diplomatic events and their recording for the public.

The historical development of the series, together with some attention to publication problems, is exceptionally well reviewed by a member of this Committee, Professor Richard W. Leopold, in a paper prepared as a recognition of the series' centennial, read before the American Historical Association in 1961, and published in the *Mississippi Valley Historical Review* for March, 1963. That paper may well be considered a part of this report.

The Twenty-Year Lag. For almost fifty years after the "Foreign Relations" series began, publication was substantially current, that is, only a

year elapsed between the date of the documents and their publication. Gradually, however, as documentation proliferated and other difficulties were encountered, the time lag increased until it became fifteen years in 1919 and is now twenty years. The Advisory Committee at first felt strongly that this time lag ought to be reduced, and President Kennedy two years ago indicated his desire for a more rapid unfolding of the historical record.

After thorough consideration, however, the Committee has reluctantly concluded that a reduction in the time lag is virtually impossible, that a twenty-year lag is defensible, but that every effort must be made to hold the line at twenty years. The Committee discussed this problem at a luncheon session with Secretary Rusk last year, and was gratified to receive his formal approval of such a program, subject only to the reservation that an occasional case might arise when an exception might have to be made. The Historical Office has accordingly prepared a schedule of publication to maintain that twenty-year lag over the next several years; and it has also, in cooperation with the Division of Publishing Services, developed new procedures in respect to the mechanics of publication (checking references, proof-reading, and the like) that should serve to speed up production and thus assist in maintaining the twenty-year lag. The Committee warmly approved these plans and procedures, but feels strongly that they can hardly be carried out without substantial increase in budget and staff. This matter was discussed again this year with Under Secretary Ball, and the Committee received from him not only a sympathetic response but also some intimation of future support if funds could be found.

Quantity and Complexity of Material. A major problem confronting the Historical Office is the enormous increase in documentation in view of the two World Wars, the resulting range and complexity of our international relationships, the large number of international conferences, and the establishment of permanent international organizations such as the United Nations and related agencies. Until these developments the conduct of our foreign relations was largely in the hands of the State Department, and State Department documents made up almost the entire record of our diplomacy. Even these increased many times over the years; but now other departments and agencies of the government, the Treasury Department, the Department of Commerce, the Department of Defense, the National Security Council, the Central Intelligence Agency, and others, exercise functions so important in respect to foreign policy that their transactions cannot be ignored if the record is to be accurate and reasonably complete. This Committee is convinced that the "Foreign Relations" series must increasingly include documentation from these other agencies, and it commends the Historical Office for recognizing this necessity, even though the task of compilation and editing is thereby made much more difficult.

The increase in documentary materials during recent years has been such as to require, in the view of the Committee, fifteen to twenty annual

volumes if the papers are to be published as fully as in the past. To produce so vast a record would require a staff and budget that it is quite unrealistic to expect; nor does it seem to us necessary to have so complete a record in order to maintain historical accuracy. It has become essential to be much more selective of the documents to be published, and for this purpose the Historical Office has worked out a system of priorities which has the general approval of this Committee, which cannot, of course, be applied inflexibly, but which can be used as a guide in compilation and should make the problem of selection somewhat easier.

Something can also be done to reduce the number of volumes and yet maintain historical integrity by appropriate citation of documents not published, by cross-reference to documents or pertinent accounts published elsewhere, and by editorial notes summarizing documents or events relevant to the record but for good reason hardly deserving publication *in extenso*. There has already been experimentation with these procedures in recent volumes, and the Committee approves the results and urges their larger use. It should also be noted that the publication of *American Foreign Policy: Current Documents*, begun by the Historical Office for the years 1950-1955 (as a continuation of a previous volume prepared by the staff of the Senate Committee on Foreign Relations) and continued annually since, and the publication of other documentary collections relating to special problems, serve the two-fold purpose of filling in somewhat the twenty-year lag and of reducing the amount of documentation that need be textually reproduced later in the "Foreign Relations" series. These new methods, somewhat rigidly applied, may make possible the present goal of approximately ten volumes per year instead of twenty.

Clearance. The clearance problem continues to be one of the principal obstacles to speedy publication. The Committee has noticed this difficulty in each of its previous reports, and again records emphatically its view that there is little merit in most cases of objection and delay on the part of those officers who review the materials after compilation and editing by the "Foreign Relations" staff. There is no discernible evidence that the inclusion or exclusion of particular documents has any material effect on the conduct of foreign policy or on the relations with other governments. It was President Kennedy's view that "any official should have a clear and precise case involving the national interest before seeking to withhold from publication documents or papers fifteen or more years old"; and the twenty-year lag should make that view even more compelling.

During the past year some new procedures and pressures for more rapid clearance have been developed. Assistant Secretary Manning has brought to the attention of the geographical Bureaus Secretary Rusk's endorsement of this Committee's recommendation to hold the line at twenty years, and has proposed to these Bureau officers a maximum period of three months for consideration of the materials prepared by the "Foreign Relations" staff; he also appealed, in view of the twenty-year lag, for a more liberal clearance policy. "Only a very clear and compelling danger of real importance,"

he wrote, "could justify leaving a gap in a documentary series with a high reputation for completeness and reliability." The response to this procedure seems to have been good, with perceptible improvement in clearance.

The Committee discussed this clearance problem with representatives of three of the geographical Bureaus, and feels that further progress was made in understanding the problem and in promoting better co-operation of all concerned. The clearance problem was also discussed with Under Secretary Ball, who suggested that certain cases be sent to him for review. It is hoped that out of this may come increased pressure for more rapid consideration and a more liberal policy in respect to clearance. The Historical Office, on its part, is preparing a memorandum for the reviewing officers that should further clarify the situation and bring about better co-operation.

Access to State Department Files. The rules governing access by scholars to the records of the State Department have recently been revised. Although this matter is not strictly within the jurisdiction of the Advisory Committee, it is something that concerns scholars everywhere and especially those represented by this Committee and is of particular interest in view of the greater selectivity of the documentation to be published in *Foreign Relations*. For many years the records of the Department, for the purpose of access by scholars, were divided into three periods: an open period, through 1929; a restricted period, 1930-1941; a closed period, 1942 to the present. These fixed dates have now been changed to periods progressively geared to the publication of *Foreign Relations*, and access to the records thus automatically moved up as the volumes are published. It is also understood that access to documents in the restricted period will be granted as liberally as possible to serious scholars.

Personnel and Budget. The Committee desires to emphasize again its view that the crux of the problem in respect to *Foreign Relations* is the size and quality of the staff. In spite of the overwhelming increase in the materials to be scrutinized, compiled, and edited, the "Foreign Relations" staff has actually been reduced over the years, from 15-18 in 1947 to 12-14 in 1963. Indeed, the entire Historical Office staff has been reduced from 62 in 1952 to 39 in 1963 (this figure including two unfilled vacancies). The Committee has complete confidence in the competence and industry of the present staff, but it is obvious that this niggardly policy imposes an impossible burden and prevents effective recruitment. The Committee understands that there has been a good increase in the budget for printing and binding, which is to be warmly commended, but the provision of a budget for additional personnel has not been granted. In the view of the Committee, 8-10 additional positions are needed if the staff is to keep up with its task and maintain the twenty-year line. This matter was also discussed with Under Secretary Ball, who indicated his readiness to review the budgetary situation and see what could be done.

In the meantime the Committee would note with approval the suggestion by Secretary Rusk that internships for service in the Historical Office

might be useful. If arrangements could be made for the necessary funds (which the Committee assumes must be found outside the State Department) and if mature scholars could be interested, so that no long period of training is necessary, such internships would be helpful, not only in providing some staff assistance but also in promoting a better understanding by professional scholars of the problems involved in the production of *Foreign Relations* as well as a better appreciation of the substantive importance of the series.

Finally, the Committee warmly commends the Director, Dr. Franklin, and his staff, who have produced more volumes than we have a right to expect under the difficult circumstances confronting them, volumes whose compilation and production reflect industry, integrity, and historical scholarship of the highest order. Dr. E. Ralph Perkins is about to retire after more than thirty years on the staff and approximately thirty years as Editor of *Foreign Relations*. He has during all these years maintained the most rigorous standards of historical accuracy, objectivity, and completeness, and his services are warmly appreciated. The Historical Office is fortunate in having obtained the services of Dr. S. Everett Gleason, well-known historical scholar for some years with the National Security Council; he was brought in first as a Special Assistant and will now replace Dr. Perkins as Editor of *Foreign Relations*. In spite of the numerous and often discouraging problems noted in these annual reports, the Committee is well pleased with the operations of the Historical Office and feels that the solution of some of the most persistent problems may be in sight.

Respectfully submitted,

CLARENCE A. BERDAHL, *Chairman*

WILLIAM W. BISHOP, JR.

ROBERT H. FERRELL

FRED H. HARRINGTON

RICHARD W. LEOPOLD

ROBERT E. OSGOOD

ROBERT R. WILSON

December 30, 1963

REGIONAL MEETINGS OF THE SOCIETY

Four regional meetings of the Society have been held this year in Austin, Texas, Durham, North Carolina, Syracuse, New York, and Columbus, Ohio, respectively, under the co-sponsorship of the university law schools in those cities. A fifth meeting, in Seattle, Washington, was co-sponsored by a joint committee of the American Law Institute and the American Bar Association.

University of Texas, February 22, 1964

The meeting at Austin, Texas, was sponsored jointly by the Law Schools of the University of Texas and of Southern Methodist University, and

arrangements were made with the co-operation of the International Law Society of the University of Texas. Professor E. Ernest Goldstein of the University of Texas Law School was in charge of arrangements.

The meeting, which was devoted to the subject of "Latin America and the European Common Market," was opened on Saturday morning, February 22, by welcoming remarks from Dean Page Keeton of the University of Texas Law School. Mr. Jack H. Vaughn, Regional Director for Latin America of the Peace Corps, spoke on the topic "Beneath the Alliance," in which he surveyed international issues and problems which affect relationships between the United States and the Latin American countries. Dean César Sepúlveda, of the School of Law of the National University of Mexico, spoke on "Some Modest Proposals for Change in the Organization of American States," referring to the strengths and weaknesses of the regional system and suggesting new approaches and institutional devices to make the system more effective. Professor Howard Taubenfeld of the Southern Methodist University School of Law presided.

The Honorable St. John Garwood, former Justice of the Supreme Court of Texas, presided at the luncheon, at which an address on "The Atlantic Partnership" was given by Mr. Willem-Jan Van Slobbe, Chef de Cabinet to Vice President Sicco Mansholt of the European Economic Community.

At the afternoon session, presided over by Professor Goldstein, addresses were given by Captain Joseph B. McDevitt, Director of the International Law Division, Office of the Judge Advocate General, U. S. Navy, who spoke on "The Law of the Sea" with particular reference to Latin American problems; and His Excellency Sergio Gutiérrez-Olivos, Ambassador of Chile to the United States, who gave an analysis of a program of change in legal and other relationships between the Latin American states.

Both sessions were followed by general discussion.

E. H. F.

*Southeastern Regional Conference and the Association of Student
International Law Societies Annual Conference, Duke
University School of Law, February 28-29, 1964*

"Soviet Impact on International Law" was the subject of the conference, held in Durham, North Carolina, which was arranged by the Duke International Law Society and co-sponsored by the Association of Student International Law Societies, with the co-operation of the Duke University School of Law, the World Rule of Law Center, and the Duke University Committee on International Relations.

The conference was opened on February 28, with remarks by Douglas M. Knight, President of Duke University, and by Elvin R. Latty, Dean of Duke University School of Law. Ved P. Nanda, Chairman of the Association of Student International Law Societies, and David G. Warren, President of the Duke International Law Society, also spoke briefly to the assemblage, which included about 200 lawyers, government officials, students and academic personnel.

Five symposium panels were presented, each consisting of formal addresses followed by panel discussion and a question period. The first, with Professor Harold J. Berman of Harvard Law School as moderator, dealt with "Peaceful Co-existence"—Soviet Approach to International Law." Professor Warren Lerner, of the Duke University Department of History, spoke on "The Evolution and Trends of the Communist Philosophy of Peaceful Co-existence." Victor P. Karpov, First Secretary of the Soviet Embassy, talked on "The Soviet Concept of Peaceful Co-existence and Its Implications for International Law," followed by Professor Leon Lipson of Yale Law School, who addressed himself to a critical appraisal and analysis of what "peaceful co-existence" is and is not.

The next panel, with Professor Lipson as moderator, was entitled "Soviet Pressure on New Legal Frontiers." Robert D. Crane, Research Associate, Center for Strategic Studies, Georgetown University, spoke on "General Principles of Soviet Space Law"; Peter Maggs, Research Associate in Law, International Legal Studies, Harvard Law School, discussed "The Soviet Union's Viewpoint on Nuclear Weapons"; and Professor George Ginsburgs, Department of Political Science, State University of Iowa, "Wars of National Liberation—The Soviet Thesis."

On February 29, the session began with a panel entitled "Soviet Participation in International Agreements." "Soviet Treaty Law" was the subject of a presentation by Jan Triska, Director of Stanford Studies of the Communist System. Professor Kazimierz Grzybowski, Visiting Professor at the University of Leiden in The Netherlands, spoke on "The Rôle of International Organizations Within and Without the Soviet Bloc." Professor Robert R. Wilson, Department of Political Science at Duke University, was the moderator.

Arthur Larson, Director of the World Rule of Law Center at Duke University, conducted a panel composed of students from various law schools on the subject "Soviet Use of Third Party Judgments in International Disputes." Included were David C. Baldus, Yale; Vicente Blanco-Gaspar, Michigan; Jerry B. Chariton, Harvard; Alan Kalker, New York University; Edwin M. Larkin, Georgetown; and Charles W. Mertel, Duke.

In the afternoon the conference heard a televised address by the Honorable Luther H. Hodges, Secretary of Commerce, on "U. S. Government Policy on Trade and Business with the Soviet Union." Dr. Jack Behrman, Assistant Secretary of Commerce for Domestic and International Affairs, conducted a question period following the Secretary's address.

The final panel was on the subject of "Soviet Influence on Trade and Investment," with Professor Hans Baade of Duke Law School as moderator. Professor Stanley D. Metzger of Georgetown Law Center spoke on "Federal Regulation and Prohibition of Trade with the Soviet Bloc." Leon M. Herman, a specialist in Soviet economics with the Legislative Reference Service of the Library of Congress, talked on "The Economic Effect of Soviet World Trade." Professor Branko M. Peselj of George-

town Law Center, and a practicing Washington attorney, presented a talk on "Soviet Foreign Aid—Means and Effects."

The conference concluded with a banquet, at which an address was delivered by the Honorable Richard N. Gardner, Deputy Assistant Secretary of State for International Organization Affairs.

The papers will be published in the Fall, 1964, issue of *Law and Contemporary Problems*. Individual copies will be available in November at \$2.50 each.

DAVID G. WARREN

Syracuse University, March 14, 1964

The first regional meeting of the Society to be held in Syracuse was held on March 14 at the Ernest I. White Hall of Syracuse University, on the subject of "Procedural Aspects of International Law." The meeting was organized by Richard B. Lillich, Associate Professor of Law, and Director, International Legal Studies, Syracuse University College of Law. The International Legal Studies Program of the University co-sponsored the meeting, for which arrangements were made by the International Law Club of the College of Law.

The morning session was opened by remarks of welcome from Dean Ralph E. Kharas of the College of Law. An address on "The Rôle of Domestic Courts in the International Legal Order" was given by Richard A. Falk, Associate Professor of International Law, Woodrow Wilson School of Public and International Affairs, Princeton University. Thomas M. Franck, Professor of Law at New York University Law School, spoke on "Structuring Impartiality in International Third-Party Law-Making." Comments on the papers were presented by Michael H. Cardozo, Executive Director of the Association of American Law Schools, and were followed by a general discussion.

A luncheon was held for international law teachers, at which Professor Cardozo delivered an informal address on international problems with which the Association of American Law Schools is concerned.

At the afternoon session introductory remarks were made by Gerard J. Mangone, Professor of Political Science and Director, International Organization Research Program, Maxwell Graduate School of Citizenship and Public Affairs of Syracuse University. Professor Hans W. Baade of Duke University School of Law spoke on "Nullity and Avoidance in Public International Law." Professor Lillich discussed "International Claims—A Comparative Study of American and British Postwar Practice." Professor Wade J. Newhouse of the School of Law of State University of New York at Buffalo, commented on the papers, and a general discussion followed. The meeting concluded with a reception and banquet at which Professor Lillich gave an informal address on the International Legal Studies Program of the Syracuse University College of Law.

The four principal papers will be published as a symposium on "Procedural Aspects of International Law" in the Spring issue of the *Indiana*

Law Journal. Individual copies are available at \$1.50 each. Orders should be addressed to the Business Manager, *Indiana Law Journal*, Indiana University School of Law, Bloomington, Indiana.

Seattle, Washington, April 10-11, 1964

The Society also co-sponsored a meeting, designated as a Course of Study on "Counseling Clients on International Business Transactions," and organized by the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, which was held at the Olympic Hotel in Seattle, April 10-11.

On April 10 a morning session was devoted to "International Litigation," and an afternoon session to "Direct Foreign Investment." On April 11 "Foreign Licensing Arrangements" were discussed at the morning session, while the afternoon session considered "Financing of International Business Transactions."

Speakers at the sessions included James N. Hyde, President of the Society, Herbert S. Little, David M. Goldie, Dan Fenno Henderson, Griffith Way, Roger C. Henselman, John J. Cooper, David S. M. Huberman, Harold F. Olsen, Henry Harfield, and L. Gordon Jahnke.

Arrangements for this meeting, which was one of a number of similar meetings organized by the Joint Committee on Continuing Legal Education, were under the charge of Mr. Paul A. Wolkin, Director of the Committee.

Ohio State University, April 17, 1964

A meeting, arranged under the chairmanship of Professor Roland Stanger, of the College of Law of Ohio State University, was held on April 17 in the auditorium of the College of Law. The theme of the meeting was "Self-Defense in the Nuclear Age." The principal speakers were Professor M. Seara-Vazquez of the National University of Mexico, and Richard J. Barnet of the Institute for Policy Studies, Washington, D. C. Their papers, along with papers prepared on the same subject by Ian Brownlie, of the University of Nottingham, and Florentino P. Feliciano of Manila, will be published later by the Ohio State University Press.

ELEANOR H. FINCH

GERMANY'S EASTERN BORDER AND MASS EXPULSIONS*

On May 5, 1945, the German armed forces capitulated. Germany's adversaries, the United States of America, England, France and Russia, assumed and exercised supreme power in Germany through their military governors and the Control Council.

On August 2, 1945, the heads of the governments of the United States,

* This comment was submitted as a reaction to the review by Prof. George Ginsburgs in 57 A.J.I.L. 700 (1963) of G. C. Paikert, *The German Exodus: A Selective Study on the Post-World War II Expulsion of German Population and Its Effects* (1962). —ED.

Great Britain, and the Union of the Soviet Socialist Republics summarized the results of the Potsdam Conference in a Protocol, in which they endorsed "their opinion that the final fixing of the western border of Poland should be postponed until the peace conference." Until that time all German territory east of the Oder and the Lusatian Neisse was placed "under Polish administration."¹ An exception was made in respect to the northern part of the province of East Prussia. This was transferred to the Soviet Union to be administered by it "subject to the final determination of territorial questions at the time of the peace settlement." At the same time the President of the United States of America and the British Prime Minister promised to support the Soviet's desire to acquire these territories at the peace conference.² Thus, this arrangement entrusted Poland and the U.S.S.R. with the trusteeship of those German territories east of the Oder and the Lusatian Neisse.

Both states, however, did not leave it at a trusteeship but, in the following years, annexed the territories entrusted to their administration. Since that time both states hold the view that their annexations are legally in force. Nevertheless, in 1950, Poland secured the confirmation of its Western border, the "Oder-Neisse Line," as the "border of peace" from the government established in the meantime in Central Germany by Russia. In its draft peace treaty of 1958 the U.S.S.R. demanded that the Germans renounce their claim to the territories east of the Oder and the Lusatian Neisse.

In 1945 many of the inhabitants of the territories annexed by Poland and Russia had fled and their return was denied. With the exception of approximately one million inhabitants, who today live chiefly in Upper Silesia and southeast Prussia, all those remaining were expelled. Although the Potsdam Protocol speaks solely of expulsion from Poland, not only were German nationals—Polish citizens of German descent living there—expelled, but also the inhabitants from the area east of the Oder and the Lusatian Neisse, which at any rate indisputably belonged to Germany in 1945–1946.

The legal view that these territories were transferred to Poland and Russia to be solely administered by them has until now been confirmed time and again by the United States and the other allies of Germany in NATO.

The Federal Republic of Germany, in the interest of the free world, calls for the return of those territories belonging to it as well as unification with the Soviet Zone of Occupation. The legal foundation for this claim is that right for which the United States entered the second World War. Generally, international law prohibits the annexation of foreign territory and condemns expulsion as a violation of the dignity of man. In other words, Germany's claim is based upon the prohibition of annexation, the right of self-determination, and the prohibition of mass expulsion.

Whereas formerly a war won constituted a legitimate claim to acquisition of foreign territory, which was valid and indisputable under international

¹ 39 A.J.I.L. Supp. 254–255 (1945).

² *Ibid.* 253.

law, a total change in international legal thought set in in the era between the two world wars. The doctrine prohibiting annexation developed from the Kellogg-Briand Pact and the Stimson Doctrine as a peremptory rule of international law developed from customary law binding on all members of the international community of nations. It resulted from the prohibition of war: recognition of territorial gains should be denied to states resorting to illegal violent measures. At the same time states attacked illegally may do nothing more than preserve their territorial possessions. They cannot undertake counter-annexations.

This universally applicable prohibition of annexation was already a binding rule of international law when the U.S.S.R. and the People's Republic of Poland annexed the eastern part of Germany. For this reason it was included in the Charter of the United Nations (Article 2, paragraph 4).

Furthermore, annexation infringes on the right of self-determination, which is now accepted as a principle of international law. The case of application of the law involved here says that territorial annexations require the consent of the inhabitants concerned, which is to be obtained by means of a plebiscite. Until now these territories have never had the benefit of a plebiscite. On the contrary, the inhabitants of East Prussia, Eastern Pomerania, Eastern Brandenburg and Silesia were expelled, evidently simply in order to avoid a vote of this type, the results of which would not have been uncertain. For these provinces have been a part of Germany since time immemorial and their inhabitants German according to language and civilization.

Such an expulsion is a further offense against international law, for, along with this, numerous rights of man were violated, in particular those concerning the personality and dignity of man. Mass expulsion, which was prohibited as early as 1907 in the Hague Convention respecting the Laws and Customs of War on Land, was rightly declared criminal by the Nuremberg Tribunal. Therefore, the science of international law must point out the following illegal act: The annexations of German territory undertaken following World War II against the will of the German inhabitants, who were expelled, is contrary to international law. This illegal act can only be canceled by returning to Germany that territory annexed by Poland and the U.S.S.R. at the future peace settlement. Only a settlement based on law can produce a stable situation in eastern Central Europe satisfactory to all interested states, peoples and citizens.

In particular, it must be noted that about ten million human beings were expelled from German territory east of the Oder and the Neisse, including the Free City of Danzig. Other than this expulsion of German citizens from German territory German nationals were simultaneously expelled from Poland, Czechoslovakia, Hungary, Yugoslavia and, for the most part, from Rumania. The total number of Germans expelled from other states equals almost seven million. There is no need to go into particulars about the millions of casualties suffered during the expulsion. These were primarily children, women, and aged persons. It must be

especially remembered that the majority of all expellees came from German territory east of the Oder and the Neisse, where their forefathers settled more than 700 years ago.

FREIHERR VON BRAUN

Director of the Goettingen Research Committee

PUBLICATION OF ITALIAN CONCILIATION COMMISSION DECISIONS

Under the auspices of the Law School of the University of Bologna, Professor Angelo Piero Sereni and a staff of experts will attend to the publication of the decisions of the Commissions of Conciliation established between Italy and several countries pursuant to Article 83 of the Peace Treaty of February 10, 1947.

The collection, consisting of several volumes, will include:

(a) One or more introductory studies examining the origin of the various Commissions, their organization and operation, the work done, the results achieved, and the principles of substantive and procedural law set forth in the decisions, as well as the preliminary and subsequent procedures relating to the processing of claims, together with statistical data.

(b) The texts of the treaties and other international instruments and of the Italian legislative enactments relating to the claims and to the organization and operation of the Commissions, including the latter's rules of procedure.

(c) The texts in the original language or languages of those decisions which involve matters of law.

(d) The summary in the Italian, French and English languages of all decisions.

(e) Detailed indexes.

(f) The bibliography.

It will be deeply appreciated if the authors of studies relating to the Commissions would send copies of them to Professor Angelo Piero Sereni, Istituto Giuridico, Università degli Studi, Via Zamboni 27-29, Bologna, Italy.

A. P. SERENI

GROTIUS DINNER IN LONDON*

On March 4, 1964, the British Institute of International and Comparative Law held a dinner honoring Hugo Grotius at Lincoln's Inn, London, at which the President of the American Society of International Law, Mr. James N. Hyde was a guest. The principal speaker was Sir Percy Spender, Judge of the International Court of Justice. Addresses also were given by Lord Denning, Chairman of the Institute and Master of the Rolls, and by Mr. S. P. Chambers, Chairman of Imperial Chemical Industries, Ltd.

* Grateful acknowledgment is made to Mr. Harry H. Almond, Jr., for the information contained in this note.

Lord Denning, in his remarks, expressed the gratitude of the Institute to the Ford Foundation for its recent gift of over \$250,000 for research and studies into Commonwealth, European and Public International Law. Mr. Chambers emphasized that the modern international community urgently needs a working system of harmonized non-competing laws, and suggested that efforts in this direction would be of paramount importance in the promotion of peace and the maintenance of orderly relations among states.

Judge Spender stated that developments in the fields of comparative Commonwealth law and in international law demand the trained mind of the common-law lawyer. Lawyers must direct constructive thinking toward fashioning fruitful ways for governments to submit to the rule of law. The lawyer's task is difficult, he said, but in spite of delays and frustration, the lawyer is engaged in an important pursuit, whose purpose is the achievement of peace and the settlement of disputes among nations on the basis of justice. Referring to the work of the British Institute, Judge Spender said that its rôle must be to increase confidence among nations. Lawyers must lead in developing public opinion and making it aware of the importance of the International Court of Justice in settling disputes among states. They must remind world leaders and world public opinion that if states refuse to live up to the rule of law, there will be no peace in the world.

E. H. F.

PRIZES INSTITUTED BY JAMES BROWN SCOTT IN MEMORY OF HIS MOTHER AND
HIS SISTER JEANNETTE SCOTT

The Institute of International Law announces the subject for the Emer de Vattel Prize (2000 Swiss francs) to be awarded in 1967. The subject is: "The Applicability of International Law to New States."

The competition is open to anyone except members or associates, or former members or associates, of the Institute. The essays submitted should be unpublished manuscripts of not less than 150 nor more than 500 pages corresponding to a printed octavo page of the same character as a page of the 1961 volume of the *Annuaire de l'Institut de Droit International*. Essays may be written in English, French, German, Italian or Spanish. They should be sent anonymously and in three copies. Each copy must be supplied with two mottoes. The same mottoes should be inscribed on an accompanying envelope containing the surname and first names, the date and the place of birth, the nationality and the address of the author. The essays must be in the hands of the Acting Deputy Secretary-General of the Institute (Mrs. Paul Bastid, 88, rue de Grenelle, Paris VIIe) not later than December 31, 1966.

The conditions of the Prize will be found in the *Annuaire de l'Institut de Droit International* for 1961, Vol. 49, Tome II, pp. 554-561.

E. H. F.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section has been prepared by a committee consisting of HAROLD S. BURMAN, STANLEY L. COHEN, THOMAS T. F. HUANG, and SYLVIA E. NILSEN, under the chairmanship of RICHARD B. BILDER, all of the Office of the Legal Adviser, Department of State. Mr. ALFRED P. RUBIN, of the Office of the General Counsel, Department of Defense, and Mr. BRUNO A. RISTAU, of the Department of Justice, have provided the committee with relevant material originating in those two agencies.

UNITED NATIONS

Consideration by Committee VI (Legal) of principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations—Charter prohibitions concerning the threat or use of force, peaceful settlement of disputes, international law and non-intervention, and sovereign equality of states

At its Seventeenth Session, the General Assembly had adopted Resolution 1815(XVII), which called for the initiation of a study of certain principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations. This study was to begin at the Eighteenth Session with the study of four such principles: (a) the principle that states shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations; (b) the principle that states shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered; (c) the principle of the duty not to intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter; and (d) the principle of sovereign equality of states.

At the Eighteenth Session of the General Assembly this item was assigned to Committee VI (Legal). In the course of the debate in this committee, the United States Delegation made a separate statement with respect to each of the four principles under discussion.

The outcome of the debate was the adoption in Plenary Session on December 16 of Resolutions 1966 (XVIII) and 1967 (XVIII). Under Resolution 1966 (XVIII) a special committee will be appointed by the President of the General Assembly to "draw up a report containing, for the purpose of the progressive development and codification of the four principles so as to secure their more effective application, the conclusions of its study and its recommendations," and to report to the General As-

sembly at its Nineteenth Session. The resolution also places the following principles on the Assembly's agenda for study during the Nineteenth Session: (a) the duty of states to co-operate with one another in accordance with the Charter; (b) the principle of equal rights and self-determination of peoples; and (c) the principle that states shall fulfill in good faith the obligations assumed by them in accordance with the Charter.

Space limitations preclude quotation here of the four major statements on this agenda item by the United States Delegation in the Sixth Committee, which have been reprinted in the *Department of State Bulletin*.¹

Interpretation of Article 19 of the Charter—suspension of vote for financial default

Certain Members of the United Nations currently are in arrears within the terms of Article 19 of the Charter. The application of that article accordingly will arise when the General Assembly first meets in 1964, unless all of such Members have made the requisite payment on their arrears before the Assembly convenes. The position of the United States on legal issues involved in the application of Article 19 is set forth in the following Memorandum of Law, prepared by the Office of the Legal Adviser of the Department of State:

ARTICLE 19 OF THE CHARTER OF THE UNITED NATIONS

MEMORANDUM OF LAW *

SUMMARY

This memorandum contains an analysis of the considerations of law involved in the application of Article 19 of the Charter of the United Nations. Its conclusions may be summarized as follows:

(A) The first sentence of Article 19, which provides that a Member in arrears to a specified extent "shall have no vote in the General Assembly," entails no decision of the General Assembly to suspend a Member's vote; it is mandatory and automatic in effect. The second sentence, which provides that the General Assembly "may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member", is permissive in effect (paragraphs 1-2, 4-9).

(B) The records of the San Francisco Conference demonstrate the intention of the drafters of the Charter that the application of the first

¹ For the statement of Nov. 11, 1963, by Ambassador Francis T. P. Plimpton on "Principles of International Law Concerning Friendly Relations and Cooperation among States: Threat or Use of Force," see 49 Dept. of State Bulletin 973 (Dec. 23, 1963). For statement of Nov. 19 by Hon. Edna F. Kelly on "Peaceful Settlement of Disputes," see 50 *ibid.* 57 (Jan. 13, 1964). For statement of Dec. 3 by Ambassador Plimpton on "International Law and Nonintervention," see *ibid.* 133 (Jan. 27, 1964). For statement of Dec. 3 by Mrs. Kelly on "Sovereign Equality of States," see *ibid.* 264 (Feb. 17, 1964).

* Prepared by the Office of the Legal Adviser, Department of State, February, 1964.

sentence of Article 19 entail no decision of the General Assembly to suspend a Member's vote (paragraph 10).

(C) The practice of the United Nations confirms the plain meaning of Article 19 and the intention of the Charter's drafters (paragraphs 11-16).

(D) The fact that a Member is in arrears within the terms of Article 19 is, by established practice, computed and reported by the Secretary-General, or reported by the Committee on Contributions on the basis of the computations of the Secretary-General (paragraphs 17-24, 27-30).

(E) Assessments for peacekeeping operations, including those for UNEF and ONUC, are included in the computation of arrears within the terms of Article 19 (paragraphs 25-26).

(F) The Committee on Contributions advises the General Assembly on the application of the second sentence of Article 19, a provision which has no bearing on willful failure to pay (paragraphs 31-32).

(G) Differing interpretations of Article 19 are without merit (paragraphs 33-34).

(H) The analogous constitutional provisions and practice of the Specialized Agencies similarly show that (i) a provision that a Member in arrears "shall have no vote" is mandatory and automatic in effect, and (ii) the finding of the fact of arrears is a ministerial, mathematical calculation performed by the Secretariat and accepted by the Assembly without challenge (appendix).

A. The Mandatory and Automatic Application of the Provision That a Member "Shall Have No Vote"

1. Article 19 of the United Nations Charter provides:

"A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member."

2. It is plain that the application of the second sentence of Article 19 is permissive: the General Assembly "may . . . permit" a Member in the requisite arrears to vote "if it is satisfied that the failure to pay is due to conditions beyond the control of the Member." It has been contended that the application of the first sentence of Article 19 is likewise permissive. It has been suggested that, just as a General Assembly decision is required to implement the second sentence of Article 19, a General Assembly decision is required to implement the first sentence; and that, absent a decision of the General Assembly depriving a Member of its vote, a Member in arrears within the meaning of Article 19 continues to enjoy its voting rights unimpaired. It has been argued that, since suspension of a Member's right to vote in the General Assembly is a matter of great importance, the effecting of suspension requires an exercise of the Gen-

eral Assembly's discretion; it requires a decision and, indeed, a decision on an "important question" (as that term is employed in Article 18), with the result that the taking of that decision requires a vote of a two-thirds majority.

3. It has otherwise been contended that, even if the mandatory and automatic application of Article 19 is conceded, nevertheless the General Assembly itself must, as a condition of the article's application, first find as a fact that a Member is in arrears within the terms of Article 19; and that the General Assembly's so finding is a determination of an "important question" which, by the terms of Article 18, requires a two-thirds majority of the Members present and voting.

4. These contentions will be discussed in turn. It will be shown that the terms of the Charter, the proceedings at San Francisco, the provisions of the Organization's Financial Regulations and the practice pursued in accordance with them, the conclusions of the Secretary-General and the President of the Fourth Special Session of the General Assembly, and the analogous constitutional provisions and practice of the Specialized Agencies, all demonstrate that (a) the first sentence of Article 19 neither requires nor permits a General Assembly decision to suspend a Member's vote and (b) establishment of the fact of arrears within the terms of Article 19 results from a mathematical computation performed by the Secretary-General in accordance with rules laid down by the General Assembly.

5. The argument which would assimilate the permissive language of the second sentence of Article 19 to the mandatory language of the first sentence is without merit. The terms of the Charter are clear and decisive. The first sentence of Article 19 provides that a Member of the United Nations in the requisite arrears "shall have no vote in the General Assembly, . . ." From the fact of the requisite arrears, the consequence of loss of vote follows automatically. The question is not one of the General Assembly's discretion in suspending the voting rights of a Member; the question rather is whether the requisite arrears exist. On the determination of that question more is said below, but, in short, the existence of the requisite arrears is determined by the facts shown by the accounts of the Organization. Given the requisite arrears within the terms of Article 19, a Member has no vote in the General Assembly. "The General Assembly *may*, nevertheless, *permit* such a Member to vote *if* it is satisfied that the failure to pay is due to conditions beyond the control of the Member."

6. The mandatory and automatic character of the first sentence of Article 19 emerges with even greater force from a study of the Charter's French text. It provides that a Member of the United Nations in the requisite arrears in the payment of its contributions "ne peut participer au vote à l'Assemblée Générale. . ." The Spanish text provides that such a Member "no tendrá voto." A literal translation from the Russian prescribes that a Member in the requisite arrears "is deprived of the right to vote in the General Assembly." A literal translation from the Chinese

provides that such a Member "shall lose its right to vote in the General Assembly."

7. Where the Charter is meant to be mandatory in effect, it uses mandatory language: The General Assembly "shall." Where the Charter is intended to be permissive in effect, it uses permissive language: The General Assembly "may." Examples could be multiplied. Two further references suffice to supplement that of Article 19: Article 20 provides that the General Assembly "shall" meet in regular annual sessions. Article 22 provides that the General Assembly "may" establish such subsidiary organs as it deems necessary. The difference is plain, and it is vital.

8. The pertinence and importance of the Charter's distinction between mandatory provisions and permissive provisions is demonstrated by that Article of the Charter which, in addition to Article 19, relates to suspension of a right: Article 5, which provides for suspension not of the single right of voting in the General Assembly but for suspension "from the exercise of the rights and privileges of membership. . . ." Article 5 provides:

"A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council."

It will be noted that Article 5 specifies that a Member against which preventive or enforcement action has been taken "may"—not "shall" but "may"—be suspended. In contrast, Article 19 provides that a Member in the requisite arrears "shall"—not "may" but "shall"—have no vote in the General Assembly.

9. The second sentence of Article 19 reinforces the conclusion that suspension of vote under that Article requires no decision by the General Assembly. It provides that: "The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member." Now it is plain that, normally, all Members of the United Nations have the right to vote. Indeed, Article 18, paragraph 1, of the Charter provides that: "Each member of the General Assembly shall have one vote." Thus, there would be no purpose in Article 19 providing that, "The General Assembly may . . . permit" a Member in the requisite arrears to vote unless that Member's voting rights in the General Assembly were already suspended. The General Assembly need not grant permission to a Member to do what it is entitled to do. But the General Assembly must "permit" a Member in the requisite arrears to vote if that Member is to be entitled to vote. Without such permission, a Member in the requisite arrears "shall have no vote in the General Assembly. . . ."

10. The records of the San Francisco Conference demonstrate the intention of the drafters of the Charter that the application of the first sentence of Article 19 entail no decision of the General Assembly to suspend a Member's vote. They further demonstrate their intention to ac-

cord the General Assembly discretion in the application of the second sentence. Thus, the Revised Report of the Rapporteur (Judge Alfaro of Panama) of Commission II, adopted by the Plenary Session of the San Francisco Conference, declares that:

"The Assembly will be a body on which every member of the United Nations is represented and in which every member has one vote. A member which has fallen two years in arrears on its financial obligations to the Organization, however *will not* be allowed to vote *except by special decision of the Assembly*. On important questions a two-thirds majority will be required, but otherwise decision will be made by a majority vote.

"The Assembly *will have the right*, upon a recommendation of the Security Council, to admit new members, to *suspend the rights and privileges of members against which preventive or enforcement action is taken by the Security Council*, and to expel members. . . ." (UNCIO, Vol. 8, pp. 265-66; emphasis supplied.)

The first paragraph quoted of the Report of the Rapporteur sets forth the rule that a Member in the requisite arrears "will not be allowed to vote." The exception to the rule is that, "by special decision of the Assembly," a Member whose voting rights are suspended may be allowed to vote. In contrast with this mandatory regime, which is subject only to the special exception of the second sentence of Article 19, "The Assembly will have the right . . . to suspend the rights and privileges of members against which preventive or enforcement action is taken by the Security Council. . . ." Thus, in treating Article 19, the Rapporteur speaks in mandatory terms. He confines the General Assembly's "decision" to that of allowing a Member in the requisite arrears to vote. But when the Rapporteur turns from Article 19 to Article 5, he purposefully provides that: "The Assembly will have the right"—that is, the discretion—to suspend the rights and privileges of membership.*

* Article 19 has its origins primarily in amendments proposed at San Francisco by the delegations of India, the Netherlands and Australia (UNCIO, Vol. 8, pp. 508-09). These amendments all import that a Member in the requisite arrears has no vote, with no decision of the General Assembly being taken to deprive it of its vote. Committee II/1 of the San Francisco Conference, in response to these amendments, recommended "that states failing to fulfill their financial obligations should be deprived of all voting rights in the Assembly as long as they are in arrears. In its discussions of this matter, the experience of the League of Nations was cited as indicating the need for such a penalty. . . . It also recommends that the General Assembly should be empowered to waive this penalty if the default of a member is due to causes beyond its control." (*Ibid.*, p. 453.) The Committee accordingly proposed the following provision:

"Each member of the Organization shall have one vote in the General Assembly. A member which is in arrears in the payment of its financial contributions to the Organization shall have no vote so long as its arrears amount to its contributions for two full years. The General Assembly may waive the penalty if it is satisfied that the reasons for delay in payment are beyond the control of the state in question." (*Ibid.*, p. 457.)

The Secretariat of the Conference suggested, in transmitting this text to the Coordination Committee, that it be revised to substitute for the words "waive the penalty" the words "restore the privilege of voting." (UNCIO, Vol. 18, p. 174.) The Co-

11. The practice of the United Nations in respect of the mandatory and automatic character of Article 19, while slender, is nevertheless illuminating. It shows that no affirmative action is expected of the General Assembly in application of the first sentence of Article 19. At the opening of the Fourth Special Session of the General Assembly on May 14, 1963, Haiti was in arrears within the terms of that Article. The Secretary-General of the United Nations accordingly wrote a letter to the President of the General Assembly, dated May 14, 1963, as follows:

"Dear Mr. President,

"At the present time one Member State, Haiti, is in arrears in the payment of its financial contribution to the United Nations within the terms of Article 19 of the Charter which provides as follows:

'A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The General Assembly may, nevertheless, permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.'

"The arrear contributions due from the Government of Haiti exceed by \$22,400 the amount of the contributions due from it for the preceding two full years, and a payment exceeding that amount would be necessary in order to reduce the arrears below the limit specified in Article 19.

Yours sincerely,

U Thant
Secretary-General"

ordination Committee, which could make no substantive change in the draft provisions, being confined to questions of organization, language clarification and consistency of committee decisions (see Russell & Muther, *A History of the United Nations Charter*, 1958, p. 641), recast the second sentence of what became Article 19 substantially as it appears in the Charter. In the course of so doing, a discussion took place among three of its fourteen members with regard to the wording of the second sentence, in which the discretionary nature of the General Assembly's authority under that sentence was restated. (UNCIO, Vol. 17, p. 54.) Subsequently, the Soviet member of the Coordination Committee, Professor Golunsky, in referring to the intention to restrict loss of vote to the General Assembly, stated that the Article "... clearly meant that the Member in arrears could not vote in the General Assembly. . . ." (*Ibid.*, p. 350.) The final, governing interpretation of Article 19 at San Francisco, which was unanimously adopted by the Conference's 9th Plenary Session (UNCIO, Vol. I, p. 623), is the Revised Report of the Rapporteur of Commission II which is quoted in the body of this memorandum.

Of further interest is the Department of State's Report to the President on the Results of the San Francisco Conference of June 26, 1945: "The Conference made only one change of substance in the portions of the Dumbarton Oaks texts relating to the structure and proceedings of the General Assembly itself. This was to add a provision, depriving a Member of the right to vote if it is two years or more in arrears in the payment of its financial contributions. This amendment, which was submitted in various forms by five different Delegations, was adopted with the overwhelming support of the representatives of nations large and small. In order to prevent undue hardship, it has been provided that the General Assembly should have the power to waive the penalty if the non-payment of contributions is due to causes beyond the control of the Member in question (Article 19)." (At p. 60.)

The President of the General Assembly replied to the Secretary-General by letter dated May 15, 1963, as follows:

"Dear Mr. Secretary-General,

"I have received your letter of 14 May 1963, informing me that, at the opening of the Fourth Special Session of the General Assembly, Haiti was in arrears in the payment of its financial contribution to the United Nations within terms of Article 19 of the Charter. I would have made an announcement drawing the attention of the General Assembly to the loss of voting rights in the Assembly of the Member State just mentioned, under the first sentence of Article 19, had a formal count of vote taken place in the presence of a representative of that State at the opening plenary meeting. As no such vote took place, and as the representative of Haiti was not present, this announcement became unnecessary.

"I am transmitting a copy of your letter and of my present reply to the Chairman of the Fifth Committee at the present Special Session so that he may be informed of the situation which will give rise to the loss of voting rights in the Fifth Committee of the Member concerned if the situation is not previously rectified. I am informed, in this respect, that the representative of Haiti will very shortly make the payment necessary to render the first sentence of Article 19 inapplicable.

Yours sincerely,

Muhammad Zafrulla Khan
President
Fourth Special Session of
the General Assembly"

The foregoing exchange of letters was transmitted to the Permanent Missions of the States Members of the United Nations for their information, by note dated May 20, 1963.

12. The President of the General Assembly, in the course of a television interview on May 19, 1963, had occasion to amplify the view contained in the letters of May 14 and 15. Questions put to the President, and his answers, follow:

Question: "Sir, as you know, the Charter of the United Nations provides sanctions or punitive measures against any country which falls in arrears to the extent of two years' default in its dues. Do you believe that sanction should be applied now to countries which are or will be in default, such as Haiti was until the other day, or that it should be applied against say the Soviet Union which is likely to be in serious default in the near future?"

Mr. Zafrulla Khan: "The matter has nothing to do with my opinion or belief. The Article is perfectly clear. Article 19 of the Charter says that when that situation arises which you have mentioned, that a Member is in default up to a certain point, it has no vote in the Assembly. It is not for me to decide whether it has or it hasn't. The English version says it shall have no vote and the French version says it cannot vote. It applies automatically.

"The second portion of the Article provides, however, that the Assembly might, as it were, suspend the operation of the first part if it finds that the default was due to conditions over which the defaulting

member had no control. But so far as the first part is concerned, it comes into force automatically when that situation arises."

Question: "In other words, if Haiti had shown up on the first day of the Session and been in arrears as it was, you would not have allowed Haiti to vote?"

Mr. Zafrulla Khan: "... if a vote had been taken and Haiti had been present, I would have had to announce that Haiti would not be able to participate in the vote."

Question: "And if the Soviet Union in a year or two—next year, for instance—is sufficiently in arrears to lose its vote—would you deprive it from exercising its vote?"

Mr. Zafrulla Khan: "It has nothing to do with any particular Member. All Members stand on the same footing."

Question: "Is there a general feeling in the General Assembly that any country that falls in [the requisite] arrears must automatically be deprived of its vote?"

Mr. Zafrulla Khan: "I do not know whether that is the feeling in the Assembly or not, but that is what the Charter says."

13. The Government of Haiti, in the course of the Fourth Special Session of the General Assembly, paid a portion of its arrears sufficient to absolve it from the application of Article 19. It did so before its delegation appeared at any meeting of the Assembly's Plenary Session or any meeting of the single Main Committee then sitting, the Fifth Committee.

14. The application of Article 19 also arose in 1958. The Report of the Committee on Contributions to the Thirteenth Session noted the fact that, at the time of its Report, which was dated August, 1958, Bolivia had not paid part of its contribution for 1955, as well as its total contribution for 1956, 1957 and 1958. The Report continued: "The attention of the General Assembly is therefore invited to the terms of Article 19 of the Charter, which provides: . . ." (A/3890, p. 5) As the Secretary-General later stated: "Before the opening of the General Assembly session, arrangements had, however, been made by the Member State concerned for payment of the outstanding arrears." (*I.C.J. Pleadings, Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, p. 54.)

15. The practice of the United Nations in implementing Article 19 is in most respects scant because the very great majority of Members have paid their assessments or, being in arrears, have nevertheless paid enough to avoid that Article's application. Thus, while there were, shortly before the Fourth Special Session of the General Assembly convened in 1963, ten Members in arrears within the terms of Article 19, nine of them made payment sufficient to avoid the Article by the time the Session opened. (The tenth Member was Haiti.) Among them were Hungary and Cuba—Members whose liability under Article 19 was subject to the inclusion in the computation of their arrears of assessments for ONUC and UNEF.

16. What does the practice of the Organization indicate? It shows that Members in arrears within the terms of Article 19 have recognized the mandatory and automatic force of that Article by not even appearing in Plenary Session and in Main Committee. The Charter requires that a Member in the requisite arrears shall have no vote in the General Assembly.

It does not oblige such a Member to refrain otherwise from participating in the Assembly's proceedings. But such has been the deference to Article 19 that Members falling within its terms have managed to make sufficient payment in time to avoid its application or, failing that, were absent from the proceedings of the Assembly, both in Plenary Session and in Main Committee, until making payment.*

B. The Computation of Arrears under Article 19

17. The terms of the Charter, the provisions of the General Assembly's Rules of Procedure and of the Financial Regulations, the extensive, established practice followed in pursuance of those Rules and Regulations, and the large body of analogous practice of the Specialized Agencies, combine to demonstrate that establishment of the fact of arrears within the terms of Article 19 is not a matter of General Assembly decision. What is required for loss of vote is not a determination of the fact of arrearage, but the mere existence of the requisite arrears. The calculation and report of their existence by the Secretary-General is the result of his routine and required implementation of the Financial Regulations. It is a question not of General Assembly decision, but of accounting computation.

18. By the terms of Article 19, a Member in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly only "if the amount of its arrears equals or exceeds the amount of contributions due from it for the preceding two full years." Thus the finding of whether a Member is in arrears within the terms of the Article requires a totalling of the amount of its arrears on contributions due from it, a totalling of the amount of contributions due from it for the preceding two full years, and the mathematical conclusion as to whether the first sum equals or exceeds the second. This is an arithmetical, not a political, decision. It is no more required to be made by the General Assembly than is any other computation in which the Secretary-General, by reason of his position as "the chief administrative officer of the Organization", must engage.

19. This is not to say that the ascertainment of arrearage within the terms of Article 19 is beyond the General Assembly's control. On the contrary, the General Assembly has adopted rules, general and impartial in nature, which the Secretary-General is obliged to apply. The General Assembly's Rules of Procedure provide, in Rule 153, that: "The General Assembly shall establish regulations for the financial administra-

* The practice of the Organization, as exemplified in the Haitian case, also confirms that suspension of vote under Article 19 applies to the Main Committees of the General Assembly. In transmitting the exchange of letters between the Secretary-General and the President to the Chairman of the Fifth Committee, "so that he may be informed of the situation which will give rise to the loss of voting rights in the Fifth Committee of the Member concerned if the situation is not previously rectified", the President both reaffirmed the automatic and mandatory effect of Article 19 and took note of that Article's embracing the Main Committees, as well as Plenary Session, of the General Assembly.

tion of the United Nations." Rule 161 assigns to the Committee on Contributions the task of advising the General Assembly on the scale of assessments "and on the action to be taken with regard to the application of Article 19 of the Charter." The Financial Regulations which the General Assembly has unanimously adopted provide that they "shall govern the financial administration of the United Nations. . . ." (Regulation 1.1) Rule 101.1, promulgated in pursuance of the Financial Regulations, notes that: "The Controller shall be responsible for the administration of these Rules, on behalf of the Secretary-General." Regulation 11.1 provides that: "The Secretary-General shall maintain such accounting records as are necessary and shall submit annual accounts. . . ." Pursuant to that regulation, Rule 111.4 provides that the financial statements which shall be prepared "at intervals as prescribed by the Controller" shall include supporting schedules on: "Status of Members' contributions and advances." Such statements are in fact prepared monthly and circulated as official documents.* They show, for each Member, the status of advances to the Working Capital Fund and of "contributions due" to the United Nations Regular Budget, the United Nations Emergency Force Special Account, and the Congo *ad hoc* Account. The total amounts due from each Member under each account are given. The authority, and accuracy, of the Secretary-General in making such computations are not known to have been challenged by any Member. Furthermore, Regulation 5.7 provides:

"The Secretary-General shall submit to the regular session of the General Assembly a report on the collection of contributions and advances to the Working Capital Fund."

The Secretary-General accordingly is required by the Financial Regulations to report to the General Assembly on the status of Members' arrears, a report which may refer to the status of their arrears within the terms of Article 19. Thus the Report of the Secretary-General on the Collection of Contributions as at 14 September 1959 declares:

"As at 14 September 1959, the contributions payable by Member States for the years prior to 1957 have been paid in full, and for 1957 the amounts outstanding represent in all cases less than the total contributions due for that year. At the present time therefore, no Member State is in arrears in the payment of its financial obligations to the Organization to the extent that Article 19 of the Charter would apply." (A/C.5/778, p. 1.)

20. Regulation 5.7 governs the submission of a report on the collection of contributions "to the regular session of the General Assembly." When the General Assembly otherwise meets, the Secretary-General has, as occasion required, informed it of the occurrence of the fact of arrears within the terms of Article 19. Thus in the Haitian case in 1963, at the General Assembly's Fourth Special Session, the Secretary-General brought the fact

* See, for example, "Statement on the Collection of Contributions as at 31 December 1963", ST/ADM/SER.B/183.

of that Member's arrears to the attention of the General Assembly by letter addressed to its President. The President's letter in response to that of the Secretary-General accepted the Secretary-General's computation of arrears within the terms of Article 19.

21. The Committee on Contributions, on the basis of the Secretary-General's reports, likewise may report the occurrence of the fact of arrears within the terms of Article 19. As noted above, the Committee, in 1958, recorded that, as of the August date of its Report, Bolivia was in the requisite arrears. The Committee has regularly reported the contrary. For example, its Report to the Eighteenth Session of the General Assembly states: "As at present no Member State is in arrears in the payment of its contributions to the extent that Article 19 would apply, no action of the Committee was required in this respect." (A/5510, p. 4.) The rôle of the Committee on Contributions is not confined to noting the fact of arrears as computed by the Secretary-General, however. Its advice, pursuant to Rule 161 of the Rules of Procedure, clearly concerns the question of whether a Member's failure to pay is due to conditions beyond that Member's control. Since the prime function of the Committee is to advise the General Assembly on the scale of the apportionment of expenses, the Committee is well fitted to advise on a claim that a Member is not able to pay its assessments "due to conditions beyond the control of the Member." Because the Committee on Contributions is not characteristically in session on the day of the opening of the General Assembly, it falls to the Secretary-General to report the latest facts of arrearage to the presiding officer of the General Assembly when it first meets.

22. The respective functions of the Secretary-General and the Committee on Contributions in respect of Article 19 are admirably set forth in the Dossier Transmitted by the Secretary-General to the International Court of Justice in the course of its advisory proceedings on *Certain Expenses of the United Nations*. Under the heading, "Application of Article 19 of the Charter (Arrears on contributions)", the Note by the Controller declared:

"58. The General Assembly, in establishing the Committee on Contributions, an expert committee, prescribed that the Committee's functions should include advising it 'on the action to be taken with regard to the application of Article 19 of the Charter' . . .

"59. In compliance with this directive, the Committee on Contributions has considered at each of its sessions a report by the Secretary-General on the collection of contributions which included a detailed statement of the amounts due from each Member State in respect of its financial contributions to the Organization.

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"64. On the basis of the status of the contributions at the time of its meetings, usually August of each year, the Committee on Contributions has reported annually to the General Assembly that no action was required by the General Assembly in respect of the application of Article 19, except in 1958, when the Committee on Contributions, referring to the arrears of one Member State, invited attention to the

terms of Article 19 of the Charter. Before the opening of the General Assembly session, arrangements had, however, been made by the Member State concerned for payment of the outstanding arrears. In 1960, when the session of the Committee on Contributions opened on 17 October, the Secretary-General's report (A/C.5/825) on the Collection of Contributions as at 20 September 1960, submitted in compliance with Financial Regulation 5.7 to the fifteenth session of the General Assembly contained the following paragraph:

'As of this date, one Member State is in arrears in the payment of its contributions to the extent that Article 19 of the Charter might be deemed to apply, no payments having been received in respect of the years 1958, 1959, or 1960. Assurances have been given, however, on behalf of the Government of the Member State in question that a payment is in transit which will reduce its outstanding arrears below the stipulated limit.'

"As the payment referred to in this paragraph was received, no further action was called for." (*Pleadings*, pp. 53-55.)

23. Those who contend that the General Assembly must itself find the fact of arrearage within the terms of Article 19 cannot contest the established character of the contrary practice described. They cannot deny that the General Assembly, in its adoption of the pertinent Rules of Procedure and Financial Regulations, has authoritatively interpreted the procedure for the application of Article 19 which implementation of that Article entails. Moreover, the extensive analogous practice of the Specialized Agencies in applying constitutional provisions virtually identical to Article 19 is uniform in demonstrating that establishment of the fact of arrears always is a ministerial act of mathematical calculation, performed by the Director General of the Agency concerned; it never is a matter of determination by the Assembly of the Agency (see the appendix to this memorandum).

24. Persuasive as established, unchallenged practice is, it could nevertheless be urged that there could be a difference of view between a Member and the Secretary-General on the amounts which the Member has in fact paid the Organization; a question which, arguably, would be for the General Assembly to settle. There could be other differences on which the General Assembly might arguably be required to pass, such as whether the Member is due a credit for claims or services which should be set off against unpaid contributions; or whether the allocation of credits and debts between Members formerly part of a single Member State is correct. Since such conceivable differences of view between the Secretary-General and a Member are of no practical moment to the application of Article 19 in 1964, they may be put aside. However, it actually is argued that there are differences of view between certain Members and the Organization as to whether certain financial contributions as to which the Secretary-General lists such Members as being in arrears are indeed so; that is to say, whether such Members are bound, as a matter of legal obligation, to pay certain financial contributions to the Organization. This is a question which, by reason of Article 17 of the Charter, is determined by the General As-

sembly. Insofar as it is pertinent to the implementation of Article 19 in 1964, it is a question which has already and amply been determined by resolutions of the General Assembly.

25. It has, in particular, been contended that Article 19 does not apply to arrears on assessments for peacekeeping operations, notably those for UNEF and ONUC. That contention plainly is in error. Nothing in the Charter, or its drafting history, indicates that Article 19 does not embrace peacekeeping expenses.* Article 19 refers to Members' "financial contributions to the Organization", which certainly appear to include contributions for peacekeeping expenditures. As Secretary-General Dag Hammarskjöld stated to the Fifth Committee: "... all expenses of the Organization within the meaning of Article 17, paragraph 2, were subject without exception to the sanctions provided for in Article 19."**

26. As the Secretary-General thus indicated, the "financial contributions" specified in Article 19 equate with the "expenses" referred to in Article 17, paragraph 2. That paragraph provides that: "The expenses of the Organization shall be borne by the Members as apportioned by the General Assembly." In its advisory opinion of July 20, 1962, the International Court of Justice reached the conclusion that the expenditures authorized by the General Assembly for peacekeeping operations in the Congo and the Middle East "constitute 'expenses of the Organization' within the meaning of Article 17, paragraph 2, of the Charter of the United Nations."***

On December 19, 1962, the General Assembly, by a vote of 76-17-8, adopted resolution 1854 (XVII) by which it "accepts the opinion of the Court on the question submitted to it." It was understood that the Assembly, by accepting the Court's opinion, thereby confirmed that peacekeeping assessments for ONUC and UNEF are "expenses of the Organization" and, hence, included in the "financial contributions to the Organization" to which Article 19 refers. This is emphasized by the Assembly's rejection of an amendment to resolution 1854, submitted by Jordan, to

* Mexico urged the contrary, in a construction of the records of the San Francisco Conference which the Secretary-General described as "a misinterpretation of the discussions at San Francisco." (General Assembly, Fifteenth Session, Official Records, 839th Meeting of the Fifth Committee, p. 59. See, for the verbatim text of the statement of the representative of Mexico, A/C.5/862, pp. 30-34.) The Mexican argument was submitted in its verbatim text to the International Court of Justice in the Dossier Transmitted by the Secretary-General in the advisory proceedings on Certain Expenses of the United Nations (Pleadings, p. 90). It was restated and endorsed in the Written Statements submitted to the Court by the Republic of South Africa (Pleadings, p. 260) and the Union of Soviet Socialist Republics (Pleadings, p. 273). The Mexican argument was rebutted by the Written Statements of Australia (Pleadings, pp. 233-238) and the United States of America (Pleadings, pp. 207-209) and the Oral Statement of Sir Kenneth Bailey (Australia) (Pleadings, pp. 372-377). It was not accepted in any degree by the Court (Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962, I.C.J. Reports 1962, p. 151).

** (839th Meeting of the Fifth Committee, *loc. cit.*)

*** (I.C.J. Reports 1962, pp. 151, 179-180.)

substitute "takes note of" for "accepts." The delegate of Jordan, in so moving, explained that the Jordanian amendment was designed to avoid inclusion of ONUC and UNEF assessments in the computation of liability under Article 19.* 68 Members voted against the Jordanian amendment, 28 for, and 14 abstained. Thus, any question about whether peacekeeping assessments, including those for ONUC and UNEF, are within the scope of Article 19 was answered affirmatively, overwhelmingly and definitively by the Seventeenth Session of the General Assembly.

27. It has been shown that the fact of arrears within the terms of Article 19 is computed and reported by the Secretary-General (or reported by the Committee on Contributions acting on the basis of accounts kept by the Secretary-General). It has been shown that, in making this computation, the Secretary-General acts in response to the impartial, standing requirements of the Rules of Procedure and the Financial Regulations, which have been adopted without regard to the particular case and in advance of its occurrence. It has been shown that, in the computation of such arrears, the assessments that are the prime focus of controversy, those for UNEF and ONUC, necessarily are included. It has been shown that the Secretary-General is obliged, by the terms of the Regulations, to communicate his findings to the General Assembly. It has been shown that—putting aside the possibility of exculpation pursuant to the second sentence of Article 19—once the fact of a Member's being in the requisite arrears obtains, the Member "shall have no vote in the General Assembly." In the light of these showings, it may be asked: Once the General Assembly is informed of the fact of the requisite arrearage, what fact, if any, is it required to establish? What decision is it required, or permitted, to take? Apart from a decision to exculpate the Member pursuant to the conditions of the second sentence of Article 19, it is plain that the Assembly is neither obliged nor permitted to take a decision establishing the fact of the requisite arrearage, any more than it is obliged or permitted to take a decision suspending such a Member's vote. Thus the question of whether such a decision is to be taken by a simple majority or a majority of two-thirds does not arise. Consideration of whether such a decision is a "budgetary question," or a "suspension of the rights and privileges of membership" or is otherwise an "important question" is immaterial; there is no such decision at all.

28. To be sure, the General Assembly is required to be informed of the fact of arrearage which gives rise to the suspension of a Member's vote, not only by the terms of the Financial Regulations but by the clear import of the second sentence of Article 19. Thus the President of the Fourth Special Session rightly stated that, had the Member in the

* (General Assembly, Seventeenth Session, Official Records, 964th meeting of the Fifth Committee, par. 4; see also, verbatim text, Press Release PM/4197 of December 6, 1962, at p. 3.)

requisite arrears been present and had there been a vote, he would have made an announcement drawing the attention of the General Assembly to the loss of voting rights. Is such an announcement subject to a point of order?

29. Rule 73 of the Rules of Procedure provides that, during "the discussion of any matter," a representative may rise to a point of order, which shall be immediately decided by the President. A representative may appeal against the President's ruling. Rule 73 further provides: "The appeal shall be immediately put to the vote and the President's ruling shall stand unless overruled by a majority of the Members present and voting. A representative rising to a point of order may not speak on the substance of the matter under discussion."

30. Thus should one or more Members be in the requisite arrears when the General Assembly meets in 1964, and the presiding officer accordingly states to the General Assembly that certain named Members, being so, "have no vote in the General Assembly" unless it should permit such Members to vote because it is satisfied that failure to pay is due to conditions beyond their control, that announcement could give rise to a point of order. That point of order "shall be immediately decided by the President in accordance with the rules of procedure"—rules which, in turn, give effect to the provisions of the Charter. Should a representative appeal against the President's ruling, the appeal shall be immediately put to the vote and the President's ruling shall stand unless overruled by a simple majority of the Members present and voting. Actually, such a challenge would be irregular. The Charter does not contemplate that its provisions shall be subject to points of order. But, nevertheless, should a point of order be raised and pressed, it must be disposed of in accordance with the Charter's terms and the Rules of Procedure. A procedural mechanism exists through which the President's announcement that a Member in the requisite arrears has no vote may be challenged; but the only vote which would be substantively in accord with the law of the Charter would be that in support of the President's ruling. It may be noted, in this regard, that, in the many cases in which announcement or other communication has been made in the Specialized Agencies that certain Members have no vote because of financial default, such announcement has never been challenged.

31. Where, pursuant to the second sentence of Article 19, there is a motion to permit a Member to vote, the advice of the Committee on Contributions should be sought, in accordance with Rule 161. Thus, in the event of such a motion, the Committee should be urgently convened. Pending its report, the vote of any Member in arrears under Article 19 shall, consonant with Article 19's mandatory terms and the analogous procedures of the Specialized Agencies, remain suspended. However, should the Committee on Contributions, in its Report to the General Assembly,

already have advised it on the Member's claim for exculpation, the General Assembly will be in a position to act immediately on a motion to permit that Member to vote.

32. It should be noted that the criterion for exculpation under the second sentence of Article 19 is objective. The General Assembly, to permit a Member to vote under Article 19, must be satisfied that failure to pay is "due to conditions beyond the control of the Member." Moreover, the exculpation provision of Article 19 can have no application where the Member in arrears asserts not that failure to pay is due to conditions beyond its control, but that it deliberately has not paid certain assessments upon it. Whatever the reason for willful failure to pay its financial contributions, the second sentence of Article 19 has no application to it.

33. Certain contentions have been advanced by Members of the United Nations which are not consistent with the views set forth in this paper. The Union of Soviet Socialist Republics addressed a letter to the Secretary-General dated June 10, 1963 (document A/5431), primarily concerning the Haitian precedent. The Czechoslovak Socialist Republic addressed a note verbale of similar substance to the Secretary-General on June 17, 1963 (document A/5433). Their views may be summarized as follows:

(a) The application of the first sentence of Article 19 is not mandatory and automatic but requires a decision by the General Assembly.

(b) That decision is to be taken by a two-thirds majority of the Members present and voting, since Article 18, paragraph 2 specifies such a majority for "the suspension of the rights and privileges of membership."

(c) Arrears on the payment of assessments for ONUC and UNEF, if not indeed peacekeeping expenses generally, may not be included in the computation of liability under Article 19.

34. Points (a) and (c) have already been discussed fully above. As to point (b), it is true that, pursuant to Article 18, paragraph 2, a decision on "the suspension of the rights and privileges of membership" requires a two thirds vote. However, since the application of the first sentence of Article 19 is mandatory and automatic, it requires no "decision." Thus the question of whether such a decision is to be taken by a simple majority or a majority of two-thirds does not arise. Equally, as noted, there is no decision of the General Assembly on the fact of arrears. Moreover, the reference of Article 18, paragraph 2, to "the suspension of the rights and privileges of membership" is not to Article 19, which speaks neither of suspension nor of the rights and privileges of membership, but to Article 5, which provides that a Member "may be suspended from the exercise of the rights and privileges of membership" by the General Assembly upon the recommendation of the Security Council. This is confirmed by the following phrase of Article 18, paragraph 2, which provides for a two-thirds vote on "the expulsion of Members," a provision which, in turn, is

linked to the provision of Article 6 for expulsion of Members by the General Assembly upon the recommendation of the Security Council.*

35. The analysis contained in this memorandum is confirmed by the leading monograph in the field, that of the distinguished Indian scholar and public servant, Dr. Nagendra Singh, President of the Third Assembly of IMCO and a member of the Institut de Droit International. In his work on *Termination of Membership of International Organizations* (1958), Dr. Singh concludes:

"It is essential to examine the constituent instrument to see if suspension is mandatory or permissive. Thus on a correct interpretation of Article 13(4) of ILO, the suspension of the voting rights of a defaulting member-State is mandatory as the stipulation is 'a member *shall* have no right to vote . . .' The United Nations Charter also visualizes mandatory suspension of voting rights in the event of financial default of a certain magnitude, specified in Article 19. However, Article 5 provides a permissive type of suspension when preventive or enforcement action has been taken against a member by the Security Council, because the words used are 'may be suspended,' as against Article 19 which runs 'shall have no vote in the General Assembly.' However, both in ILO, Article 13(4), and United Nations Charter, Article 19, though mandatory suspension is prescribed in the event of financial default of a certain magnitude, power is given to the Conference and the General Assembly respectively by a two-thirds majority to permit a defaulting member to exercise its rights of vote, provided the Conference of ILO or the General Assembly of the United Nations are satisfied that the failure to pay is due to conditions beyond the control of the member. This has the effect of introducing an element of discretion into an otherwise mandatory provision regarding suspension.

"However, a number of constituent instruments provide a permissive type of suspension. For example, WHO Article 7 provides '... the Health Assembly *may* suspend . . . the voting privileges . . .' In these constituent instruments, a mere permissive type of suspension exists at the discretion of the appropriate organ authorized to exercise this right." **

* Professor Kelsen states that the provision in Article 18, paragraph 2, on "the suspension of the rights and privileges of membership" does not refer to Article 19: "... the formula probably refers only to the suspension of the rights and privileges of membership provided for in Article 5." (The Law of the United Nations, 1950, p. 719.)

** At p. 45. Professor Kelsen's earlier treatise on The Law of the United Nations interprets Article 19 in a manner differing from the foregoing analysis. His position is that the General Assembly, "by a decision not expressly provided for in Article 19, establishes the fact that a Member is in arrears in the payment of its financial contributions to the Organization and declares the exercise of the right of this Member to vote in the General Assembly suspended . . ." (at page 719). This meaning of Article 19, Professor Kelsen states, is "formulated in a technically insufficient way" by the Charter (*ibid.*).

It is submitted that, on the contrary, Article 19 means just what it says. Its first sentence provides for no decision by the General Assembly, and none is to be read

Appendix on the Precedent of the Specialized Agencies

36. The extensive history of application by the Specialized Agencies of provisions substantially identical to Article 19 is especially illuminating. It demonstrates, first, that implementation of a provision of the order of Article 19 entails no decision by the Assembly of the Agency, its effect being mandatory and automatic; and, second, that the finding of the fact of existence of the requisite arrears is made, as a matter of ministerial, mathematical calculation, by the Secretariat of the Agency.

37. The Constitutions of four of the Specialized Agencies—the ILO, FAO, UNESCO and IMCO—as well as the IAEA contain provisions parallel to Article 19. Article 13, paragraph 4 of the Constitution of the International Labor Organization provides:

“A Member of the Organisation which is in arrears in the payment of its financial contribution to the Organisation shall have no vote in the Conference, in the Governing Body, in any committee, or in the elections of members of the Governing Body, if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years: Provided that the Conference may by a two-thirds majority of the votes cast by the delegates present permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.”

Article IV, paragraph C.8 (b) and (c) of the Constitution of the United Nations Educational, Scientific and Cultural Organization provides:

“(b) A Member State shall have no vote in the General Conference if the total amount of contributions due from it exceeds the total amount of contributions payable by it for the current year and the immediately preceding calendar year.

“(c) The General Conference may, nevertheless, permit such a Member State to vote, if it is satisfied that the failure to pay is due to conditions beyond the control of the Member Nation.”

Article III, paragraph 4 of the Constitution of the Food and Agriculture Organization provides:

“Each Member Nation shall have one vote. A Member Nation which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the Conference if the amount of its arrears equals or exceeds the amount of the contributions due from it for the two preceding financial years. The Conference may, nevertheless, permit such a Member Nation to vote, if it is satisfied that

into it. The mandatory and automatic character of the first sentence of Article 19 has been amply demonstrated above. It has equally been shown that, in accordance with the Financial Regulations and the General Assembly's Rules of Procedure, as well as the analogous practice of the Specialized Agencies, it is the Secretary-General, or the Committee on Contributions acting on data supplied by the Secretary-General, who, on the basis of the Organization's accounts, finds as a fact that a Member is in the requisite arrears.

the failure to pay is due to conditions beyond the control of the Member Nation."

Article XIX, paragraph A, of the Statute of the International Atomic Energy Agency provides:

"A member of the Agency which is in arrears in the payment of its financial contributions to the Agency shall have no vote in the Agency if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two years. The General Conference may, nevertheless, permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member."

Article 42 of the Convention of the Inter-Governmental Maritime Consultative Organization provides:

"Any Member which fails to discharge its financial obligation to the Organization within one year from the date on which it is due, shall have no vote in the Assembly, the Council, or the Maritime Safety Committee unless the Assembly, at its discretion, waives this provision."

38. Where the decision to suspend the vote of a Member excessively in arrears is, contrary to the provisions which obtain in these four Specialized Agencies and the IAEA, left to the Assembly of a Specialized Agency, the constitutions of such agencies (WHO, WMO and ICAO) expressly so provide. Thus Article 7 of the Constitution of the World Health Organization gives the Health Assembly discretion to suspend the vote of a Member in arrears; it does not provide that a defaulting Member "shall have no vote" but that the Health Assembly "may, on such conditions as it thinks proper, suspend the voting privileges. . . ." Article 31 of the Convention of the World Meteorological Organization provides not that a Member which fails to meet its financial obligations "shall have no vote" but that "the Congress may by resolution suspend it from exercising its rights and enjoying its privileges. . . ." Article 62 of the Convention on International Civil Aviation provides not that a Member in the requisite arrears "shall have no vote" but that: "The Assembly may suspend the voting power in the Assembly and in the Council of any contracting State that fails to discharge within a reasonable period its financial obligations to the Organization."** The language of these constitutional provisions, providing for the discretion of the plenary organs of the Agencies concerned to take or not to take a decision suspending voting privileges, lends emphasis to the contrasting language of Article 19 of the Charter. It demonstrates that, had it been the intention of the Charter's authors to accord the General Assembly such discretionary power, Article 19 would have

* Nevertheless, by resolution 6 (Cg-III), the Congress adopted an automatic standard, which has been automatically applied.

** The Assembly had adopted resolutions for limited terms containing an automatic standard: cf. resolutions A I-56 and A 6-2.

been drafted otherwise. As it is, the mandatory and automatic intent of Article 19 emerges the more clearly.

39. The application by the ILO of Article 13, paragraph 4, has been in accordance with detailed, dispositive Standing Orders of the International Labor Conference. The text of those Orders is of extreme interest, and is quoted in full below.*

*

"Section D

"Disqualification from Voting of Members Which Are in Arrears in the Payment of Their Contributions to the Organization

Article 29

Notification to Member in Arrears

"1. If the Director-General finds that the amount of the arrears due from a Member of the Organization which is in arrears in the payment of its contribution to the Organization will, in the event of no payment being received from the Member during the succeeding three months, increase so as to equal or exceed the amount of the contribution due from that Member for the two full years preceding the expiration of the said period of three months, he shall send to the Member in question a communication calling its attention to the terms of article 13, paragraph 4, of the Constitution.

"2. When the amount of the arrears due to the International Labour Organization from a Member which is in arrears in the payment of its contribution to the Organization equals or exceeds the contribution due from that Member for the preceding two full years, the Director-General shall notify the Member in question of this fact and call its attention to the terms of article 13, paragraph 4, of the Constitution.

"3. Contributions are due on 1 January of the year to which they relate, but the year in respect of which they are due shall be regarded as a period of grace and a contribution shall be regarded as being in arrears for the purpose of this article only if it has not been paid by 31 December of the year in respect of which it is due.

Article 30

Notification to Conference and Governing Body that Member is in Arrears

"The notification provided for in paragraph 2 of article 29 shall be brought by the Director-General to the attention of the next sessions of the International Labour Conference, the Governing Body, and any other committee of the International Labour Organization in which the question of the right to vote of the Member concerned may arise, and to the attention of the electoral colleges provided for in articles 49 and 50 of the Standing Orders of the Conference.

Article 31

Procedure Where Proposal is Made to Permit Member in Arrears to Vote

"1. Any request or proposal that the Conference should nevertheless permit a Member which is in arrears in the payment of its contributions to vote in accordance with article 13, paragraph 4, of the Constitution shall be referred in the first instance to the Finance Committee of the Conference, which shall report thereon as a matter of urgency.

"2. Pending a decision on the request or proposal by the Conference, the Member shall not be entitled to vote.

"3. The Finance Committee shall submit to the Conference a report giving its opinion on the request or proposal.

Pursuant to them, it is the Director-General who finds as a fact that a Member is in arrears within the terms of Article 13, paragraph 4. He brings this fact to the attention of the Financial and Administrative Committee of the Governing Body by a written report. For example, G.B. 157/F.A./D.1/5, of November, 1963, states that the "arrears due" from two Members "exceed the amount of the contributions due from them for the past two full years (1961 and 1962). Both of the above-mentioned States are, therefore, subject to the provisions of paragraph 4 of Article 13 of the Constitution . . ." (at pp. 1-2). G.B. 155/F.A./D.2/5, of May-June 1963, has an identical statement by the Director-General in respect of eight Members in the requisite arrears. A similar statement of arrears in contributions is inserted in the Provisional Record of the Conference (for example, Provisional Record No. 4 of the 47th Session of the Conference, at p. XX).

"4. If the Finance Committee, having found that the failure to pay is due to conditions beyond the control of the Member, thinks fit to propose to the Conference that the Member should nevertheless be permitted to vote in accordance with article 13, paragraph 4, of the Constitution, it shall in its report—

- (a) explain the nature of the conditions beyond the Member's control;
- (b) give an analysis of the financial relations between the Member and the Organization during the preceding ten years; and
- (c) indicate the measures which should be taken in order to settle the arrears.

"5. Any decision which may be taken by the Conference to permit a Member which is in arrears in the payment of its contribution to vote notwithstanding such arrears may be made conditional upon the Member complying with any recommendations for settling the arrears which may be made by the Conference.

Article 32

Period of Validity of a Decision to Permit Member in Arrears to Vote

"Any decision by the Conference permitting a Member which is in arrears in the payment of its contributions to vote shall be valid for the session of the Conference at which the decision is taken. Any such decision shall be operative in regard to the Governing Body and committees until the opening of the general session of the Conference next following that at which it was taken.

Article 33

Cessation of Disqualification from Voting

"When, as a result of the receipt by the Director-General of the International Labour Office of payments made by a Member, article 13, paragraph 4, of the Constitution ceases to be applicable to that Member—

- (a) the Director-General shall notify the Member that its right to vote is no longer suspended;
- (b) if the International Labour Conference, the Governing Body, the electoral colleges provided for in articles 49 and 50 of the Standing Orders of the Conference, or any committee concerned, has received the notification provided for in article 30 of the present section, the Director-General shall inform it that the right to vote of the Member is no longer suspended."

40. The Director-General's finding of the fact of the requisite arrearage, and the consequent automatic suspension of the vote of the Member in question, has repeatedly taken place. No verbal announcement is made to the ILO body in question of the loss of vote of the Member. But such a Member does not participate in the vote; its name is not called on a record vote; its delegates are left out of the calculation of the quorum. In only one of many cases of automatic loss of vote does a question seem to have been raised. In a record vote on the re-admission of Japan to the ILO, the following exchange took place in the Conference:

"Interpretation: MR. MATEEV (Government delegate, Bulgaria)
—The Bulgarian delegation has not been asked to vote.

*"Interpretation: The PRESIDENT—*Under Article 13, paragraph 4, of the Constitution, 'a Member of the Organisation which is in arrears in the payment of its financial contribution to the Organisation shall have no vote in the Conference, in the Governing Body, in any committee, or in the elections of members of the Governing Body, if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years . . .'

"It is at the Bulgarian delegate's request that I have recalled this provision. I hope that my successor will not have the painful duty of repeating this reminder, and I hope that by then Bulgaria will have paid the contributions, which should be easy, since we have learnt that Bulgaria is at present enjoying very great prosperity."

That settled the matter.*

41. The application of the loss-of-vote provision of Article IV.C.8 of the UNESCO Constitution is of special interest, since that provision was drafted in pursuance of an instruction of the General Conference to the Director-General to recommend "any measures necessary to ensure payment of contributions from Member States, bearing in mind the provisions of Article 19 of the Charter of the United Nations. . . ."** The General Conference further resolved that:

"On 1 January of each year the Director-General shall notify any Member State which by virtue of non-payment of contributions would not be entitled to vote in the next Session of the General Conference that the State in question has failed in its financial responsibilities to Unesco; that this fact will be reported to the next session of the General Conference where the State in question will not be entitled to vote unless payment has been made prior to the date of such Conference, or the Conference decides otherwise under Article IV/C/8(c) of the Constitution." (Fifth Session, resolution 18.31.)

The Director-General computes the existence of arrears within the terms of Article IV.C.8, and expressly communicates that fact to the General Conference in his Report on the Collection of Contributions. For example, at the 11th Session, the Director-General's report listed five Mem-

* International Labor Conference, Record of Proceedings of the 34th Session, 1951, p. 220.

** Records of the General Conference, Second Session, p. 40.

bers in arrears for 1958 and earlier, and stated:

"The attention of the above-mentioned Member States has been drawn to the provisions of Article IV.C.8 of the Constitution which governs the right to vote of Member States. The application of this Article at the eleventh session of the General Conference will affect any Member State which is in arrears for the year 1958 or earlier." (11 C/ADM/5, p. 2.)

The Director-General's report to the 12th Session made the same finding in the same terms in respect of four Member States. (12 C/ADM/9, pp. 1-2.)

42. In response to the Director-General's report, the President of the General Conference declares at the First Plenary Meeting that the Members in question "have not the right to vote at this session of the General Conference. . . ." An example of the President's statement merits quotation in full:

"The PRESIDENT (Translation from the French): It is now my duty to make a statement about arrears in payment of contributions and their effect on the right to vote of Member States at this session of the General Conference.

"Under Article IV, paragraph 8 (b) of the Constitution, the right of Member States to vote is contingent upon payment of their contributions. Paragraph 8 (b) reads as follows:

'A Member State shall have no vote in the General Conference if the total amount of contributions due from it exceeds the total amount of contributions payable by it for the current year and the immediately preceding calendar year.'

"At present, four Member States have not the right to vote at this session of the General Conference, since the total amount of contributions due from them exceeds the total amount of contributions payable by them for the current year and the immediately preceding calendar year. These four States are Bolivia, China, Honduras and Paraguay. Paragraph 8(c) of Article IV, however, states that the General Conference may nevertheless permit such a Member State to vote, if it is satisfied that the failure to pay is due to conditions beyond the control of the Member Nation.

"The delegations of the States concerned will therefore have to decide whether they should request the General Conference to apply this paragraph. Such requests, if not already submitted to the Director-General, should be addressed without delay to the President of the General Conference, who will transmit them to the Administrative Commission, to which such requests are normally referred."

(*Records of the General Conference*, Eleventh Session, p. 52.)

The President's announcement that Members "have not the right to vote" has not been challenged. Rather, the mandatory and automatic application of Article IV.C.8 has been treated by the Secretariat, the President of the General Conference, and all Member States, as plain and incontestable. The computation of the requisite arrearage by the Director-General has similarly not been questioned. While there have been a number of instances where Member States, being automatically deprived

of their votes, subsequently have been permitted by the General Conference to vote in response to a motion to exculpate them pursuant to the second sentence of Article IV.C.8, such Members, being without the right to vote, naturally have not voted on the motion to exculpate them.

43. In the International Atomic Energy Agency, the Director General determines the fact that a Member State is in arrears in its contributions within the meaning of Article XIX.A of the Statute. His computation is communicated to the General Conference by a "Note by the Director General," which is issued in pursuance to Financial Regulation 6.07:

"The Director General shall submit to each regular session of the General Conference through the Board of Governors a report on the collection of contributions and of advances to the Working Capital Fund." (INFCIRC/8/Add. 1.)

The similarity of this regulation to that of Financial Regulation 5.7 of the United Nations will be noted. The Director General's note is issued on the day of the opening of the regular session of the General Conference and shows the status of financial contributions as of the day before. One example of the relevant passage of his note follows:

"From the above tables, and that in Annex B, it will be noted that three Members, namely Cuba, Honduras and Paraguay have not paid their advances to the Working Capital Fund, nor any part of their contributions for 1958 and 1959. Article XIX.A of the Agency's Statute provides that:

'A member of the Agency which is in arrears in the payment of its financial contributions to the Agency shall have no vote in the Agency if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two years. The General Conference may, nevertheless, permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member.'

On 5 July 1960 the Director General telegraphed the three Governments concerned about their arrears inviting their attention to the provisions of Article XIX.A of the Statute, but no payments have so far been received, although the Government of Honduras has telegraphed the Director General indicating that it will make the necessary payments in time to preserve its voting rights in the General Conference during the fourth regular session." (GC (IV) 126, Annex A, pp. 1-2)

Another example lists: "States to which Article XIX.A of the Statute applied on 23 September 1963 (noon)" (GC (VII)/243, Annex B, p. 3).

44. No further communication is made to the General Conference, either by the Director General or by the President. The delegation concerned is informed by the Secretariat orally that it has no vote. The voting officers of the Secretariat are instructed not to call the Member's name in any roll-call vote, and, to prevent error, the roll-call lists are overprinted to block out the names of the Member States affected. Voting officers are further instructed not to distribute ballot papers to such Members nor to

count their votes should they attempt to vote on a show of hands. There has never been a challenge to this procedure of automatic and mandatory application of Article XIX.A, though it has been applied at four General Conferences from 1960 through 1963, to nine Member States, only one of which subsequently has been exculpated pursuant to the second sentence of Article XIX.A. The Member State exculpated was not permitted to vote on the motion to exculpate.

45. The FAO has a similar history of the mandatory and automatic application of its loss-of-vote provision, upon the computation by the Director-General of the existence of the requisite arrears. The Director-General reports to the Finance Committee on the status of arrears; the Committee reports to the Council, which in turn reports to the Conference. At a meeting of the General Committee of the Conference, the Secretary-General of the Conference announces which Members have no vote. In the absence of any recommendation by the General Committee for the application of the exculpatory clause of Article III, paragraph 4, such Members are treated as not having the right to vote. No formal announcement is made to the Conference, but the delegations of the Members in question are privately informed. No account is taken of their vote in a show of hands; the names of Members whose voting rights are suspended are not called in a roll-call vote. When there is a secret ballot, the names of Members whose voting rights are suspended are not called and they are not given a ballot paper.

46. In 1959, the delegation of Bolivia protested its not having been called upon to vote. It set forth the conditions beyond its control which, in its view, led to its failure to pay its assessments. (C.59/PV/9.) The Chairman then made reference to the provisions of Article III, paragraph 4, and the matter was referred to the General Committee. The Chairman subsequently announced that the General Committee had considered the circumstances of Bolivian default and had arrived at the conclusion "that the circumstances so set out justify the position in which the Bolivian Government finds itself . . . it has, therefore, decided to recommend to the Conference that the rights of Bolivia to participate fully in this conference, with the concomitant right to vote, should be restored." (C.59/PV/11.) This recommendation was accepted in 1959, and again in 1961. (C.61/PV/9.) The Eleventh Session of the Conference in 1961 also treated the voting rights of Paraguay as automatically suspended, but took no action to restore them. Again, at its Twelfth Conference in 1963, Bolivia and Paraguay were in the requisite arrears. Paraguay's vote was treated as automatically suspended, there being no vote of the Conference withdrawing it, and, while Paraguay was represented at the Conference, it on no occasion sought to vote. Waiver of Bolivia's suspension was sought on Bolivia's behalf by application of the exculpatory clause of Article III, paragraph 4. Exculpation was not granted and, since Bolivia's vote was treated as automatically suspended, it did not vote at the Conference.

47. Pursuant to Financial Regulation 5.10 of the Inter-Governmental Maritime Consultative Organization, the Secretary-General is required to report to each session of the Assembly, the Council and Maritime Safety Committee on the application of Article 42 of the Convention. For example, the Secretary-General stated, in his "Report on the Application of Article 42 of the Convention" to the 3rd Session of the IMCO Assembly, ". . . that at the time of preparing this document Article 42 of the Convention is applicable to the following Members" (listing seven). (A/III/4) The disposition of the Secretary-General's report at that session is described in the summary record as follows:

"After informing the Assembly that Argentina had now paid up in full, the PRESIDENT inquired whether there were any objections to the application of Article 42 of the Convention in respect of the six countries which had not discharged their financial obligations for the previous year. There being no objections, it was *decided* that Article 42 should be applied to the following Members: Dominican Republic, Ecuador, Haiti, Honduras, Indonesia and Panama." (A.III/SR.1, pp. 8-9.)

It will be recalled that the waiver provision of Article 42 of the IMCO Convention is more liberal than the exculpatory clause of Article 19 of the Charter (*supra*, paragraph 37). The announcement by the President that a Member shall have no vote unless the Assembly decides "at its discretion" to waive the provision has never been challenged by any Member. Nor has question ever been raised about the Secretary-General's making the computation of the requisite arrearage which leads to the automatic loss of vote under Article 42.

JUDICIAL DECISIONS

BY JOHN R. STEVENSON *

Of the Board of Editors

Act of state doctrine—United States courts precluded from inquiring into validity of expropriations of property within its own territory by a foreign sovereign government recognized by the United States in absence of a treaty or other agreement regarding controlling legal principles, even if complaint alleges that taking violates customary international law

BANCO NACIONAL DE CUBA *v.* SABBATINO. 376 U. S. 398.
United States Supreme Court, March 23, 1964.**

MR. JUSTICE HARLAN delivered the opinion of the Court.

The question which brought this case here, and is now found to be the dispositive issue, is whether the so-called act of state doctrine serves to sustain petitioner's claims in this litigation. Such claims are ultimately founded on a decree of the Government of Cuba expropriating certain property, the right to the proceeds of which is here in controversy. The act of state doctrine in its traditional formulation precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory.

I.

In February and July of 1960, respondent Farr, Whitlock & Co., an American commodity broker, contracted to purchase Cuban sugar, free alongside the steamer, from a wholly owned subsidiary of Compania Azucarera Vertientes-Camaguey de Cuba (C. A. V.), a corporation organized under Cuban law whose capital stock was owned principally by United States residents. Farr, Whitlock agreed to pay for the sugar in New York upon presentation of the shipping documents and a sight draft.

On July 6, 1960, the Congress of the United States amended the Sugar Act of 1948 to permit a presidentially directed reduction of the sugar quota for Cuba. On the succeeding day President Eisenhower exercised the granted power. The day of the congressional enactment, the Cuban Council of Ministers adopted "Law No. 851," *** which characterized this reduc-

* Assisted by Peter S. Paine, Jr. of the New York and English Bars, William J. Williams, Jr., of the New York Bar, and Robert A. R. MacLennan of the English Bar.

** Opinion of the Court and the dissenting opinion of Justice White in full, except that some citations and footnotes have been omitted and the remaining footnotes have been renumbered. The decision of the United States Court of Appeals for the Second Circuit, herein reversed, is reported at 307 F.2d 845 and 56 A.J.I.L. 1085 (1962). The decision of the District Court is reported at 193 F. Supp. 375 and is digested at 55 A.J.I.L. 741 (1961).

*** Reprinted in 55 A.J.I.L. 822 (1961).

tion in the Cuban sugar quota as an act of "aggression, for political purposes" on the part of the United States, justifying the taking of counter measures by Cuba. The law gave the Cuban President and Prime Minister discretionary power to nationalize by forced expropriation property or enterprises in which American nationals had an interest. Although a system of compensation was formally provided, the possibility of payment under it may well be deemed illusory. Our State Department has described the Cuban law as "manifestly in violation of those principles of international law which have long been accepted by the free countries of the West. It is in its essence discriminatory, arbitrary, and confiscatory."

Between August 6 and August 9, 1960, the sugar covered by the contract between Farr, Whitlock and C. A. V.¹ was loaded, destined for Morocco, onto the S. S. *Hornfels*, which was standing offshore at the Cuban port of Jucaro (Santa Maria). On the day loading commenced, the Cuban President and Prime Minister, acting pursuant to Law No. 851, issued Executive Power Resolution No. 1. It provided for the compulsory expropriation of all property and enterprises, and of rights and interests arising therefrom, of certain listed companies, including C. A. V., wholly or principally owned by American nationals. The preamble reiterated the alleged injustice of the American reduction of the Cuban sugar quota and emphasized the importance of Cuba serving as an example for other countries to follow "in their struggle to free themselves from the brutal claws of Imperialism." In consequence of the resolution, the consent of the Cuban Government was necessary before a ship carrying sugar of a named company could leave Cuban waters. In order to obtain this consent, Farr, Whitlock, on August 11, entered into contracts, identical to those it had made with C. A. V., with the Banco Para el Comercio Exterior de Cuba, an instrumentality of the Cuban Government. The S. S. *Hornfels* sailed for Morocco on August 12.

Banco Exterior assigned the bills of lading to petitioner, also an instrumentality of the Cuban Government, which instructed its agent in New York, Societe Generale, to deliver the bills and a sight draft in the sum of \$175,250.69 to Farr, Whitlock in return for payment. Societe Generale's initial tender of the documents was refused by Farr, Whitlock, which on the same day was notified of C. A. V.'s claim that as rightful owner of the sugar it was entitled to the proceeds. In return for a promise not to turn the funds over to petitioner or its agent, C. A. V. agreed to indemnify Farr, Whitlock for any loss. Farr, Whitlock subsequently accepted the shipping documents, negotiated the bills of lading to its customer, and received payment for the sugar. It refused, however, to hand over the proceeds to Societe Generale. Shortly thereafter, Farr, Whitlock was served with an order of the New York Supreme Court, which had appointed Sabbatino as Temporary Receiver of C. A. V.'s New York assets, enjoining it from

¹ The parties have treated the interest of the wholly owned subsidiary as if it were identical with that of C. A. V.; hence no distinction between the two companies will be drawn in the remainder of this opinion.

taking any action in regard to the money claimed by C. A. V. that might result in its removal from the State. Following this, Farr, Whitlock, pursuant to court order, transferred the funds to Sabbatino, to abide the event of a judicial determination as to their ownership.

Petitioner then instituted this action in the Federal District Court for the Southern District of New York. Alleging conversion of the bills of lading, it sought to recover the proceeds thereof from Farr, Whitlock and to enjoin the receiver from exercising any dominion over such proceeds. Upon motions to dismiss and for summary judgment, the District Court, 193 F. Supp. 375, sustained federal *in personam* jurisdiction despite state control of the funds. It found that the sugar was located within Cuban territory at the time of expropriation and determined that under merchant law common to civilized countries Farr, Whitlock could not have asserted ownership of the sugar against C. A. V. before making payment. It concluded that C. A. V. had a property interest in the sugar subject to the territorial jurisdiction of Cuba. The court then dealt with the question of Cuba's title to the sugar, on which rested petitioner's claim of conversion. While acknowledging the continuing vitality of the act of state doctrine, the court believed it inapplicable when the questioned foreign act is in violation of international law. Proceeding on the basis that a taking invalid under international law does not convey good title, the District Court found the Cuban expropriation decree to violate such law in three separate respects: it was motivated by a retaliatory and not a public purpose; it discriminated against American nationals; and it failed to provide adequate compensation. Summary judgment against petitioner was accordingly granted.

The Court of Appeals, 307 F. 2d 845, affirming the decision on similar grounds, relied on two letters (not before the District Court) written by State Department officers which it took as evidence that the Executive Branch had no objection to a judicial testing of the Cuban decree's validity. The court was unwilling to declare that any one of the infirmities found by the District Court rendered the taking invalid under international law, but was satisfied that in combination they had that effect. We granted certiorari because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area. 372 U. S. 905. For reasons to follow we decide that the judgment below must be reversed.

Subsequent to the decision of the Court of Appeals, the C. A. V. receivership was terminated by the State Supreme Court; the funds in question were placed in escrow, pending the outcome of this suit. C. A. V. has moved in this Court to be substituted as a party in the place of Sabbatino. Although it is true that Sabbatino's defensive interest in this litigation has largely, if not entirely, reflected that of C. A. V., this is true also of Farr, Whitlock's position. There is no indication that Farr, Whitlock has not adequately represented C. A. V.'s interest or that it will not continue to do so. Moreover, insofar as disposition of the case here is con-

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cerned, C. A. V. has been permitted as *amicus* to brief and argue its position before this Court. In these circumstances we are not persuaded that the admission of C. A. V. as a party is necessary at this stage to safeguard any claim either that it has already presented or that it may present in the future course of this litigation. Accordingly, we are constrained to deny C. A. V.'s motion to be admitted as a party, without prejudice however to the renewal of such a motion in the lower courts if it appears that C. A. V.'s interests are not adequately represented by Farr, Whitlock and that the granting of such a motion will not disturb federal jurisdiction. . . .

Before considering the holding below with respect to the act of state doctrine, we must deal with narrower grounds urged for dismissal of the action or for a judgment on the merits in favor of respondents.

II.

It is first contended that this petitioner, an instrumentality of the Cuban Government, should be denied access to American courts because Cuba is an unfriendly power and does not permit nationals of this country to obtain relief in its courts. Even though the respondents did not raise this point in the lower courts we think it should be considered here. If the courts of this country should be closed to the government of a foreign state, the underlying reason is one of national policy transcending the interests of the parties to the action, and this Court should give effect to that policy *sua sponte* even at this stage of the litigation.

Under principles of comity governing this country's relations with other nations, sovereign states are allowed to sue in the courts of the United States . . . This Court has called "comity" in the legal sense "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Hilton v. Guyot*, 159 U. S. 113, 163-164. Although comity is often associated with the existence of friendly relations between states . . . prior to some recent lower court cases which have questioned the right of instrumentalities of the Cuban Government to sue in our courts, the privilege of suit has been denied only to governments at war with the United States . . .

Respondents, pointing to the severance of diplomatic relations, commercial embargo, and freezing of Cuban assets in this country, contend that relations between the United States and Cuba manifest such animosity that unfriendliness is clear, and that the courts should be closed to the Cuban Government. We do not agree. This Court would hardly be competent to undertake assessments of varying degrees of friendliness or its absence, and, lacking some definite touchstone for determination, we are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to United States courts. Although the severance of diplomatic relations is an overt act with objective significance in the dealings of sovereign states, we are unwilling to say that it should inevitably result in the withdrawal of the

privilege of bringing suit. Severance may take place for any number of political reasons, its duration is unpredictable, and whatever expression of animosity it may imply does not approach that implicit in a declaration of war.

It is perhaps true that nonrecognition of a government in certain circumstances may reflect no greater unfriendliness than the severance of diplomatic relations with a recognized government, but the refusal to recognize has a unique legal aspect. It signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control . . . Political recognition is exclusively a function of the Executive. The possible incongruity of judicial "recognition," by permitting suit, of a government not recognized by the Executive is completely absent when merely diplomatic relations are broken.²

The view that the existing situation between the United States and Cuba should not lead to a denial of status to sue is buttressed by the circumstance that none of the acts of our Government have been aimed at closing the courts of this country to Cuba, and more particularly by the fact that the Government has come to the support of Cuba's "act of state" claim in this very litigation.

Respondents further urge that reciprocity of treatment is an essential ingredient of comity generally, and, therefore, of the privilege of foreign states to bring suit here. Although *Hilton v. Guyot*, 159 U. S. 113, contains some broad language about the relationship of reciprocity to comity, the case in fact imposed a requirement of reciprocity only in regard to conclusiveness of judgments, and even then only in limited circumstances. *Id.*, at 170-171. In *Direction der Disconto-Gesellschaft v. United States Steel Corp.*, 300 F. 741, 747 (D.C.S.D.N.Y.), Judge Learned Hand pointed out that the doctrine of reciprocity has apparently been confined to foreign judgments.

There are good reasons for declining to extend the principle to the question of standing of sovereign states to sue. Whether a foreign sovereign will be permitted to sue involves a problem more sensitive politically than whether the judgments of its courts may be re-examined, and the possibility of embarrassment to the Executive Branch in handling foreign relations is substantially more acute. Re-examination of judgments, in principle, reduces rather than enhances the possibility of injustice being done in a particular case; refusal to allow suit makes it impossible for a court to see that a particular dispute is fairly resolved. The freezing of Cuban assets exemplifies the capacity of the political branches to assure, through a variety of techniques . . . that the national interest is protected

² The doctrine that nonrecognition precludes suit by the foreign government in every circumstance has been the subject of discussion and criticism. . . . In this litigation we need intimate no view on the possibility of access by an unrecognized government to United States courts, except to point out that even the most inhospitable attitude on the matter does not dictate denial of standing here.

against a country which is thought to be improperly denying the rights of United States citizens.

Furthermore, the question whether a country gives *res judicata* effect to United States judgments presents a relatively simple inquiry. The precise status of the United States Government and its nationals before foreign courts is much more difficult to determine. To make such an investigation significant, a court would have to discover not only what is provided by the formal structure of the foreign judicial system, but also what the practical possibilities of fair treatment are. The courts, whose powers to further the national interest in foreign affairs are necessarily circumscribed as compared with those of the political branches, can best serve the rule of law by not excluding otherwise proper suitors because of deficiencies in their legal systems.

We hold that this petitioner is not barred from access to the federal courts.⁸

III.

Respondents claimed in the lower courts that Cuba had expropriated merely contractual rights the situs of which was in New York, and that the propriety of the taking was, therefore, governed by New York law. The District Court rejected this contention on the basis of the right of ownership possessed by C. A. V. against Farr, Whitlock prior to payment for the sugar. That the sugar itself was expropriated rather than a contractual claim is further supported by Cuba's refusal to let the S. S. *Hornfels* sail until a new contract had been signed. Had the Cuban decree represented only an attempt to expropriate a contractual right of C. A. V., the forced delay of shipment and Farr, Whitlock's subsequent contract with petitioner's assignor would have been meaningless. Neither the District Court's finding concerning the location of the S. S. *Hornfels* nor its conclusion that Cuba had territorial jurisdiction to expropriate the sugar, acquiesced in by the Court of Appeals, is seriously challenged here. Respondents' limited view of the expropriation must be rejected.

Respondents further contend that if the expropriation was of the sugar itself, this suit then becomes one to enforce the public law of a foreign state and as such is not cognizable in the courts of this country. They rely on the principle enunciated in federal and state cases that a court need not give effect to the penal or revenue laws of foreign countries or sister states. . . .

The extent to which this doctrine may apply to other kinds of public laws, though perhaps still an open question, need not be decided in this case. For we have been referred to no authority which suggests that the doctrine reaches a public law which, as here, has been fully executed

⁸ Respondents suggest that suit may be brought, if at all, only by an authorized agent of the Cuban Government. Decisions establishing that privilege based on sovereign prerogatives may be evoked only by such agents . . . are not apposite to cases in which a state merely sues in our Courts without claiming any right uniquely appertaining to sovereigns.

within the foreign state. Cuba's restraint of the *S. S. Hornfels* must be regarded for these purposes to have constituted an effective taking of the sugar, vesting in Cuba C. A. V.'s property right in it. Farr, Whitlock's contract with the Cuban bank, however compelled to sign Farr, Whitlock may have felt, represented indeed a recognition of Cuba's dominion over the property.

In these circumstances the question whether the rights acquired by Cuba are enforceable in our courts depends not upon the doctrine here invoked but upon the act of state doctrine discussed in the succeeding sections of this opinion.⁴

IV.

The classic American statement of the act of state doctrine, which appears to have taken root in England as early as 1674, *Blad v. Bamfield*, 3 Swans. 604, 36 Eng. Rep. 992, and began to emerge in the jurisprudence of this country in the late eighteenth and early nineteenth centuries, see, e. g., *Ware v. Hylton*, 3 Dall. 199, 230; *Hudson v. Guestier*, 4 Cranch 293, 294; *The Schooner Exchange v. M'Faddon*, 7 Cranch 116, 135, 136; *L'Invincible*, 1 Wheat. 238, 253; *The Santissima Trinidad*, 7 Wheat. 283, 336, is found in *Underhill v. Hernandez*, 168 U. S. 250, where Chief Justice Fuller said for a unanimous Court (p. 252):

"Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."

Following this precept the Court in that case refused to inquire into acts of Hernandez, a revolutionary Venezuelan military commander whose government had been later recognized by the United States, which were made the basis of a damage action in this country by Underhill, an American citi-

⁴ The courts below properly declined to determine if issuance of the expropriation decree complied with the formal requisites of Cuban law. In dictum in *Hudson v. Guestier*, 4 Cranch 293, 294, Chief Justice Marshall declared that one nation must recognize the act of the sovereign power of another, so long as it has jurisdiction under international law, even if it is improper according to the internal law of the latter state. This principle has been followed in a number of cases. . . . An inquiry by United States courts into the validity of an act of an official of a foreign state under the law of that state would not only be exceedingly difficult but, if wrongly made, would be likely to be highly offensive to the state in question. Of course, such review can take place between States in our federal system, but in that instance there is similarity of legal structure and an impartial arbiter, this Court, applying the full faith and credit provision of the Federal Constitution.

Another ground supports the resolution of this problem in the courts below. Were any test to be applied it would have to be what effect the decree would have if challenged in Cuba. If no institution of legal authority would refuse to effectuate the decree, its "formal" status—here its argued invalidity if not properly published in the Official Gazette in Cuba—is irrelevant. It has not been seriously contended that the judicial institutions of Cuba would declare the decree invalid.

zen, who claimed that he had been unlawfully assaulted, coerced, and detained in Venezuela by Hernandez.

None of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from *Underhill*. See *American Banana Co. v. United Fruit Co.*, 213 U. S. 347; *Oetjen v. Central Leather Co.*, 246 U. S. 297; *Ricaud v. American Metal Co.*, 246 U. S. 304; *Shapleigh v. Mier*, 299 U. S. 468; *United States v. Belmont*, 301 U. S. 324; *United States v. Pink*, 315 U. S. 203. On the contrary in two of these cases, *Oetjen* and *Ricaud*, the doctrine as announced in *Underhill* was reaffirmed in unequivocal terms.

Oetjen involved a seizure of hides from a Mexican citizen as a military levy by General Villa, acting for the forces of General Carranza, whose government was recognized by this country subsequent to the trial but prior to decision by this Court. The hides were sold to a Texas corporation which shipped them to the United States and assigned them to defendant. As assignee of the original owner, plaintiff replevied the hides, claiming that they had been seized in violation of the Hague Conventions. In affirming a judgment for defendant, the Court suggested that the rules of the Conventions did not apply to civil war and that, even if they did, the relevant seizure was not in violation of them. 246 U. S., at 301-302. Nevertheless, it chose to rest its decision on other grounds. It described the designation of the sovereign as a political question to be determined by the legislative and executive departments rather than judicial, invoked the established rule that such recognition operates retroactively to validate past acts, and found the basic tenet of *Underhill* to be applicable to the case before it.

"The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" *Id.*, at 303-304.

In *Ricaud* the facts were similar—another general of the Carranza forces seized lead bullion as a military levy—except that the property taken belonged to an American citizen. The Court found *Underhill*, *American Banana*, and *Oetjen* controlling. Commenting on the nature of the principle established by those cases, the opinion stated that the rule

"does not deprive the courts of jurisdiction once acquired over a case. It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision. To accept a ruling authority and to decide accordingly is

not a surrender or abandonment of jurisdiction but is an exercise of it. It results that the title to the property in this case must be determined by the result of the action taken by the military authorities of Mexico. . . ." 246 U. S., at 309.

To the same effect is the language of Mr. Justice Cardozo in the *Shapleigh* case, *supra*, where, in commenting on the validity of a Mexican land expropriation, he said (299 U. S., at 471): "The question is not here whether the proceeding was so conducted as to be a wrong to our nationals under the doctrines of international law, though valid under the law of the situs of the land. For wrongs of that order the remedy to be followed is along the channels of diplomacy."

In deciding the present case the Court of Appeals relied in part upon an exception to the unqualified teachings of *Underhill*, *Oetjen*, and *Ricaud* which that court had earlier indicated. In *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246, suit was brought to recover from an assignee property allegedly taken, in effect, by the Nazi Government because plaintiff was Jewish. Recognizing the odious nature of this act of state, the court, through Judge Learned Hand, nonetheless refused to consider it invalid on that ground. Rather, it looked to see if the Executive had acted in any manner that would indicate that United States Courts should refuse to give effect to such a foreign decree. Finding no such evidence, the court sustained dismissal of the complaint. In a later case involving similar facts the same court again assumed examination of the German acts improper, *Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F. 2d 71, but, quite evidently following the implications of Judge Hand's opinion in the earlier case, amended its mandate to permit evidence of alleged invalidity, 210 F. 2d 375, subsequent to receipt by plaintiff's attorney of a letter from the Acting Legal Adviser to the State Department written for the purpose of relieving the court from any constraint upon the exercise of its jurisdiction to pass on that question.⁵

This Court has never had occasion to pass upon the so-called *Bernstein* exception, nor need it do so now. For whatever ambiguity may be thought to exist in the two letters from State Department officials on which the Court of Appeals relied,⁶ 307 F. 2d, at 858, is now removed by the position

⁵ The letter stated:

"1. This government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls.

.

"3. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." State Department Press Release, April 27, 1949, 20 Dept. State Bull. 592.

⁶ Abram Chayes, the Legal Adviser to the State Department, wrote on October 18, 1961, in answer to an inquiry regarding the position of the Department by Mr. John Laylin,

which the Executive has taken in this Court on the act of state claim; respondents do not indeed contest the view that these letters were intended to reflect no more than the Department's then wish not to make any statement bearing on this litigation.

The outcome of this case, therefore, turns upon whether any of the contentions urged by respondents against the application of the act of state doctrine in the premises is acceptable: (1) that the doctrine does not apply to acts of state which violate international law, as is claimed to be the case here; (2) that the doctrine is inapplicable unless the Executive specifically interposes it in a particular case; and (3) that in any event, the doctrine may not be invoked by a foreign government plaintiff in our courts.

V.

Preliminarily, we discuss the foundations on which we deem the act of state doctrine to rest, and more particularly the question of whether state or federal law governs its application in a federal diversity case.

We do not believe that this doctrine is compelled either by the inherent nature of sovereign authority, as some of the earlier decisions seem to imply, see *Underhill, supra*; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347; *Oetjen, supra*, at 303, or by some principle of international law. If a transaction takes place in one jurisdiction and the forum is in another, the forum does not by dismissing an action or by applying its own law purport to divest the first jurisdiction of its territorial sovereignty; it merely declines to adjudicate or makes applicable its own law to parties or property before it. The refusal of one country to enforce the penal laws of another . . . is a typical example of an instance when a court will not entertain a cause of action arising in another jurisdiction. While historic notions of sovereign authority do bear upon the wisdom of employing the act of state doctrine, they do not dictate its existence.

That international law does not require application of the doctrine is evidenced by the practice of nations. Most of the countries rendering decisions on the subject fail to follow the rule rigidly. No international arbitral or judicial decision discovered suggests that international law prescribes recognition of sovereign acts of foreign governments, see 1

attorney for *amici*:

"The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalizations by Secretary Herter. Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine. Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction."

A letter dated November 14, 1961, from George Ball, Under Secretary for Economic Affairs, responded to a similar inquiry by the same attorney:

"I have carefully considered your letter and have discussed it with the Legal Adviser. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts."

Oppenheim's International Law §115aa (Lauterpacht, 8th ed. 1955), and apparently no claim has ever been raised before an international tribunal that failure to apply the act of state doctrine constitutes a breach of international obligation. If international law does not prescribe use of the doctrine, neither does it forbid application of the rule even if it is claimed that the act of state in question violated international law. The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another. Because of its peculiar nation-to-nation character the usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal. See *United States v. Diekelman*, 92 U. S. 520, 524. Although it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances, *Ware v. Hylton*, 3 Dall. 199, 281; *The Nereide*, 9 Cranch, 388, 423; *The Paquete Habana*, 175 U. S. 677, 700, the public law of nations can hardly dictate to a country which is in theory wronged how to treat that wrong within its domestic borders.

Despite the broad statement in *Oetjen* that "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments," 246 U. S., at 302, it cannot of course be thought that "every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U. S. 186, 211. The text of the Constitution does not require the act of state doctrine; it does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state.

The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. Many commentators disagree with this view; they have striven by means of distinguishing and limiting past decisions and by advancing various considerations of policy to stimulate a narrowing of the apparent scope of the rule. Whatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.

We could perhaps in this diversity action avoid the question of deciding whether federal or state law is applicable to this aspect of the litigation.

New York has enunciated the act of state doctrine in terms that echo those of federal decisions decided during the reign of *Swift v. Tyson*, 16 Pet. 1: In *Hatch v. Baez*, 7 Hun. 596, 599 (N. Y. Sup. Ct.), *Underhill* was foreshadowed by the words, "the courts of one country are bound to abstain from sitting in judgment on the acts of another government done within its own territory." More recently, the Court of Appeals, *Salimoff & Co. v. Standard Oil Co.*, 262 N. Y. 220, 224, 186 N. E. 679, 681, has declared, "The courts of one independent government will not sit in judgment upon the validity of the acts of another done within its own territory, even when such government seizes and sells the property of an American citizen within its boundaries." . . . Thus our conclusions might well be the same whether we dealt with this problem as one of state law . . . or federal law.

However, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.⁷ It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*. Soon thereafter, Professor Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers were *Erie* extended to legal problems affecting international relations.⁸ He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.

The Court in the pre-*Erie* act of state cases, although not burdened by the problem of the source of applicable law, used language sufficiently strong and broad-sweeping to suggest that state courts were not left free to develop their own doctrines (as they would have been had this Court merely been interpreting common law under *Swift v. Tyson*, *supra*). The Court of Appeals in the first *Bernstein* case, *supra*, a diversity suit, plainly considered the decisions of this Court, despite the intervention of *Erie*, to be controlling in regard to the act of state question, at the same time indicating that New York law governed other aspects of the case. We are not without other precedent for a determination that federal law governs; there are enclaves of federal judge-made law which bind the States. A national body of federal-court-built law has been held to have been contemplated by § 301 of the Labor Management Relations Act . . . Principles formulated by federal judicial law have been thought by this Court to be necessary to protect uniquely federal interests . . . Of course the federal interest guarded in all these cases is one the ultimate statement of which is derived from a federal statute. Perhaps more directly on point

⁷ At least this is true when the Court limits the scope of judicial inquiry. We need not now consider whether a state court might, in certain circumstances, adhere to a more restrictive view concerning the scope of examination of foreign acts than that required by this Court.

⁸ The Doctrine of *Erie Railroad v. Tompkins* Applied to International Law, 83 Am. J. Int'l L. 740 (1939).

are the bodies of law applied between States over boundaries and in regard to the apportionment of interstate waters.

In *Hinderlider v. LaPlata River Co.*, 304 U. S. 92, 110, in an opinion handed down the same day as *Erie* and by the same author, Mr. Justice Brandeis, the Court declared, "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." Although the suit was between two private litigants and the relevant States could not be made parties, the Court considered itself free to determine the effect of an interstate compact regulating water apportionment. The decision implies that no State can undermine the federal interest in equitably apportioned interstate waters even if it deals with private parties. This would not mean that, absent a compact, the apportionment scheme could not be changed judicially or by Congress, but only that apportionment is a matter of federal law. . . . The problems surrounding the act of state doctrine are, albeit for different reasons, as intrinsically federal as are those involved in water apportionment or boundary disputes. The considerations supporting exclusion of state authority here are much like those which led the Court in *United States v. California*, 332 U. S. 19, to hold that the Federal Government possessed paramount rights in submerged lands though within the three-mile limit of coastal States. We conclude that the scope of the act of state doctrine must be determined according to federal law.⁹

VI.

If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs. It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice. It is also evident that some aspects of international law touch much more sharply on national nerves than do others; the less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches. The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of state

⁹ Various constitutional and statutory provisions indirectly support this determination, see U. S. Const., Art. I, §8, cls. 3, 10; Art. II, §§2, 3; Art. III, §2; 28 U. S. C. §§1251 (a)(2), (b)(1), (b)(3), 1332 (a)(2), 1333, 1350-1351, by reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions. . . .

is no longer in existence, as in the *Bernstein* case, for the political interest of this country may, as a result, be measurably altered. Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens.¹⁰ There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries, although they have in fact provided a degree of compensation after diplomatic efforts, commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.

The disagreement as to relevant international law standards reflects an even more basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control of a considerable portion of the means of production and those that adhere to a free enterprise system. It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations.¹¹

When we consider the prospect of the courts characterizing foreign expropriations, however justifiably, as invalid under international law and ineffective to pass title, the wisdom of the precedents is confirmed. While each of the leading cases in this Court may be argued to be distinguishable on its facts from this one—*Underhill* because sovereign immunity provided an independent ground and *Oetjen*, *Ricaud*, and *Shapleigh* because there was actually no violation of international law—the plain implication of all these opinions, and the import of express statements in *Oetjen* . . . and

¹⁰ . . . We do not, of course, mean to say that there is no international standard in this area; we conclude only that the matter is not meet for adjudication by domestic tribunals.

¹¹ There are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law.

Shapleigh . . . is that the act of state doctrine is applicable even if international law has been violated. In *Ricaud*, the one case of the three most plausibly involving an international law violation, the possibility of an exception to the act of state doctrine was not discussed. Some commentators have concluded that it was not brought to the Court's attention, but Justice Clarke delivered both *Oetjen* and *Ricaud* opinions, on the same day, so we can assume principles stated in the former were applicable to the latter case.

The possible adverse consequences of a conclusion to the contrary of that implicit in these cases is highlighted by contrasting the practices of the political branch with the limitations of the judicial process in matters of this kind. Following an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly. Representing all claimants of this country, it will often be able, either by bilateral or multilateral talks, by submission to the United Nations, or by the employment of economic and political sanctions, to achieve some degree of general redress. Judicial determinations of invalidity of title can, on the other hand, have only an occasional impact, since they depend on the fortuitous circumstance of the property in question being brought into this country.¹² Such decisions would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep seated, any state may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another state could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached. Relations with third countries who have engaged in similar expropriations would not be immune from effect.

The dangers of such adjudication are present regardless of whether the State Department has, as it did in this case, asserted that the relevant act violated international law. If the Executive Branch has undertaken negotiations with an expropriating country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law would greatly strengthen the bargaining hand of the other state with consequent detriment to American interests.

Even if the State Department has proclaimed the impropriety of the expropriation, the stamp of approval of its view by a judicial tribunal, however impartial, might increase any affront and the judicial decision might occur at a time, almost always well after the taking, when such an impact would be contrary to our national interest. Considerably more serious

¹² It is, of course, true that such determinations might influence others not to bring expropriated property into the country . . . so their indirect impact might extend beyond the actual invalidations of title.

and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary. When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns. In short, whatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches could hardly be avoided.

Respondents contend that, even if there is not agreement regarding general standards for determining the validity of expropriations, the alleged combination of retaliation, discrimination, and inadequate compensation makes it patently clear that this particular expropriation was in violation of international law.¹³ If this view is accurate, it would still be unwise for the courts so to determine. Such a decision now would require the drawing of more difficult lines in subsequent cases and these would involve the possibility of conflict with the Executive view. Even if the courts avoided this course, either by presuming the validity of an act of state whenever the international law standard was thought unclear or by following the State Department declaration in such a situation, the very expression of judicial uncertainty might provide embarrassment to the Executive Branch.

Another serious consequence of the exception pressed by respondents would be to render uncertain titles in foreign commerce, with the possible consequence of altering the flow of international trade.¹⁴ If the attitude of the United States courts were unclear, one buying expropriated goods would not know if he could safely import them into this country. Even were takings known to be invalid, one would have difficulty determining after goods had changed hands several times whether the particular articles in question were the product of an ineffective state act.¹⁵

¹³ Of course, to assist respondents in this suit such a determination would have to include a decision that for the purpose of judging this expropriation under international law *C. A. V.* is not to be regarded as Cuban and an acceptance of the principle that international law provides other remedies for breaches of international standards of expropriation than suits for damages before international tribunals. . . .

¹⁴ This possibility is consistent with the view that the deterrent effect of court invalidations would not ordinarily be great. If the expropriating country could find other buyers for its products at roughly the same price, the deterrent effect might be minimal although patterns of trade would be significantly changed.

¹⁵ Were respondents' position adopted, the courts might be engaged in the difficult tasks of ascertaining the origin of fungible goods, of considering the effect of improvements made in a third country on expropriated raw materials, and of determining the title to commodities subsequently grown on expropriated land or produced with expropriated machinery.

By discouraging import to this country by traders certain or apprehensive of non-recognition of ownership, judicial findings of invalidity of title might limit competition among sellers; did the excluded goods constitute a significant portion of the market, prices for United States purchasers might rise with a consequent economic burden on

Against the force of such considerations, we find respondents' countervailing arguments quite unpersuasive. Their basic contention is that United States courts could make a significant contribution to the growth of international law, a contribution whose importance, it is said, would be magnified by the relative paucity of decisional law by international bodies. But given the fluidity of present world conditions, the effectiveness of such a patchwork approach toward the formulation of an acceptable body of law concerning state responsibility for expropriations is, to say the least, highly conjectural. Moreover, it rests upon the sanguine presupposition that the decisions of the courts of the world's major capital exporting country and principal exponent of the free enterprise system would be accepted as disinterested expressions of sound legal principle by those adhering to widely different ideologies.

It is contended that regardless of the fortuitous circumstances necessary for United States jurisdiction over a case involving a foreign act of state and the resultant isolated application to any expropriation program taken as a whole, it is the function of the courts to justly decide individual disputes before them. Perhaps the most typical act of state case involves the original owner or his assignee suing one not in association with the expropriating state who has had "title" transferred to him. But it is difficult to regard the claim of the original owner, who otherwise may be recompensed through diplomatic channels, as more demanding of judicial cognizance than the claim of title by the innocent third party purchaser, who, if the property is taken from him, is without any remedy.

Respondents claim that the economic pressure resulting from the proposed exception to the act of state doctrine will materially add to the protection of United States investors. We are not convinced, even assuming the relevance of this contention. Expropriations take place for a variety of reasons, political and ideological as well as economic. When one considers the variety of means possessed by this country to make secure foreign investment, the persuasive or coercive effect of judicial invalidation of acts of expropriation dwindles in comparison. The newly independent states are in need of continuing foreign investment; the creation of a climate unfavorable to such investment by wholesale confiscations may well work to their long-run economic disadvantage. Foreign aid given to many of these countries provides a powerful lever in the hands of the political branches to ensure fair treatment of United States nationals. Ultimately the sanctions of economic embargo and the freezing of assets in this country may be employed. Any country willing to brave any or all of these consequences is unlikely to be deterred by sporadic judicial decisions directly affecting only property brought to our shores. If the political branches are unwilling to exercise their ample powers to effect compensation, this reflects a judgment of the national interest which the judiciary would be ill advised to undermine indirectly.

United States consumers. Balancing the undesirability of such a result against the likelihood of furthering other national concerns is plainly a function best left in the hands of the political branches.

It is suggested that if the act of state doctrine is applicable to violations of international law, it should only be so when the Executive Branch expressly stipulates that it does not wish the courts to pass on the question of validity. See Association of the Bar of the City of New York, Committee on International Law, *A Reconsideration of the Act of State Doctrine in United States Courts* (1959). We should be slow to reject the representations of the Government that such a reversal of the *Bernstein* principle would work serious inroads on the maximum effectiveness of United States diplomacy. Often the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically. Adverse domestic consequences might flow from an official stand which could be assuaged, if at all, only by revealing matters best kept secret. Of course, a relevant consideration for the State Department would be the position contemplated in the court to hear the case. It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive as to probable result and, at any rate, should a prediction be wrong, the Executive might be embarrassed in its dealings with other countries. We do not now pass on the *Bernstein* exception, but even if it were deemed valid, its suggested extension is unwarranted.

However offensive to the public policy of this country and its constituent States an expropriation of this kind may be, we conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application.

VII.

Finally, we must determine whether Cuba's status as a plaintiff in this case dictates a result at variance with the conclusions reached above. If the Court were to distinguish between suits brought by sovereign states and those of assignees, the rule would have little effect unless a careful examination were made in each case to determine if the private party suing had taken property in good faith. Such an inquiry would be exceptionally difficult, since the relevant transaction would almost invariably have occurred outside our borders. If such an investigation were deemed irrelevant, a state could always assign its claim.

It is true that the problem of security of title is not directly presented in the instance of a sovereign plaintiff, although were such a plaintiff denied relief, it would ship its goods elsewhere, thereby creating an alteration in the flow of trade. The sensitivity in regard to foreign relations and the possibility of embarrassment of the Executive are, of course, heightened by the presence of a sovereign plaintiff. The rebuke to a recognized power would be more pointed were it a suitor in our courts. In discussing the rule against enforcement of foreign penal and revenue laws, the High Court of Justice in *Eire, Peter Buchanan Ltd. v. McVey*, [1955] A. C. 516,

529-530, aff'd, *id.*, at 530, emphasized that its justification was in large degree the desire to avoid embarrassing another state by scrutinizing its penal and revenue laws. Although that rule presumes invalidity in the forum whereas the act of state principle presumes the contrary, the doctrines have a common rationale, a rationale that negates the wisdom of discarding the act of state rule when the plaintiff is a state which is not seeking enforcement of a public act.

Certainly the distinction proposed would sanction self-help remedies, something hardly conducive to a peaceful international order. Had Farr, Whitlock not converted the bills of lading, or alternatively breached its contract, Cuba could have relied on the act of state doctrine in defense of a claim brought by C. A. V. for the proceeds. It would be anomalous to preclude reliance on the act of state doctrine because of Farr, Whitlock's unilateral activities, however justified such action may have been under the circumstances.

Respondents offer another theory for treating the case differently because of Cuba's participation. It is claimed that the forum should simply apply its own law to all the relevant transactions. An analogy is drawn to the area of sovereign immunity, *National City Bank v. Republic of China*, 348 U. S. 356, in which, if a foreign country seeks redress in our courts, counterclaims are permissible. But immunity relates to the prerogative right not to have sovereign property subject to suit; fairness has been thought to require that when the sovereign seeks recovery, it be subject to legitimate counterclaims against it. The act of state doctrine, however, although it shares with the immunity doctrine a respect for sovereign states, concerns the limits for determining the validity of an otherwise applicable rule of law. It is plain that if a recognized government sued on a contract with a United States citizen, concededly legitimate by the locus of its making, performance, and most significant contacts, the forum would not apply its own substantive law of contracts. Since the act of state doctrine reflects the desirability of presuming the relevant transaction valid, the same result follows; the forum may not apply its local law regarding foreign expropriations.

Since the act of state doctrine proscribes a challenge to the validity of the Cuban expropriation decree in this case, any counterclaim based on asserted invalidity must fail. Whether a theory of conversion or breach of contract is the proper cause of action under New York law, the presumed validity of the expropriation is unaffected. Although we discern no remaining litigable issues of fact in this case, the District Court may hear and decide them if they develop.

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE WHITE, dissenting.

I am dismayed that the Court has, with one broad stroke, declared the ascertainment and application of international law beyond the competence

of the courts of the United States in a large and important category of cases. I am also disappointed in the Court's declaration that the acts of a sovereign state with regard to the property of aliens within its borders are beyond the reach of international law in the courts of this country. However clearly established that law may be, a sovereign may violate it with impunity, except insofar as the political branches of the government may provide a remedy. This backward looking doctrine, never before declared in this Court, is carried a disconcerting step further: not only are the courts powerless to question acts of state proscribed by international law but they are likewise powerless to refuse to adjudicate the claim founded upon a foreign law; they must render judgment and thereby validate the lawless act. Since the Court expressly extends its ruling to all acts of state expropriating property, however clearly inconsistent with the international community, all discriminatory expropriations of the property of aliens, as for example the taking of properties of persons belonging to certain races, religions or nationalities, are entitled to automatic validation in the courts of the United States. No other civilized country has found such a rigid rule necessary for the survival of the executive branch of its government; the executive of no other government seems to require such insulation from international law adjudications in its courts; and no other judiciary is apparently so incompetent to ascertain and apply international law.¹

I do not believe that the act of state doctrine, as judicially fashioned in this Court, and the reasons underlying it, require American courts to decide cases in disregard of international law and of the rights of litigants to a full determination on the merits.

¹ The courts of the following countries, among others, and their territories have examined a fully "executed" foreign act of state expropriating property [citing cases from England, Netherlands, Germany, Japan, Italy and France].

The Court does not refer to any country which has applied the act of state doctrine in a case where a substantial international law issue is sought to be raised by an alien whose property has been expropriated. This country and this Court stand alone among the civilized nations of the world in ruling that such an issue is not cognizable in a court of law.

The Court notes that the courts of both New York and Great Britain have articulated the act of state doctrine in broad language similar to that used by this Court in *Underhill* . . . and from this it infers that these courts recognize no international law exception to the act of state doctrine. The cases relied on by the Court involved no international law issue. For in these cases the party objecting to the validity of the foreign act was a citizen of the foreign state. It is significant that courts of both New York and Great Britain, in apparently the first cases in which an international law issue was squarely posed, ruled that the act of state doctrine was no bar to examination of the validity of the foreign act. *Anglo-Iranian Oil Co. v. Jaffrate* (The Rose Mary), [1953] Int'l L. Rep. 316 (Aden Sup. Ct.): "[T]he Iranian Laws of 1951 were invalid by international law, for, by them, the property of the company was expropriated without any compensation." *Sulyok v. Pensintseseti Kospont Budapest*, 279 App. Div. 528, 111 N. Y. S. 2d 75, aff'd, 804 N. Y. 704, 107 N. E. 2d 604 (foreign expropriation of intangible property denied effect as contrary to New York public policy).

I.

Prior decisions of this Court in which the act of state doctrine was deemed controlling do not support the assertion that foreign acts of state must be enforced or recognized or applied in American courts when they violate the law of nations. These cases do hold that a foreign act of state applied to persons or property within its borders may not be denied effect in our courts on the ground that it violates the public policy of the forum. Also the broad language in some of these cases does evince an attitude of caution and self-imposed restraint in dealing with the laws of a foreign nation. But violations of international law were either not presented in these cases, because the parties or predecessors in title were nationals of the acting state, or the claimed violation was insubstantial in light of the facts presented to the Court and the principles of international law applicable at the time.² These cases do not strongly imply or even suggest that the

² In one of the earliest decisions of this Court even arguably invoking the act of state doctrine, *Hudson v. Guestier*, 4 Cranch 293, Chief Justice Marshall held that the validity of a seizure by a foreign power of a vessel within the jurisdiction of the sentencing court could not be reviewed "unless the court passing the sentence loses its jurisdiction by some circumstance *which the law of nations can notice*." (Emphasis added.) *Underhill v. Hernandez*, 188 U. S. 250, where the Court stated the act of state doctrine in its oft quoted form, was a suit in tort by an American citizen against an officer of the Venezuelan Government for an unlawful detention and compelled operation of the plaintiff's water facilities during the course of a revolution in that country. Well-established principles of immunity precluded the plaintiff's suit, and this was one of the grounds for dismissal. However, as noted above, the Court did invoke the act of state doctrine in dismissing the suit and arguably the forced detention of a foreign citizen posed a claim cognizable under international law. But the Court did not ignore this possibility of a violation of international law; rather in distinguishing cases involving arrests by military authorities in the absence of war and those concerning the right of revolutionary bodies to interfere with commerce, the Court passed on the merits of plaintiff's claim under international law and deemed the claim without merit under then existing doctrines. "[A]cts of *legitimate warfare* cannot be made the basis of individual liability." (Emphasis added.) 168 U. S., at 253. Indeed the Court cited *Dow v. Johnson*, 100 U. S. 153, a suit arising from seizures by American officers in the South during the Civil War, in which it was held without any reliance on the act of state doctrine that the law of nations precluded making acts of legitimate warfare a basis for liability after the cessation of hostilities, and *Ford v. Surget*, 97 U. S. 594, which held an officer of the Confederacy immune from damages for the destruction of property during the war. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, a case often invoked for the blanket prohibition of the act of state doctrine, held only that the antitrust laws did not extend to acts committed by a private individual in a foreign country with the assistance of a foreign government. Most of the language in that case is in response to the issue of how far legislative jurisdiction should be presumed to extend in the absence of an express declaration. The Court held that the ordinary understandings of sovereignty warranted the proposition that conduct of an American citizen should ordinarily be adjudged under the law where the acts occurred. Rather than ignoring international law, the law of nations was relied on for this rule of statutory construction.

More directly on point are the Mexican seizures passed upon in *Oetjen* . . . 246 U. S. 297, and *Bicaud* . . . 246 U. S. 304. In *Oetjen* the plaintiff claimed title from a Mexican owner who was divested of his property during the Mexican revolution. The terms of the expropriation are not clear, but it appears that a promise of compensation was made

Court would woodenly apply the act of state doctrine and grant enforcement to a foreign act where the act was a clear and flagrant violation of international law, as the District Court and the Court of Appeals have found in respect to the Cuban law challenged herein. 193 F. Supp. 375, *aff'd*, 307 F. 2d 845.

II.

Though not a principle of international law, the doctrine of restraint, as formulated by this Court, has its roots in sound policy reasons, and it is to these we must turn to decide whether the act of state doctrine should be extended to cover wrongs cognizable under international law.

Whatever may be said to constitute an act of state, our decisions make clear that the doctrine of nonreview ordinarily applies to foreign laws affecting tangible property located within the territory of a government which is recognized by the United States. *Oetjen v. Central Leather Co.*,

by the revolutionary government and that the property was to be used for the war effort. The only international law issue arguably present in the case was by virtue of a treaty of [*sic*] the Hague Convention, to which both Mexico and the United States were signatories, governing customs of war on land; although the Court did not rest the decision on the treaty, it took care to point out that this seizure was probably lawful under the treaty as a compelled contribution in time of war for the needs of the occupying army. Moreover, the Court stressed the fact that the title challenged was derived from a Mexican law governing the relations between the Mexican Government and Mexican citizens. Aside from the citizenship of the plaintiff's predecessor in title, the property seized was to satisfy an assessment of the revolutionary government which the Mexican owner had failed to pay. It is doubtful that this measure, even as applied to non-Mexicans, would constitute a violation of international law. *Dow v. Johnson*, *supra*. In *Ricaud* the titleholder was an American and the Court deemed this difference irrelevant "for the reasons given" in *Oetjen*. In *Ricaud* there was a promise to pay for the property seized during the revolution upon the cessation of hostilities and the seizure was to meet exigencies created by the revolution, which was permissible under the provisions of the Hague Convention considered in *Oetjen*. This declaration of legality in the Hague Convention, and the international rules of war on seizures, rendered the allegation of an international law violation in *Ricaud* sufficiently frivolous so that consideration on the merits was unnecessary. The sole question presented in *Shapleigh v. Mier*, 299 U. S. 468, concerned the legality of certain action under Mexican law, and the parties expressly declined to press the question of legality under international law. And the Court's language in that case—"For wrongs of that order the remedy to be followed is along the channels of diplomacy"—must be read against the background of an arbitral claims commission that had been set up to determine compensation for claimants in the position of Shapleigh, [of] the existence of which the Court was well aware. "[A] tribunal is in existence, the International Claims Commission, established by convention between the United States and Mexico, to which the plaintiffs are at liberty to submit and have long ago submitted a claim for reparation." 299 U. S., at 471.

In the other cases cited in the Court's opinion, *ante* [Sec. IV above], the act of state doctrine was not even peripherally involved; the law applicable in both *United States v. Belmont*, 301 U. S. 324, and *United States v. Pink*, 315 U. S. 203, was a compact between the United States and Russia regarding the effect of Russian nationalization decrees on property located in the United States. No one seriously argued that the act of state doctrine precludes reliance on a binational compact dealing with the effect to be afforded or denied a foreign act of state.

246 U. S. 297; *Ricaud v. American Metal Co.*, 246 U. S. 304. This judicially fashioned doctrine of nonreview is a corollary of the principle that ordinarily a state has jurisdiction to prescribe the rules governing the title to property within its territorial sovereignty . . . a principle reflected in the conflicts of law rule, adopted in virtually all nations, that the *lex loci* is the law governing title to property. This conflicts rule would have been enough in itself to have controlled the outcome of most of the act of state cases decided by this Court. Both of these rules rest on the deeply imbedded postulate in international law of the territorial supremacy of the sovereign, a postulate that has been characterized as the touchstone of private and public international law. That the act of state doctrine is rooted in a well-established concept of international law is evidenced by the practice of other countries. These countries, without employing any act of state doctrine, afford substantial respect to acts of foreign states occurring within their territorial confines. Our act of state doctrine, as formulated in past decisions of the Court, carries the territorial concept one step further. It precludes a challenge to the validity of foreign law on the ordinary conflicts ground of repugnancy to the public policy of the forum. Against the objection that the foreign act violates domestic public policy, it has been said that the foreign law provides the rule of decision, where the *lex loci* rule would so indicate, in American courts. . . .

The reasons that underlie the deference afforded to foreign acts affecting property in the acting country are several; such deference reflects an effort to maintain a certain stability and predictability in transnational transactions, to avoid friction between nations, to encourage settlement of these disputes through diplomatic means and to avoid interference with the executive control of foreign relations. But to adduce sound reasons for a policy of nonreview is not to resolve the problem at hand but to delineate some of the considerations that are pertinent to its resolution.

Contrary to the assumption underlying the Court's opinion, these considerations are relative, their strength varies from case to case and they are by no means controlling in all litigation involving the public acts of a foreign government. This is made abundantly clear by numerous cases in which the validity of a foreign act of state is drawn in question and in which these identical considerations are present in the same or a greater degree. American courts have denied recognition or effect to foreign law, otherwise applicable under the conflicts rules of the forum, to many foreign laws where these laws are deeply inconsistent with the policy of the forum, notwithstanding that these laws were of obvious political and social importance to the acting country. For example, foreign confiscatory decrees purporting to divest nationals and corporations of the foreign sovereign of property located in the United States uniformly have been denied effect in our courts, including this Court; courts continued to recognize private property rights of Russian corporations owning property within the United States long after the Russian Government, recognized by the United States, confiscated all such property and had rescinded the laws on which

corporate identity depended.³ Furthermore, our courts customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign. And the judgments of foreign courts are denied conclusive or prima facie effect where the judgment is based on a statute unenforceable in the forum, where the procedures of the rendering court markedly depart from our notions of fair procedure, and generally where enforcement would be contrary to the public policy of the forum. These cases demonstrate that our courts have never been bound to pay unlimited deference to foreign acts of state, defined as an act or law in which the sovereign's governmental interest is involved; they simultaneously cast doubt on the proposition that the additional element in the case at bar, that the property may have been within the territorial confines of Cuba when the expropriation decree was promulgated, requires automatic deference to the decree, regardless of whether the foreign act violates international law.⁴

3. . . *James & Co. v. Second Russian Ins. Co.*, 239 N. Y. 248, 146 N.E. 369; *Sokoloff v. National City Bank*, 239 N. Y. 158, 145 N. E. 917; *A/S Merilaid & Co. v. Chase Nat'l Bank*, 189 Misc. 285, 71 N. Y. S. 2d 377 (Sup. Ct. N. Y.). See also *Compania Ron Bacardi v. Bank of Nova Scotia*, 193 F. Supp. 814 (D. C. S. D. N. Y.) (normal conflicts rule superseded by a national policy against recognition of Cuban confiscatory decrees).

Similarly, it has been held that nationalization of shares of a foreign corporation or partnership owning property in the United States will not affect the title of former shareholders or partners; the prior owners are deemed to retain their equitable rights in assets located in the United States. . . . The acts of a belligerent occupant of a friendly nation in respect to contracts made within the occupied nation have been denied application in our courts. . . .

⁴ The Court attempts to distinguish between these foreign acts on the ground that all foreign penal and revenue and perhaps other public laws are irrebuttably presumed invalid to avoid the embarrassment stemming from examination of some acts and that all foreign expropriations are presumed valid for the same reason. This distinction fails to explain why it may be more embarrassing to refuse recognition to an extraterritorial confiscatory law directed at nationals of the confiscating state than it would be to refuse effect to a territorial confiscatory law. From the viewpoint of the confiscating state, the need to affect property beyond its borders may be as significant as the need to take title to property within its borders. And it would appear more offensive to notions of sovereignty for an American court to deny enforcement of a foreign law because it is deemed contrary to justice, morals, or public policy, than to deny enforcement because of principles of international law. It will not do to say that the foreign state has no jurisdiction to affect title to property beyond its borders, since other jurisdictional bases, such as citizenship, are invariably present. But for the policy of the forum state, doubtless the foreign law would be given effect under ordinary conflict principles. Compare *Sokoloff v. National City Bank*, 239 N. Y. 158, 145 N. E. 917; *Second Russian Ins. Co. v. Miller*, 297 F. 404 (C. A. 2d Cir.) with *Werfel v. Zivnostenska Banka*, 260 App. Div. 747, 23 N. Y. S. 2d 1001.

The refusal to enforce foreign penal and tax laws and foreign judgments is wholly at odds with the presumption of validity and requirement of enforcement under the act of state doctrine; the political realms of the acting country are clearly involved, the enacting country has a large stake in the decision, and when enforcement is against nationals of the enacting country, jurisdictional bases are clearly present. Moreover, it is difficult, conceptually or otherwise, to distinguish between the situation where a tax judgment secured in a foreign country against one who is in the country at the

III.

I start with what I thought to be unassailable propositions: that our courts are obliged to determine controversies on their merits, in accordance with the applicable law; and that part of the law American courts are bound to administer is international law.

Article III, §2 of the Constitution states that "[t]he judicial Power shall extend to all Cases . . . affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." And §1332 of the Judicial Code gives the courts jurisdiction over all civil actions between citizens of a State and foreign states or citizens or subjects thereof. The doctrine that the law of nations is a part of the law of the land, originally formulated in England and brought to America as part of our legal heritage, is reflected in the debates during the Constitutional Convention and in the Constitution itself.⁶ This Court has time and again effectuated the clear understanding of the Framers, as embodied in the Constitution, by applying the law of nations to resolve cases and controversies. As stated in *The Paquete Habana*, 175 U. S. 677, 700, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." Principles of international law have been applied in our courts to resolve controversies not merely because they provide a convenient rule for decision but because they represent a consensus among civilized nations on the proper ordering of relations between nations and the citizens thereof. Fundamental fairness to litigants as well as the interest in stability of relationships and preservation of reasonable expectations call for their application whenever international law is controlling in a case or controversy.

The relevance of international law to a just resolution of this case is apparent from the impact of international law on other aspects of this controversy. Indeed it is only because of the application of international rules to resolve other issues that the act of state doctrine becomes the determinative issue in this case. The basic rule that the law of the situs

time of judgment is presented to an American court and the situation where a confiscatory decree is sought to be enforced in American courts.

⁶ This intention was reflected and implemented in the Articles of the Constitution. Article I, § 8 empowers the Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." Article III, § 2 extends the judicial power "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

of property is the proper law to be applied in determining title in other forums, whether styled a rule of private international law or domestic conflict of law, is rooted in concepts firmly embedded in a consensus of nations on territorial sovereignty. Without such a consensus and the conflicts rule derived therefrom, the question of whether Cuba's decree can be measured against the norms of international law would never arise in this litigation, since then a court presumably would be free to apply its own rules governing the acquisition of title to property. Furthermore, the contention that the sugar in question was within the territorial confines of Cuba when the Cuban decree was enacted itself rests on widely accepted principles of international law, namely, that the bays or inlets contiguous to a country are within its boundaries and that territorial jurisdiction extends at least three miles beyond these boundaries. See Oppenheim, *International Law* §§186, 190-191 (Lauterpacht, 8th ed. 1955). Without these rules derived from international law, this confiscation could be characterized as extraterritorial and therefore—unless the Court also intends to change this rule—subject to the public policy test traditionally applied to extraterritorial takings of property, even though embarrassing to foreign affairs. Further, in response to the contention that title to the sugar had already passed to Farr, Whitlock by virtue of the contract with C.A.V. when the nationalization decree took effect, it was held below that under "*the law merchant common to civilized countries*" (emphasis supplied) Farr could not acquire title to the shipment until payment was made in New York. Thus the central issue in this litigation is posed only because of numerous other applications of the law of nations and domestic rules derived therefrom in respect to subsidiary, but otherwise controlling, legal issues in the controversy.

The Court accepts the application of rules of international law to other aspects of this litigation, accepts the relevance of international law in other cases and announces that when there is an appropriate degree of "consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice." . . . The Court then, rather lightly in my view, dispenses with its obligation to resolve controversies in accordance with "international justice" and the "national interest" by assuming and declaring that there are no areas of agreement between nations in respect to expropriations. There may not be, but without critical examination, which the Court fails to provide, I would not conclude that a confiscatory taking which discriminates against nationals of another country to retaliate against the government of that country falls within that area of issues in international law "on which opinion seems to be so divided." Nor would I assume, as the ironclad rule of the Court necessarily implies, that there is not likely to be a consensus among nations in this area, as for example upon the illegality of discriminatory takings of alien property based upon race, religion or

nationality. But most of all I would not declare that even if there were a clear consensus in the international community, the courts must close their eyes to a lawless act and validate the transgression by rendering judgment for the foreign state at its own request. This is an unfortunate declaration for this Court to make. It is, of course, wholly inconsistent with the premise from which the Court starts, and, under it, banishment of international law from the courts is complete and final in cases like this. I cannot so cavalierly ignore the obligations of a court to dispense justice to the litigants before it.⁶

IV.

The reasons for nonreview, based as they are on traditional concepts of territorial sovereignty, lose much of their force when the foreign act of state is shown to be a violation of international law. All legitimate exercises of sovereign power, whether territorial or otherwise, should be exercised consistent with rules of international law, including those rules which mark the bounds of lawful state action against aliens or their property located within the territorial confines of the foreign state. Although a state may reasonably expect that the validity of its laws operating on property within its jurisdiction will not be defined by local notions of public policy of numerous other states (although a different situation may well be presented when courts of another state are asked to lend their enforcement machinery to effectuate the foreign act),⁷ it cannot with impunity ignore the rules governing the conduct of all nations and expect that other nations and tribunals will view their acts as within the permissible scope of territorial sovereignty. Contrariwise, to refuse inquiry into the question of whether norms of the international community have been contravened by the act of state under review would seem to deny the existence or purport of such norms, a view that seems inconsistent with

⁶ In the only reference in the Court's opinion to fairness between the litigants, and a court's obligation to resolve disputes justly . . . the Court quickly disposes of this consideration by assuming that the typical act of state case is between an original owner and an "innocent" purchaser, so that it is not unjust to leave the purchaser's title undisturbed by applying the act of state doctrine. Beside the obvious fact that this assumption is wholly inapplicable to the case where the foreign sovereign itself or its agent seeks to have its title validated in our courts—the case at bar—it is far from apparent that most cases represent suits between the original owner and an innocent purchaser. The "innocence" of a purchaser who buys goods from a government with knowledge that possession or apparent title was derived from an act patently in violation of international law is highly questionable. More fundamentally, doctrines of commercial law designed to protect the title of a bona fide purchaser can serve to resolve this question without reliance upon a broad irrebuttable presumption of validity.

⁷ Another situation was also presented by the Nazi decrees challenged in the *Bernstein* litigation; these racial and religious expropriations, while involving nationals of the foreign state and therefore customarily not cognizable under international law, had been condemned in multinational agreements and declarations as crimes against humanity. The acts could thus be measured in local courts against widely held principle rather than judged by the parochial views of the forum.

the role of international law in ordering the relations between nations. Finally, the impartial application of international law would not only be an affirmation of the existence and binding effect of international rules of order, but also a refutation of the notion that this body of law consists of no more than the divergent and parochial views of the capital importing and exporting nations, the socialist and free-enterprise nations.

The Court puts these considerations to rest with the assumption that the decisions of the courts "of the world's major capital exporting country and principal exponent of the free enterprise system" would hardly be accepted as impartial expressions of sound legal principle. The assumption, if sound, would apply to any other problem arising from transactions that cross state lines and is tantamount to a declaration excusing this Court from any future consequential role in the clarification and application of international law. . . . This declaration ignores the historic role which this Court and other American courts have played in applying and maintaining principles of international law.

Of course, there are many unsettled areas of international law, as there are with domestic law, and these areas present sensitive problems of accommodating the interests of nations that subscribe to divergent economic and political systems. It may be that certain nationalizations of property for a public purpose fall within this area. Also, it may be that domestic courts, as compared to international tribunals, or arbitral commissions, have a different and less active role to play in formulating new rules of international law or in choosing between rules not yet adhered to by any substantial group of nations. Where a clear violation of international law is not demonstrated, I would agree that principles of comity underlying the act of state doctrine warrant recognition and enforcement of the foreign act. But none of these considerations relieve a court of the obligation to make an inquiry into the validity of the foreign act, none of them warrant a flat rule of no inquiry at all. The vice of the act of state doctrine, as formulated by the Court and applied in this case, where the decree is alleged not only to be confiscatory but also retaliatory and discriminatory and found by two courts to be a flagrant violation of international law, is that it precludes any such examination and proscribes any decision on whether Cuban Law No. 851 contravenes an accepted principle of international law.

The other objections to reviewing the act challenged herein, save for the alleged interference with the executive's conduct of foreign affairs, seem without substance, both in theory and as applied to the facts of the instant case. The achievement of a minimum amount of stability and predictability in international commercial transactions is not assured by a rule of nonreviewability which permits any act of a foreign state, regardless of its validity under international law, to pass muster in the courts of other states. The very act of a foreign state against aliens which contravenes rules of international law, the purpose of which is to support and foster an order upon which people can rely, is at odds with the achievement of stability and predictability in international transactions. And the infre-

quency of cases in American courts involving foreign acts of state challenged as invalid under international law furnishes no basis at all for treating the matter as unimportant and for erecting the rule the Court announces today.⁸

There is also the contention that the act of state doctrine serves to channel these disputes through the processes designed to rectify wrongs of an international magnitude, see *Oetjen v. Central Leather Co.*, *supra*; *Shapleigh v. Mier*, *supra*; the result of the doctrine, it is said, requires an alien to seek relief in the courts or through the executive of the expropriating country, to seek relief through diplomatic channels of his own country and to seek review in an international tribunal. These are factors an American court should consider when asked to examine a foreign act of state, although the availability and effectiveness of these modes of accommodation may more often be illusory than real. Where alternative modes are available and are likely to be effective, our courts might well stay their hand and direct a litigant to exhaust or attempt to utilize them before adjudicating the validity of the foreign act of state. But the possibility of alternative remedies, without more, is frail support for a rule of automatic deference to the foreign act in all cases. The Court's rule is peculiarly inappropriate in the instant case, where no one has argued that C.A.V. can obtain relief in the courts of Cuba, where the United States has broken off diplomatic relations with Cuba, and where the United States, although protesting the illegality of the Cuban decrees, has not sought to institute any action against Cuba in an international tribunal.

V.

There remains for consideration the relationship between the act of state doctrine and the power of the executive over matters touching upon the foreign affairs of the nation. It is urged that the act of state doctrine is a necessary corollary of the executive's authority to direct the foreign relations of the United States and accordingly any exception in the doctrine, even if limited to clear violations of international law, would impede

⁸ The Court argues that an international law exception to the act of state doctrine would fail to deter violations of international law, since judicial intervention would at best be sporadic. At the same time, proceeding on a contradictory assumption as to the impact of such an exception, the Court argues that the exception would render titles uncertain and upset the flow of international trade. The Court attempts to reconcile these conclusions by distinguishing between "direct" and "indirect" impacts of a declaration of invalidity, and by assuming that the exporting nation need only find other buyers for its products at the same price. From the point of view of the exporting nation, the distinction between indirect and direct impact is meaningless, and the facile assumption that other buyers at the same price are available and the further unstated assumption that purchase price is the only pertinent consideration to the exporting country are based on an oversimplified view of international trade.

There is no evidence that either the absence of an act of state doctrine in the law of numerous European countries or the uncertainty of our own law on this question until today's decision has worked havoc with titles in international commerce or presented the nice questions the Court sets out . . . or has substantially affected the flow of international commerce.

or embarrass the executive in discharging his constitutional responsibilities. Thus, according to the Court, even if principles of comity do not preclude inquiry into the validity of a foreign act under international law, due regard for the executive function forbids such examination in the courts.

Without doubt political matters in the realm of foreign affairs are within the exclusive domain of the Executive Branch, as, for example, issues for which there are no available standards or which are textually committed by the Constitution to the executive. But this is far from saying that the Constitution vests in the executive exclusive absolute control of foreign affairs or that the validity of a foreign act of state is necessarily a political question. International law, as well as a treaty or executive agreement, see *United States v. Pink*, 315 U. S. 203, provides an ascertainable standard for adjudicating the validity of some foreign acts, and courts are competent to apply this body of law, notwithstanding that there may be some cases where comity dictates giving effect to the foreign act because it is not clearly condemned under generally accepted principles of international law. And it cannot be contended that the Constitution allocates this area to the exclusive jurisdiction of the executive, for the judicial power is expressly extended by that document to controversies between aliens and citizens or States, aliens and aliens, and foreign states and American citizens or States.

A valid statute, treaty or executive agreement could, I assume, confine the power of federal courts to review or award relief in respect of foreign acts or otherwise displace international law as the rule of decision. I would not disregard a declaration by the Secretary of State or the President that an adjudication in the courts of the validity of a foreign expropriation would impede relations between the United States and the foreign government or the settlement of the controversy through diplomatic channels. But I reject the presumption that these undesirable consequences would follow from adjudication in every case, regardless of the circumstances. Certainly the presumption is inappropriate here.

Soon after the promulgation of Cuban Law No. 851, the State Department of the United States delivered a note of protest to the Cuban Government declaring this nationalization law to be in violation of international law. Since the nationalization of the property in question, the United States has broken off diplomatic relations with the present Government of Cuba. And in response to inquiries by counsel for the respondent in the instant case, officials of the State Department nowhere alleged that adjudication of the validity of the Cuban decree nationalizing C.A.V. would embarrass our relations with Cuba or impede settlement on an international level. In 1963, the United States Government issued a freeze order on all Cuban assets located in the United States. On these facts—although there may be others of which we are not aware—it is wholly unwarranted to assume that an examination of the validity of Cuban Law No. 851 and a finding of invalidity would intrude upon the relations between the United States and Cuba.

But the Court is moved by the spectre of another possibility; it is said

that an examination of the validity of the Cuban law in this case might lead to a finding that the Act is not in violation of widely accepted international norms or that an adjudication here would require a similar examination in other more difficult cases, in one of which it would be found that the foreign law is not in breach of international law. The finding, either in this case or subsequent ones, that a foreign act does not violate widely accepted international principles, might differ from the executive's view of the act and international law, might thereby seriously impede the executive's functions in negotiating a settlement of the controversy and would therefore be inconsistent with the national interest. "[T]he very expression of judicial uncertainty might provide embarrassment to the Executive Branch." . . . These speculations, founded on the supposed impact of a judicial decision on diplomatic relations, seem contrary to the Court's view of the arsenal of weapons possessed by this country to make secure foreign investment and the "ample powers [of the political branches] to effect compensation," . . . and wholly inconsistent with its view of the limited competence and knowledge of the judiciary in the area of foreign affairs and diplomacy. Moreover the expression of uncertainty the Court fears is inevitable under the Court's approach, as is well exemplified by the ex-cathedra pronouncements in the instant case. While premising that a judicial expression of uncertainty on whether a particular act clearly violates international law would be embarrassing to the executive, this Court, in this very case, announces as an underpinning of its decision that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens," and proceeds to demonstrate the absence of international standards by cataloguing the divergent views of the "capital exporting," "free enterprise" nations, of the "newly independent and underdeveloped countries," and of the "Communist countries" toward both the issue of expropriation and international law generally. The act of state doctrine formulated by the Court bars review in this case and will do so in all others involving expropriation of alien property precisely because of the lack of a consensus in the international community on rules of law governing foreign expropriations.⁹ Contrariwise, it would seem that the act of state doctrine will not apply to a foreign act if it concerns an

⁹ The Court disclaims saying that there is no governing international standard in this area, but only that the matter is not meet for adjudication. . . . But since the Court's view is that there are only the divergent views of nations that subscribe to different ideologies and practical goals on "expropriations," the matter is not meet for adjudication, according to the Court, because of the lack of any agreement among nations on standards governing expropriations, i.e., there is no international law in this area, but only the political views of the political branches of the various nations.

These assertions might find much more support in the authorities relied on by the Court and others if the issue under discussion was not the undefined category—expropriation—but the clearly discrete issue of adequate and effective compensation. It strains credulity to accept the proposition that newly emerging nations or their spokesmen denounce all rules of state responsibility—reject international law in regard to foreign nationals generally—rather than reject the traditional rule of international law requiring prompt, adequate, and effective compensation.

area in which there is unusual agreement among nations . . . which is not the case with the broad area of expropriations.¹⁰ I fail to see how greater embarrassment flows from saying that the foreign act does not violate clear and widely accepted principles of international law than from saying, as the Court does, that nonexamination and validation is required because there are no widely accepted principles to which to subject the foreign act.¹¹ As to potential embarrassment, the difference is semantic, but as to determining the issue on its merits and as to upholding a regime of law, the difference is vast.

There is a further possibility of embarrassment to the executive from the blanket presumption of validity applicable to all foreign expropriations, which the Court chooses to ignore, and which, in my view, is far more self-evident than those adduced by the Court. That embarrassment stems from the requirement that all courts, including this Court, approve, validate, and enforce any foreign act expropriating property, at the behest of the foreign state or a private suitor, regardless of whether the act arbitrarily discriminates against aliens on the basis of race, religion, or nationality, and regardless of the position the executive has taken in respect to the act. I would think that an adjudication by this Court that the foreign act, to which the executive is protesting and attempting to secure relief for American citizens, is valid and beyond question enforceable in the courts of the United States would indeed prove embarrassing to the Executive Branch of our Government in many situations, much more so than a declaration of invalidity or a refusal to adjudicate the controversy at all. For the likelihood that validation and enforcement of a foreign act which is condemned by the executive will be inconsistent with national policy as well as the goals of the international community is great.¹² This result is

¹⁰ There is another implication in the Court's opinion: the act of state doctrine applies to all expropriations, not only because of the lack of a consensus among nations on any standards but because the issue of validity under international law "touches . . . the practical and ideological goals of the various members of the community of nations." If this statement means something other than that there is no agreement on international standards governing expropriations, it must mean that the doctrine applies because the issue is important politically to the foreign state. If this is what the Court means, the act of state doctrine has been expanded to unprecedented scope. No foreign act is subject to challenge where the foreign nation demonstrates that the act is in furtherance of its practical or ideological goals. What foreign acts would not be so characterized?

¹¹ "A refusal of courts to consider foreign acts of State in the light of the law of nations is not . . . merely a neutral doctrine of abstention. On the contrary the effect of such a doctrine is to lend the full protection of the United States courts, police and governmental agencies to commercial property transactions which are contrary to the minimum standard of civilized conduct. . . ." The Association of the Bar of the City of New York, Committee on International Law, *A Reconsideration of the Act of State Doctrine In United States Courts* (1959), 8.

¹² That embarrassment results from a rigid rule of act of state immunity is well demonstrated by the judicial enforcement of German racial decrees after the war. The pronouncements by United States courts that these decrees vest title beyond question was wholly at odds with the executive's official policy, embodied in representations to other governments, that property taken through racial decrees by the Nazi Government should be returned to original owners and thus not be subject to reparation claims.

precisely because the Court, notwithstanding its protestations to the contrary . . . has laid down "an inflexible and all-encompassing rule in this case."¹⁸

VI.

Obviously there are cases where an examination of the foreign act and declaration of invalidity or validity might undermine the foreign policy of the Executive Branch and its attempts at negotiating a settlement for a nationalization of the property of Americans. The respect ordinarily due to a foreign state, as reflected in the decisions of this Court, rests upon a desire not to disturb the relations between countries and on a view that other means, more effective than piecemeal adjudications of claims arising out of a large-scale nationalization program of settling the dispute, may be available. Precisely because these considerations are more or less present, or absent, in any given situation and because the Department of our Government primarily responsible for the formulation of foreign policy and settling these matters on a state-to-state basis is more competent than courts to determine the extent to which they are involved, a blanket presumption of nonreview in each case is inappropriate and a requirement that the State Department render a determination after reasonable notice, in each case, is necessary. Such an examination would permit the Department to evaluate whether adjudication would "vex the peace of nations," whether a friendly foreign sovereign is involved, and whether settlement through diplomacy or through an international tribunal or arbitration is impending. Based upon such an evaluation, the Department may recommend to the court that adjudication should not proceed at the present time. Such a request I would accord considerable deference and I would not require a full statement of reasons underlying it. But I reject the contention that

Compare statements by Secretary of State Marshall, reprinted in 16 Dept. State Bull. 658, 793 (1947), with *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246 (C. A. 2d Cir.). This embarrassing divergence of governmental opinion was eliminated only after the executive intervened and requested the courts to adjudicate the matter on the merits. *Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F. 2d 875 (C. A. 2d Cir.).

¹⁸ It is difficult to reconcile the Court's statement that rules pertaining to expropriations are unsettled or unclear with the Court's pronounced desire to avoid making any statements on the proper or accepted principles of international law, lest it embarrass the executive, who may have a different view in respect to this particular expropriation or this particular expropriating country. Is not the Court's limitation of the act of state doctrine to the area of expropriations—based upon the uncertainty and fluidity of the governing law in this area—an admission that may prove to be embarrassing to the executive at some later date? And the very line drawing that the Court stresses as potentially disruptive of the executive's conduct of foreign affairs is inevitable under the Court's approach, since subsequent cases not involving expropriations will require us to determine if the act of state doctrine applies and the Court's standard is the strength and clarity of the principles of international law thought to govern the issue. Again our view of the clarity of these principles and the extent to which they are really rules of international law may not be identical with the views of the Department of State. These are some of the inherent difficulties of establishing a rule of law on the basis of speculations about possible but unidentified embarrassment to the executive at some unknown and unknowable future date.

the recommendation itself would somehow impede the foreign relations of the United States or unduly burden the Department. The Court notes that "[a]dverse domestic consequences might flow from an official stand," by which I take it to mean that it might be politically embarrassing on the domestic front for the Department of State to interpose an objection in a particular case which has attracted public attention. But an official stand is what the Department must take under the so-called *Bernstein* exception, which the Court declines to disapprove. Assuming that there is a difference between an express official objection to examination and the executive's refusal to relieve "the court from any constraint upon the exercise of its jurisdiction," it is not fair to allow the fate of a litigant to turn on the possible political embarrassment of the Department of State and it is not this Court's role to encourage or require nonexamination by bottoming a rule of law on the domestic public relations of the Department of State. The Court also rejects this procedure because it makes the examination of validity turn on an educated guess by the executive as to probable result and such a guess might turn out to be erroneous. The United States in its brief has disclaimed any such interest in the result in these cases, either in the ultimate outcome or the determination of validity, and I would take the Government at its word in this matter, without second-guessing the wisdom of its view.

This is precisely the procedure that the Department of State adopted voluntarily in the situation where a foreign government seeks to invoke the defense of immunity in our courts.¹⁴ If it is not unduly disruptive for the Department to determine whether to issue a certificate of immunity to a foreign government itself when it seeks one, a recommendation by the Department in cases where generally the sovereign is not a party can hardly be deemed embarrassing to our foreign relations. Moreover, such a procedure would be consonant with the obligation of courts to adjudicate cases on the merits except for reasons wholly sufficient in the particular case. As I understand it, the executive has not yet said that adjudication in this case would impede his functions in the premises; rather it has asked us to adopt a rule of law foreclosing inquiry into the subject unless the executive affirmatively allows the courts to adjudicate on the merits.

Where the courts are requested to apply the act of state doctrine at the behest of the State Department, it does not follow that the courts are to proceed to adjudicate the action without examining the validity of the foreign act under international law. The foreign relations' considerations and potential of embarrassment to the executive inhere in examination of

¹⁴ The procedure was instituted as far back as *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812), when a United States Attorney, on the initiative of the Executive Branch, entered an appearance in a case involving the immunity of a foreign vessel, and was further defined in *Ex parte Muir*, 254 U. S. 522, 588 (1921), when the Court stated that the request by the foreign suitor to the executive department was an acceptable and well-established manner of interposing a claim of immunity. Under the procedure outlined in *Muir* each of the contesting parties may raise the immunity issue by obtaining an official statement from the State Department, or by encouraging the executive to set forth appropriate suggestions to the Court through the Attorney General. . . .

the foreign act and in the result following from such an examination, not in the matter of who wins. Thus, all the Department of State can legitimately request is nonexamination of the foreign act. It has no proper interest or authority in having courts decide a controversy upon anything less than all of the applicable law or to decide it in accordance with the executive's view of the outcome that best comports with the foreign or domestic affairs of the day. We are not dealing here with those cases where a court refuses to measure a foreign statute against public policy of the forum or against the fundamental law of the foreign state itself. In those cases the judicially created act of state doctrine is an aspect of the conflicts of law rules of the forum and renders the foreign law controlling. But where a court refuses to examine foreign law under principles of international law, which it is required to do, solely because the Executive Branch requests the court, for its own reasons, to abstain from deciding the controlling issue in the controversy, then in my view, the executive has removed the case from the realm of the law to the realm of politics, and a court must decline to proceed with the case. The proper disposition is to stay the proceedings until circumstances permit an adjudication or to dismiss the action where an adjudication within a reasonable time does not seem feasible. To do otherwise would not be in accordance with the obligation of courts to decide controversies justly and in accordance with the law applicable to the case.

It is argued that abstention in the case at bar would allow C.A.V. to retain possession of the proceeds from the sugar and would encourage wrongfully deprived owners to engage in devious conduct or "self-help" in order to compel the sovereign or one deriving title from him into the position of plaintiff. The short answer to this is that it begs the question; negotiation of the documents by Farr and retention of the proceeds by C.A.V. is unlawful if, but only if, Cuba acquired title to the shipment by virtue of the nationalization decree. This is the issue that cannot be decided in the case if deference to the State Department's recommendation is paid (assuming for the moment that such a recommendation has been made). Nor is it apparent that "self-help," if such it be deemed, in the form of refusing to recognize title derived from unlawful paramount force is disruptive of or contrary to a peaceful international order. Furthermore, a court has ample means at its disposal to prevent a party who has engaged in wrongful conduct from setting up defenses which would allow him to profit from the wrongdoing. Where the act of state doctrine becomes a rule of judicial abstention rather than a rule of decision for the courts, the proper disposition is dismissal of the complaint or staying the litigation until the bar is lifted, regardless of who has possession of the property whose title is in dispute.

VII.

The position of the Executive Branch of the Government charged with foreign affairs with respect to this case is not entirely clear. As I see it no specific objection by the Secretary of State to examination of the validity

of Cuba's law has been interposed at any stage in these proceedings, which would ordinarily lead to an adjudication on the merits. Disclaiming, rightfully, I think, any interest in the outcome of the case, the United States has simply argued for a rule of nonexamination in every case, which literally, I suppose, includes this one. If my view had prevailed I would have stayed further resolution of the issues in this Court to afford the Department of State reasonable time to clarify its views in light of the opinion. In the absence of a specific objection to an examination of the validity of Cuba's law under international law, I would have proceeded to determine the issue and resolve this litigation on the merits.

NOTES

Foreign Agents Registration Act—attorneys representing foreign government in litigation must register

Petitioners, attorneys engaged in the general practice of law, alleged that they had been retained by the Government of Cuba to represent Cuba and its governmental agencies in the United States in legal matters, including litigation, involving the mercantile and financial interests of Cuba and that they had not advised, represented or acted on behalf of Cuba in respect of public relations, propaganda, lobbying, or political or other non-legal matters. In seeking a declaratory judgment that they were not required to register under the Foreign Agents Registration Act,¹ as amended, 52 Stat. 631, as amended, 22 U.S.C. §§ 611-21, the petitioners relied on the exemption in the Act for "any person engaging or agreeing to engage only in private and nonpolitical financial or mercantile activities in furtherance of the bona fide trade or commerce of a foreign principal." The Supreme Court held that "the Foreign Agents Registration Act plainly and unquestionably requires petitioners to register." In reaching this conclusion, the Court stated:

Although the work of a lawyer in litigating for a foreign government might be regarded as "private and nonpolitical" activity, it cannot properly be characterized as only "financial or mercantile" activity. It is clear from the statute and its history that "financial or mercantile" activity was intended to describe conduct of the ordinary private commercial character usually associated with those terms. . . . Furthermore, although the interest of a government in litigation might be labeled "financial or mercantile," it cannot be deemed only "private and nonpolitical." Since an attorney may not qualify for exemption "[i]f any one of these characteristics is lacking," it would be impossible to conclude, under any construction of the statute, that petitioners are engaging "only in private and nonpolitical financial or mercantile activities."

Rabinowitz v. Kennedy, 376 U. S. 605 (U. S. Sup. Ct., March 30, 1964).

¹ Reprinted in 32 A.J.I.L. Supp. 207 (1938).

BOOK REVIEWS AND NOTES

LEO GROSS

Book Review Editor

Répertoire de la Pratique Française en Matière de Droit International Public. Edited by Alexandre-Charles Kiss. Tomes I, IV, V. Paris: Editions du Centre National de la Recherche Scientifique, 1962. Tome I: pp. xxviii, 657. Fr. 89; Tome IV: pp. xii, 477. Fr. 62; Tome V: pp. xvi, 516. Fr. 69. Indices.

Of the five new national digests and repertories of international law—British, French, German, Swiss, and American—which are in preparation, the French was the first to appear. Two more substantive volumes and a sixth containing indices and other apparatus are promised.

Inspired in large measure by the resolution of the Institute of International Law of 1947 urging scientific inquiry into the actual state of international law¹ and by the International Law Commission's concern about insufficiency of documentation on international law, the *Commission des Etudes Juridiques* of the *Centre National de la Recherche Scientifique* took the decision in 1951 to publish the *Répertoire*. Monsieur Kiss, who has worked on the volumes for over a decade, has been able to rely on the guidance and active assistance of Madame Bastid and Professor Berlia, and Professor Gros, the Legal Adviser to the Ministry of Foreign Affairs, has provided a link to the French Government. The work thus appears with the highest possible credentials.

It should be made quite plain that this is not a digest of international law, in the sense of Hackworth's *Digest* or the new Whiteman *Digest*,² but a repertory of French practice. Its materials are drawn from the published French diplomatic documents; legal advice of the *Service Juridique* of the Foreign Ministry; constitutions, laws, and decrees; answers to parliamentary questions; cases; statements by representatives of France in international organizations; French memorials and statements by counsel for France before international tribunals. Treaties (with the exception of the United Nations Charter), doctrine, and the decisions of international tribunals are not included. The perspective taken is thus distinctively a French one. The fact that the French Government has been somewhat less liberal than that of the United States in publishing diplomatic correspondence and state papers has meant that the diplomatic correspondence of recent decades is comparatively lightly represented, while the legal opinions of the *Service Juridique* are not reported after 1939. But everything which is in the public domain, whether officially or privately

¹ Resolution of Aug. 12, 1947, 41 *Annuaire de l'Institut de Droit International* 261 (1947); reprinted in 42 *A.J.I.L.* 168 (1948).

published, has been consulted with meticulous care. The cases, for example, have been compiled from over twenty journals.²

The arrangement of the *Répertoire* is a model of clarity and such as to make reference extremely easy. The material is analytically arranged, and each extract is numbered in the margin. At the beginning of each section is a concise restatement of the law, incorporated within which are the numbers of the extracts bearing upon the particular point. As in other collections of national practice, no attempt has been made to reconcile inconsistencies in national views on particular points of international law, and the reader is left to draw his own conclusions about the state of the law. In this respect, the *Répertoire* departs from the approach of our *Restatement of the Foreign Relations Law of the United States*, but the idea of a "restatement" was not far from the minds of those who conceived this repertory, as Madame Bastid's preface makes clear.³

Cross-references lead one to extracts appearing under other headings, and additional cases and other materials are listed after the quoted material in those instances in which the precedents are so numerous that all cannot be included. So well ordered are the contents of the three volumes thus far published that one hardly has need of the indices which appear in each, or of the comprehensive index which will form a major part of the last volume.

So rich is this treasure-house of international law that it is difficult and possibly unfair to single out passages to which particular interest attaches. The number of cases bearing on the law of treaties (Vol. I, pp. 45-589) may perhaps surprise the American reader, who has probably proceeded on the assumption that the courts of his country have decided more cases on this subject than the tribunals of any other single country. An important section in Volume I treats of the significance of unilateral acts (pp. 617-645). Volume IV deals heavily with commerce and the rights of foreigners (pp. 187-470). Substantially more than half of Volume V is occupied by an article-by-article reporting of the views of representatives of France on the interpretation and application of the United Nations Charter (pp. 161-484).

It would be a great pity if the national digests or repertories of international law—whether American, British, French, German, or Swiss—or the helpful collections of state practice appearing in journals should entail a polarization of international law, resulting from an identification of distinctive national versions of this law. Although certain national habits and ways of looking at the law are probably inevitable, the diplomat and civil servant, as well as the scholar, must guard against asking what is the correct *national* view of international law on a particular point. The collection of national materials bearing on international law is essential to scientific examination of the law between nations, but it must be a starting point and not the ultimate objective of research—a means and not an end. With the new sources of international law which are being made available to him, the international lawyer has a challenging

² Preface at ix.

³ *Ibid.*

new opportunity to reorient doctrine to reflect the actualities of the law of nations. Professor Waldock's use of the *Répertoire* in his reports to the International Law Commission⁴ is representative of the way in which this work should and will make its influence felt.

The word "indispensable" is not one lightly to be used. This magnificent monument to French scholarship and to France's contribution to international law can be described in no other way. Research on any point of public international law will be incomplete if the *Répertoire* has not been consulted.

R. R. BAXTER

Legal Problems in International Trade and Investment. Edited by Crawford Shaw. (Published for the World Community Association of the Yale Law School.) Dobbs Ferry, N. Y.: Oceana Publications, 1962. pp. xiii, 265. Index. \$12.50.

The papers collected in this useful and stimulating volume represent the fruits of the 1961 Conference on International Trade and Investment conducted at the Yale Law School. That conference was organized by a group of law students whose energy and imagination were largely responsible for its success. Great credit is due to them and to Professor Myres McDougal for his rôle in making the symposium possible and in bringing the printed version to those who were not fortunate enough to hear the papers in person. In this reviewer's opinion they constitute an invaluable introduction to the principal areas covered and an essential library addition for those who must keep abreast of the ever-enlarging horizons of international law.

As one sifts the breadth and variety of the topics treated, one cannot but marvel that an area so vast and a jargon previously unfamiliar have become the common heritage of the American lawyer in the brief period since the second World War. The extension of international trade, the burgeoning development of international economic interests, the expansion of international economic co-operation—not to mention competition—among individuals and nations in developing the world's resources have accounted for a marked upsurge in symposia, legal literature and law school courses examining the numerous problems facing lawyers in this increasingly important field. It is a conservative guess that more consideration has been given to the many facets of international investment since 1950 than they received in the preceding century.

The volume consists of fourteen papers grouped under the four major headings of Trade, Anti-Trust Problems, Regional Marketing, and Taxation. The first group contains contributions by Mr. Mark S. Massel on the lawyer's role in international trade; by Deputy Assistant Secretary of State, Richard N. Gardner, on some current imperatives of United States

⁴ Second Report of Sir Humphrey Waldock on the Law of Treaties to the International Law Commission, p. 37, note 36, and p. 43, note 45 (U.N. Doc. A/ON.4/156) (1963); Addendum, p. 38, note 46, and p. 61, note 86 (*ibid.*/Add. 1) (1963).

foreign policy; by Mr. James G. Johnson on the day-to-day issues confronting companies in organizing their overseas operations; and by Professor Stanley D. Metzger on the future course of United States trade policy. Part II of the collection offers three excellent studies of anti-trust problems by recognized experts: Professor Corwin Edwards charts the current trend of foreign anti-trust laws, observing pointedly that in no Latin American country, and in only one Asiatic (Japan) and one African country (South Africa) is there any active policy concerned with restrictive agreements; Mr. Sigmund Timberg (whose collaboration in any such symposia has become well-nigh indispensable) discusses the effect of the European Common Market on anti-trust and patent policy; while Mr. George Haight offers us a scholarly summary of American jurisprudence on the Sherman Act and foreign operations, together with some searching comments on the relationship of international law to anti-trust jurisdiction.¹

In Part III on Regional Marketing Problems, Professor Eric Stein deals with the development of regional markets in Europe, specifically the Common Market of the "Inner Six" and the European Free Trade Association of the "Outer Seven." Mr. Martin Domke's expertise in his specialty of commercial arbitration is directed to the settlement of trade disputes in regional markets; and Mr. George Ray gives us the benefit of much practical experience in the development and maintenance of an oil operation in the Middle East, emphasizing the unique political, social, and climatic factors which form the legal basis of contractual arrangements in that area.

Part IV (Tax Problems) contains papers on the Taxation of Private Foreign Investment, by Congressman Hale Boggs, Taxation of Foreign Income, by Mr. David R. Tillinghast, and Tax Treaties with Under-industrialized Countries, by Mr. Matthew J. Kust. Mr. Kust, in the interest of encouraging private foreign investment, argues cogently for a new treaty approach under which the United States (and other Western Powers) would abandon the policy of shifting tax revenues from the treasuries of under-industrialized nations to the United States Treasury, in favor of a tax-sparing arrangement. A special outline and bibliography on tax aspects of organizing international operations, by Mr. Walter Slowinski, supplements the valuable materials in this section.

The utility of the volume as a desk guide is further enhanced by a comprehensive English language bibliography on Doing Business Abroad, prepared by the library staff of the Association of the Bar of the City of New York.

ALWYN V. FREEMAN

¹ For further treatment of the Comparative Aspects of Anti-Trust Law in the United States, the United Kingdom and the European Economic Community, attention is directed to the papers presented at a conference organized on June 14-16, 1963, by the British Institute of International and Comparative Law, and published as Supplementary Publication No. 6 (1963) of the International and Comparative Law Quarterly.

Wörterbuch des Völkerrechts. Vols. II, III and IV. 2d ed. Edited by Hans-Jürgen Schlochauer. Berlin: Verlag Walter de Gruyter & Co., 1961, 1962. Vol. II: *Ibero-Amerikanismus bis Quirin-Fall.* pp. xvi, 815. DM. 180; Vol. III: *Rapallo-Vertrag bis Zypern.* pp. xii, 903. DM. 220; Vol. IV: Index. pp. iv, 141. DM. 40.

The ambitious enterprise of producing a second and thoroughly revised edition of Strupp's *Wörterbuch* has been successfully concluded in a remarkably short period of time.¹ The work includes articles on public and private international law, on international organization, on some aspects of international politics, and the more significant decisions of domestic tribunals in various countries and the jurisprudence of international tribunals. The coverage seems more than adequate. Each of the volumes contains a number of leading articles by internationally known scholars.

Volume II contains major articles by Schlochauer on international adjudication and the International Court of Justice, by Kunz on war and the laws of war, by Scheuner on collective security, collective defense and prize law, by Grewe on peaceful change (*eo nomine*), by Bindschedler on principles of international organization, and by Makarov on public and private international law.

Vol. III includes an article on the development of international law (81 pages in double column) divided into four parts: history of international law to the settlement of Westphalia, by Preiser; European international law 1648-1815, by Reibstein; the expansion of international law 1815-1914, by Scupin; and recent developments, by Scheuner. Kunz contributed a systematic and theoretical article on international law, and Guggenheim an article on the relation between international law and municipal law along similar lines. Guggenheim and Marek have an article on treaties, Münch one on the United Nations, Barandon on the League of Nations, and Schindler on the International Law Commission. Schlochauer contributed comprehensive studies on arbitration, the Permanent Court of Arbitration and the Permanent Court of International Justice. Kelsen contributed an article on sovereignty. The advisory opinions of the International Court of Justice and of its predecessor are analyzed by Bernhardt and Berndt. Each entry is accompanied by bibliographies, some of which are extremely elaborate. They are, to some extent, continuations of those printed in Strupp.

The Index volume contains a most useful list of articles in German, English and French. The table of cases, both domestic and international, the subject index, and the list of contributors and their articles are in German only.

It seems unnecessary to repeat what has already been said about the first volume. The *Wörterbuch* is an achievement of the first order and Professor Schlochauer and his principal collaborators, Professors Herbert Krüger, Herman Mosler and Ulrich Scheuner, deserve praise and congratulations. Finally, the *vœu* may be expressed that a Foundation in

¹ For review of Vol. I, see 56 A.J.I.L. 281-282 (1962).

this country may allow itself to be persuaded to facilitate an English translation to make the *Wörterbuch* even more serviceable.

LEO GROSS

India's International Disputes: A Legal Study. By J. S. Bains. New York: Asia Publishing House, 1962. pp. viii, 219. Index.

As the title suggests, Doctor Bains, who is a Reader in Political Science at the University of Delhi, endeavors in this book to analyze the legal issues in the most significant international disputes involving India and to appraise the legal position of India on each of these issues. The disputes are eight in number—one with South Africa (treatment of persons of Indian origin), two with Pakistan (water rights and Kashmir), one with Ceylon (treatment of persons of Indian origin), two with Communist China (Tibet and the boundary), and two with Portugal (right of passage and the seizure of Goa). Though generally inclined to side with India, the author points out some weaknesses in India's positions, particularly in the dispute with Ceylon and on some aspects of the border controversy with China.

Doctor Bains is not altogether consistent in his jurisprudential stance. At times, he writes like a legal conservative and strict positivist. "Custom and treaties," he declares, "are the only real sources of international law and in themselves are sufficient to take care of every situation." Consequently, there is no necessity to fall back upon "general principles of law." Indeed,

if a plaintiff State is not able to support its case by reference to a specific rule of customary or conventional international law, the plaintiff has no case in international law and the matter belongs to the domestic jurisdiction of the defendant State. *Ce qui n'est pas defendu est permis.* (pp. 39-40.)

Upholding the Harmon doctrine, he concludes that India was free to divert the waters of the upper Indus regardless of the effect on Pakistan. He rejects the contention that a treaty concluded by a state under duress is invalid, and does not regard self-determination as a legal right. India, he asserts, has sometimes subordinated her legal rights to moralistic considerations, with detriment to herself. Accordingly, he calls for a fuller exploitation of India's "rightful legal position" (pp. 210-211).

Yet Doctor Bains also speaks with approval of the "new conceptions of international law" which must cater "to the needs and interests of the newly emerging Afro-Asian States" (pp. 193-194), and rejects conquest as being contrary to "new international law" (p. 86). Colonialism is not validated by "prescription" (p. 198). Since "traditional international law was the product of imperialist Europe, its rules cannot be applicable to the newly emerging Afro-Asian States" (p. 200). Upholding India's seizure of Goa, the author declares with evident satisfaction:

Her understanding of the rules of international law are based on the conception of *Dharma* or right reason. In conformity with this ap-

proach she has accepted the validity of only those rules which are just and to which she has given her consent. Indian action in Goa, therefore, has exposed Portuguese colonialism as a violation of the law of nations. It has, moreover, fortified India's position as a law abiding nation and the defender of the purposes and principles of the United Nations Charter. (p. 208.)

Despite doctrinal inconsistencies and some imprecisions of formulation, Doctor Bains has produced a useful if somewhat superficial survey of India's international disputes. The book is also of value in throwing light on Indian attitudes toward international law and on the functions of law in international relations.

O. J. LISSITZYN

Compulsory Jurisdiction of the International Court of Justice. By Ram Prakash Anand. (Published under the auspices of the Indian School of International Studies, New Delhi.) Bombay: Asia Publishing House, 1961. pp. xvi, 342. Index.

As Percy E. Corbett observes in the Foreword, "the characteristic quality of this book is balance." The author presents a well-written account of the development of compulsory jurisdiction, the general objections against it, the jurisdiction under Article 36, paragraphs 1 and 2 of the Statute, reservations in Declarations accepting the jurisdiction, the attitude toward the Court, and finally of compulsory jurisdiction under other provisions of the Statute. The latter chapter deals with what is usually called incidental jurisdiction and advisory opinions. Skillful use of doctrine and practice distinguishes this book.

The author follows established usage even where it obscures meaning or has become outdated. Thus the term "national judge" is a bit confusing and it would be simpler and more in accordance with practice to speak of *ad hoc* judges. The author tends to underestimate their usefulness particularly in the deliberation of the Court leading to the formulation of the judgment. It may also be pointed out that the term "optional clause" which had its place in the scheme of the Permanent Court of International Justice has no basis in the Statute of the present Court.

He is highly critical of reservations *ratione temporis* which permit the declarant states to terminate their commitment "at any moment and without any warning" (p. 184). He is also rightly critical of the Statute itself, which is open to "the worst kind of opportunism" in permitting what for want of a better term might be called "snap Declarations." What he has in mind is naturally the case of Portugal. Largely following Professor Waldock's analysis¹ he suggests either, according to the United Kingdom model, a carefully worded Declaration or, preferably, an amendment to the Statute. He seems on weaker ground when he argues that a state which has made a Declaration without time limits cannot terminate its acceptance at all or only with the consent of other declarant states

¹ "The Decline of the Optional Clause," 32 British Year Book of International Law 281 (1955-56).

or even with "the consent of all the signatories of the Statute" (p. 179). It is true that as between declarant states a legal bond is in force, but it does not necessarily follow that the rules concerning termination of treaties apply without qualification to the Declarations made under Article 36, paragraph 2, of the Statute.

In the author's view, the exercise of the advisory function constitutes, or may in certain circumstances constitute, a form of compulsory jurisdiction. This would be so if the request for an advisory opinion related to an actually pending dispute. In such a case "the Court would pronounce, in fact, if not in law, upon the dispute itself for which, however, the party had not accepted its jurisdiction" (p. 266). In the author's view, the ruling of the Permanent Court of International Justice in the *Eastern Carelia* case was sound and constitutes "convincing proof that the consent of States is necessary not only in regard to contentious cases, but also in advisory cases, where the request for the opinion relates to a dispute between states so that the answer of the Court would decide the issue that is subject of the dispute" (p. 269). He argues, consequently, and in accord with Lauterpacht, that the Advisory Opinion of the International Court of Justice in the *Peace Treaties* case was an abandonment of the *Eastern Carelia* ruling, but also expresses the hope that the Court will return to the *Eastern Carelia* doctrine (p. 280). This is not the place to pursue the matter further, but it may be observed first that Lauterpacht's gloss on the *Peace Treaties* opinion has not been generally accepted, and, secondly, that there is no compelling reason for requiring the consent of the parties at variance if an organ of the United Nations, in order to formulate a recommendation with respect to the dispute, requests the Court to elucidate a legal question.

In discussing the reasons for the decline of the compulsory jurisdiction of the Court and its prospects for the future, the author follows the usual pattern of "on the one hand" but "on the other." In the end he comes down hard on keeping this jurisdiction limited and the Court's activity restricted. A strong and active court would not be in tune with a weak international community. This view is in accord with that of some of the wisest and most experienced men in the field of international law. But is it a sound view? To go into this question would require an unwarranted extension of the proper scope of a review. At present governments choose to pursue a policy of security from law rather than a policy of security through law, a policy of relying almost exclusively on the instruments of diplomacy rather than on the instruments of law, in short, a policy which so far, at any rate, has achieved more or less prolonged periods of armistice rather than a condition of peace. It is one thing to concede that governments pursue a certain policy to achieve peace, but it is another to concede that this policy is likely to achieve the professed objective. Do diplomats and their methods, in the light of their past performance, really deserve a virtually exclusive monopoly in the conduct of affairs of states?

LEO GROSS

NATO "Fair Trial" Safeguards. Precursor to an International Bill of Procedural Rights. By Lt. Col. Robert B. Ellert, JAGC, U.S.A. The Hague: Martinus Nijhoff, 1963. pp. vi, 89. Index. Gld. 9.40; \$2.60.

In this monograph Colonel Ellert discusses the procedural guarantees in criminal trials of members of the forces contained in Paragraph 9 of Article VII of the NATO Status of Forces Agreement,¹ proposes some modifications to eliminate problems which either have arisen or appear to be inherent in the present wording, and then suggests that "the experience of these NATO countries in the implementation of the NATO 'fair trial' safeguards among different systems of law may be utilized to achieve a minimum standard of procedural justice for all aliens and, ultimately, for all persons."

The author finds that the "fair trial" provisions of the NATO Status of Forces Agreement may well be added to the list of international agreements under which individuals are granted rights under international law, although, as he points out, even here the wronged individual has no procedural capacity to enforce his rights and must, therefore, as usual, rely upon his government to espouse his cause. (In this area American servicemen have, for the most part, experienced little difficulty in obtaining the aid of the Government, even though, as the author also points out, they cannot compel such assistance by recourse to the courts.) He proposes that these "fair trial" safeguards be made applicable generally in the trials of aliens, by their inclusion in a multilateral convention, or, if that is not feasible, in the maximum possible number of bilateral treaties of friendship, commerce, and navigation; and he submits a redraft of these NATO provisions, revised to eliminate the problem areas to which he has previously drawn attention, and to fit the altered circumstances for which he envisions their use (Appendix 4). He further proposes that such international agreements provide that the home state of the alien have the right to represent him as his agent where any of these safeguards are alleged to have been withheld; but that, if it refuses to do so, the alien be authorized to proceed directly against the offending state under a procedure somewhat similar to that provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms,² with ultimate recourse to some international tribunal (Appendix 5).

There is much to be said for Colonel Ellert's proposal; and, certainly, the fact that the procedural safeguards of the NATO Status of Forces Agreement (as well as the substantially identical safeguards contained in the same type of agreements to which a number of other and dissimilar countries, such as Australia, Iceland, Japan, Libya, Nicaragua, the West Indies Federation, etc., are parties) have already had practical application in several thousand cases which have demonstrated their strengths and

¹ 4 U. S. Treaties 1792; 48 A.J.I.L. Supp. 83 (1954).

² 45 *ibid.* 24 (1951).

their weaknesses, makes them an admirable source for the suggested international legislation.

A few omissions were noted in Colonel Ellert's otherwise excellent presentation. For example, it would seem that any discussion of the right of the Judicial Branch to compel the Executive Branch to take some specific action in connection with our relations with a foreign country on behalf of an American serviceman in the toils of the law of that country (Chapter IV) should have at least a passing reference to the decision of the United States Supreme Court in *Wilson v. Girard*.³ Again, the fact that the Warsaw Pact countries failed to deal with the subject of fair-trial safeguards in their "Status of Forces Agreements"⁴ might be some indication of the practical problem of obtaining Communist adherence to a multilateral convention on the subject. But these are comparatively minor defects and do not materially detract from the original and substantial contribution which Colonel Ellert has made to the solution of a problem which, in these days of easy international travel, is destined to become ever more important.

HOWARD S. LEVIE

Internationales Staatsangehörigkeitsrecht. By Walter Schätzel. Edited after the author's death by Alfred Rudolf. With an obituary by Hans Wehberg. (Vol. 3 of Walter Schätzel, *Internationales Recht: Gesammelte Schriften und Vorlesungen.*) Bonn: Ludwig Röhrscheid Verlag, 1962. pp. 274. DM. 39.

This posthumous edition is the third volume of a comprehensive collection of essays and lectures on international law. The first volume (1959) dealt with questions of acquisition of territory; the second (1960) with international jurisdiction. The present volume is concerned with "International Law of Nationality," a subject to which Professor Schätzel has contributed numerous studies in the course of a distinguished career, which began after the close of the first World War. Special mention may be made of his two-volume work on *Changes of Nationality Resulting from Cessions of German Territory* (1921/22), as well as of the authoritative *Commentary on the German Nationality Law* (2nd edition, 1958). The purpose of the present volume was to make available essays and lectures which were either out of print or which had never been published, in addition to some writings which the author deemed to have enduring importance.

Professor Schätzel uses his studies on the various stages of nationality law in the past century and a half to point up some of the unsolved problems of modern nationality laws, which arise frequently from the conflict between the interests of individual sovereign states and the needs of international organization under modern humanitarian principles (p. 26). His approach is that of an internationalist and a comparatist. The first essay is a broad outline of the history of the nationality concept (pp. 15-

³ 354 U. S. 524; 51 A.J.I.L. 794 (1957). ⁴ 52 *ibid.* 221 (1958).

26). Then follow a discourse on nationality at the time of the Congress of Vienna (pp. 27-38) and two extensive discussions on nationality problems after the first World War (pp. 39-91) and the special problems, highly complex, of nationality in Alsace-Lorraine under the Versailles Treaty (pp. 92-179). On the latter subject Schätzel's criticism is moderate and objective and, what is more, complemented by a recognition of the novel problems which urged a new approach to nationality questions in the wake of the 1914-1918 war. It is interesting that as early as 1929 he formulated these new problems as follows: emancipation of the married woman; emancipation of the world from the domination of European international law; emancipation of the population from the territory; emancipation of the state from its territory (pp. 158 *et seq.*). "The Nationality of Political Refugees" (pp. 216-243) and "De facto Nationality and de facto Statelessness" (pp. 244-254), both written in 1960, do justice to some of the most serious present-day difficulties regarding nationality. The volume winds up with a discussion of "The jus sanguinis of the Married Mother" (pp. 255 *et seq.*), in which the author advocates the view that a German woman married to a foreigner should not only have the right to retain her German nationality (which she has had since 1957) but also the right to transfer her nationality to her children; he shows that many modern nationality laws tend in this direction.

M. MAGDALENA SCHOCH

Die Verhältnis von Parlament und Regierung im Bereich der auswärtigen Gewalt der Bundesrepublik Deutschland: Studien über den Einfluss der auswärtigen Beziehungen auf die innerstaatliche Verfassungsentwicklung. By Hans W. Baade. (Veröffentlichungen des Instituts für Internationales Recht an der Universität Kiel, No. 46.) Hamburg: Hansischer Gildenverlag, Joachim Heitmann & Co., 1962. pp. 247. DM. 30.00.

A reading of this volume deepens one's regret that German occupies a less prominent place among the American scholar's linguistic tools than it once did. For younger scholars that lack German are deprived of access to the valuable insights and syntheses of Professor Baade's study.

Although certainly qualifying as legalistic, Professor Baade's treatise has its roots also in the approaches of political science and of sociology. This interdisciplinary approach is a necessarily appropriate consequence of the selection of topic, better indicated by the subtitle than by the title of the volume. While a number of contemporary studies seek to determine the influence of domestic politics upon international politics, the present study is concerned with influences running in the opposite direction. Although the object of scholarly concentration is the West German Constitution and the influence of foreign relations thereupon, concern for constitutional development produces an examination that not only identifies the legal and political facets of the topic but also perceives their fusion in practice. Hence, because method is eclectic, that is, open to the employ-

ment of whatever devices will illuminate the topic, the book is as much, if not more, a political science treatise as it is a legal treatise.

Indeed, in the first section the effort to develop a conceptual framework leads to a review of several speculative studies, among them—again unfortunately for non-readers of German—such less well-known theses as those of Otto Hintze and Manfred Langhans-Ratzburg, the latter's ideas classifiable as geo-jurisprudence. A problem brought to our attention and meriting further study is one paralleling the much-discussed problem of the reception of foreign law, namely, the reception of constitutions and of particular types of constitutions.

Discussion of the West German Constitution is, in an important sense, employed as illustration rather than as central theme. Perhaps the most concise illustration of the significance of foreign affairs and their influence is the statistic that in 1953-1957, with the Government responsible for 51% of the bills introduced in the legislature and for 72% of those passed, the Foreign Ministry's total of 71 bills was exceeded only by the Finance Ministry's total of 81 bills.

That the West German situation at the end of the 1950's is primarily illustrative is further shown by the discussion of methods introducing the last portion of the study. Discussion of methods, brief and to the point, is phrased in terms of constitutional interpretation with the aid of legal history, of comparative law (in *The Civic Culture* (1963) Gabriel A. Almond and Sidney Verba have suggested that all social science studies are essentially comparative, whether or not deliberately so) and of the history of ideas. Of the three approaches, greatest attention is devoted to comparative law, its uses and limits, with important incorporation of methodological discussion by students of comparative government—again, a bridge connecting law with political science. Legal history and comparative law are treated as foundations for the construction of models, of the "ideal types" of Max Weber and of the "empirical types" of Georg Jellinek.

If criticism is due, it is to the limitations of coverage in the volume, particularly in the comparative section, which is limited to the Constitutions of the United States, France, and Belgium—in the Belgian instance apparently without access to the provisions of the antecedent Netherlands Constitution of 1815. It is to be hoped that Professor Baade will pursue his investigations further, making continued use of the several techniques available to produce the more comprehensive study suggested by the book under review, which builds very effectively upon the earlier related studies listed in a 21-page bibliography.

WESLEY L. GOULD

Disarmament: Its Politics and Economics. Edited by Seymour Melman. Boston: American Academy of Arts and Sciences, 1962. pp. 398.

Most of the fourteen papers which Professor Melman has edited for this volume were originally prepared for a research conference on disarmament

held at Columbia University in December, 1961; others were written especially for the publication. Some of the essays deal with the problems of making new international rules for disarmament (particularly those by Leonard S. Rodberg, Lawrence S. Finkelstein, and Louis B. Sohn, on various aspects of inspection). But most of them, true to the book's subtitle, treat of political and economic problems (Bernard T. Feld on the Geneva negotiations on general and complete disarmament; Bertrand Russell on the early history of the Pugwash movement; David F. Cavers and Lewis C. Bohn on the relationship of disarmament and peace; Emile Benoit on the economic impact of disarmament in the United States; Richard C. Raymond on the problems of industrial conversion; Robert W. Kastenmeier on U. S. machinery for disarming; Arthur I. Waskow on American military doctrine; Herbert Ritvo on diverse Soviet views of disarmament; and Christoph Hohenemser on the "nth" country problem).

Readers of this JOURNAL will probably find the essays which discuss possible new rules and mechanisms for governing disarmament interesting, but peripheral, because the specific problems are so highly political. They will certainly welcome Roger Fisher's "Internal Enforcement of International Rules," which, despite the immediate impracticality of the author's suggestions, has considerable general significance for legal theory.

Professor Fisher's essay amplifies an earlier and widely reprinted contribution of his ("Bringing Law to Bear on Governments," 74 *Harvard Law Review* 1130-1140 (1961)) and argues persuasively that disarmament enforced by combined domestic and international techniques would be more effective than disarmament enforced only by superior international authority. He recommends arranging matters so that "those forces in support of respecting rules have the maximum opportunity to be effective. . . . [A] promising way to do this is to try to weave the international obligations into the domestic rules in each country, and to rely in the first instance on national enforcement." What he has in mind, for example, is for the United States to amend the Interstate Commerce Act to regulate arms shipments; to pass statutes authorizing anyone whose land the Government has taken for an illegal (i.e., armaments) purpose to recover his land plus triple damages; and to amend the Criminal Code to make it a crime to design, construct, or to transport arms, except under specified conditions.

Mr. Fisher's arguments are ingenious and his illustrations compelling. "All" it takes to make them a reality is the firm determination of the United States, the United Kingdom, the Soviet Union, mainland China, and General de Gaulle to agree to an airtight system for preventing themselves and others from evading new disarmament rules. Mr. Fisher realizes how far we are from that goal, especially since he knows that the success of his system depends in part on states' disclosing facts through inspection and verification techniques, which have so far been unacceptable to the Soviet Union (and presumably to China), and about which the French will not even condescend to negotiate. Nonetheless, his pro-

posals for enforcing international rules, once states have agreed upon them, have theoretical value for many fields of international activity and are therefore especially significant for all legal scholars.

RICHARD N. SWIFT

Les Forces Armées des Nations Unies en Corée et au Moyen-Orient. By Gamal El Din Attia. Geneva: Librairie Droz; Paris: Librairie Minard, 1963. pp. 467. Fr. 40.

This is a study largely limited to the legal aspects of the use of armed forces in Korea and the Middle East. The purpose of the author, apart from that of throwing additional light on these two examples of the use of collective military measures, is to contribute to the clarification of certain legal aspects of the problem of an international force. In fact, this is two studies in one, for the author, instead of undertaking a step-by-step comparison of the two operations within a topical framework, has made separate studies of the Korean and Middle East experiences, and only at the end, in a brief section, does he attempt to pinpoint the similarities and differences, and to formulate conclusions of a more general order bearing on the problem of an international force for keeping the peace. The author justifies this degree of separateness in the treatment of the two forces on the ground that the two forces are almost totally different.

Of the two studies, that of UNEF undoubtedly presented fewer difficulties for the author and raises fewer questions in the mind of the reviewer. It is based largely on U.N. documents readily available, and to a large extent it deals with non-controversial matters. Focusing attention as it does on the essentially legal aspects of the operation, it usefully supplements Gabriella Rosner's *The United Nations Emergency Force*,¹ which deals more fully with political and administrative aspects.

The study of the Korean operation presents greater difficulties and of necessity deals with many controversial questions on which much has been written, but without substantially narrowing wide areas of disagreement. The author reviews these divergencies of views and adds his own, but often without having the benefit of access to additional evidence. On some of these issues, the author's conclusions seem sound; on others, more questionable. For example, on the question of the legal basis of collective military measures in Korea, the author reaches the conclusion that the Security Council resolutions of June 25 and 27, 1950, were not decisions of the Council and that American military intervention and presumably the military intervention of other Members could not find justification in these resolutions. Instead, justification was to be found in Article 51. The author's argument on the first point, that the Security Council recommended military assistance instead of deciding under Article 42 that it should be given, and that in any case the resolutions were not valid, since a permanent Member was absent and not voting, is based on a literal

¹ New York: Columbia University Press, 1963.

and restrictive interpretation of Charter provisions which finds little support in U.N. practice or in opinions of the International Court of Justice. Furthermore, in his effort to justify measures taken under Article 51, the author finds it necessary to take a very liberal view of Charter provisions in order to get around the limitation which the article places on the exercise of the right of individual and collective self-defense. If the right of collective self-defense is to be broadened in order not to put a non-Member in an unequal position under Article 2(6), it would seem equally justified and more in accordance with the spirit of the Charter liberally to interpret the powers and procedures of the Security Council in order to achieve the purpose set forth in Article 1(1).

To take another example, the author states (p. 166) that the General Assembly resolution of October 7, 1950, did not recommend, but only permitted the crossing of the 38th Parallel. While it is true that the resolution did not expressly recommend crossing the Parallel, it did recommend that "all appropriate steps be taken to ensure conditions of stability throughout Korea," that "all constituent acts be taken," including the holding of elections under the auspices of the United Nations, to establish "a unified, independent and democratic government in the sovereign state of Korea," and that United Nations forces should not remain in any part of Korea longer than necessary for the achievement of these purposes. So long as the North Korean forces resisted, it is difficult to see how these objectives could be achieved except by crossing the 38th Parallel. This is not to say that the crossing was necessarily justified under the law of the Charter, but it does suggest that the United States Government at the time was not alone in believing that the military situation at the time permitted the use of military means to achieve a political goal which the General Assembly had earlier set.

The author's general conclusions with respect to the establishment of an international force to keep the peace are eminently sound. He has added to his study a useful bibliography. This is a valuable addition to the growing literature on a subject which has long kindled man's imagination and with respect to which we are now gradually building the knowledge and understanding which will permit sound advance.

LLELAND M. GOODRICH

Histoire de l'Internationalisme. Vol. III: *Du Congrès de Vienne jusqu'à la Première Guerre Mondiale (1914)*. By August Schou. (Institut Nobel Norvégien, Publication VIII.) Oslo: H. Aschehoug & Co. (W. Nygaard); Copenhagen: Munksgaard; Paris: Presses Universitaires de France; The Hague: Martinus Nijhoff, 1963. pp. viii, 565. Index. Norwegian Cr. 75; 75 s.

This substantial volume is the last of a series issued by the Norwegian Nobel Institute on the history of the phenomenon which in our day is burgeoning in a plethora of multilateral international organizations and

treaty structures, the co-operative activities beyond the political units which people support as nations. The work was begun by Christian Lous Lange, Secretary General of the Interparliamentary Union, 1909-1933, and Nobel peace laureate in 1921, who did a first volume¹ that reviewed the ideas of a lasting peace from the earliest times up to 1648, and part of a second volume,² which dealt with the development of international law and the philosophies of the 17th and 18th centuries that embraced peace plans. That volume was completed by August Schou, Director of the Norwegian Nobel Institute, author of the third volume, which, among other things, traces the origin of the "peace movement" on both sides of the Atlantic.

The internationalism of the 19th century consisted of the peace movement, the labor movement from which sprouted the sundry varieties of socialism, the appearance of free trade, the development of the colonial system, and the products of the increase of intercommunication and of technical co-operation. This volume summarizes these popular social movements largely in the form of sketches of the writings of their leaders. At the beginning of the period the Holy Alliance provoked half a dozen studies of political organization. In 1872 the *Alabama* arbitration award was made, and in the next few years the *Institut de Droit International*, the International Law Association, the Interparliamentary Union and the regular Universal Peace Congresses were organized. That contrast is the salient feature of this century of internationalism. In other eras men had ideas, wrote them out and that was that. In the 19th century the idea received expression in a society, a series of conferences or in the official sector as a treaty or bureau and became an operating entity.

Mr. Schou has done a literary rather than an analytical history of internationalism, which is nowhere accurately defined. Summarizing the writings of the time does reflect the ideas afloat, even if the time, as was mostly the case, was blissfully unaware of the idea. A chapter on the ambiguous subject of imperialism is not derived from contemporary writings and does not reflect the thought of 1870-1900 as to the expansion of the European system.

The unification of Italy in 1870, the formation of the German Reich in 1871, the *Alabama* claims award in 1872, the socialist unrest accompanying the political changes of those years all had their effect on the elements of "internationalism." Mr. Schou pursues his thesis through the thriving activities of the peace societies of England, France, Italy, Austria, Germany, the United States, Scandinavia and elsewhere, with their international congress headquarters at Bern, Switzerland. The International Law Association and the *Institut de Droit International* were organized in 1873, the Interparliamentary Union in 1889. Mr. Schou includes in his roster the Second Socialist Internationale, 1889-1918. In this later period there was much emphasis on law. The Red Cross is noticed as the humane phase of administrative law, but the evolution of the postal, telegraphic

¹ Reviewed in 14 A.J.I.L. 483 (1920). ² Reviewed in 49 *ibid.* 434 (1955).

and other bureaus is imperfectly covered. The narrative leads up to the Hague Peace Conferences of 1899 and 1907 which somewhat organized the pacific settlement of international disputes and codified some rules of warfare; here is largely a review of the work of Léon Bourgeois, Féodor Martens, Louis Renault, Sir Thomas Barclay and Luis Drago.

The many activities touched upon in the final chapter on the years just before the war of 1914-1918 showed results in the postwar period; which is why the story of these isolated events and ideas should be continued until they fit into their destined mold. Edwin Ginn and Andrew Carnegie are mentioned, but the World Peace Foundation and the Carnegie Endowment for International Peace were both established in 1910 and before 1914, changing the range of the peace movement by the ability to support specific projects. In its treatment of the material, this history of "internationalism" does not exhibit any particular evolution of action or ideas from the period before 1914 to the era of the League of Nations.

DENYS P. MYERS

Documents on German Foreign Policy, 1918-1945. Series D (1937-1945).

Vol. XI: *The War Years, Sept. 1, 1940-January 31, 1941* (Dept. of State Pub. 7083). pp. xciv, 1267. Index. \$4.75; Vol. XII: *The War Years, February 1-June 22, 1941* (Dept. of State Pub. 7384). pp. lxxxii, 1109. \$4.50. Washington, D. C.: U. S. Government Printing Office; London: H.M. Stationery Office, 1960, 1962.

The ten months covered by the 1,413 papers printed in these two volumes fall in the most successful period of National Socialist Germany's history. All its action proved to be transitory. Within the year after the over-running of Poland, Germany had occupied Belgium, Luxembourg, The Netherlands and Norway, and, with Italy, made an armistice with, and partially occupied, France. In realizing the "new orders" in Europe and Greater East Asia, "the cooperation of Germany, Italy and Japan for the purpose of neutralizing America" (Vol. XI, p. 57) was needed. The Tripartite Pact of September 27, 1940, which was signed in English, is the alliance which mutually recognizes the two "new orders" and provides for their co-operation and assistance in case of attack. Hungary, Rumania and Bulgaria adhered to the Axis Pact with some special understandings. Spain by the secret protocol of Hendaye, October 23, 1940, adhered to the German-Italian Treaty of Alliance of May 22, 1939, but only declared its readiness to accede to the Pact in the future, which did not happen. Spain expected the Axis to retrieve Gibraltar for it, but did contribute volunteer troops against the Soviet Union in June, 1941.

Slovakia, in German eyes a protectorate surviving from the Czechoslovakia which had a government-in-exile in London, was made a party to the Pact by Berlin. Yugoslavia's Government acceded to the Pact on March 25, 1941, and on March 27 was overthrown by King Peter, whose Government on March 30 confirmed the action on the 25th while insisting

"on not being drawn into the present conflict." Germany and Italy began military action against Yugoslavia and Greece on April 6, claiming that both were joining with a British expeditionary force. An armistice signed April 17 marked the dissolution of Yugoslavia in Germany's and Italy's opinion; Croatia became a state to them and signed an alliance with Italy on May 7, the Axis states meanwhile planning how to dispose of the rest of Yugoslavia.

To the Soviet Union, which was complaining that Germany was not telling what it was doing, as it should under the treaty of August 23, 1939, Germany gave the text of the Tripartite Pact the day before it was signed. The purpose of this military alliance, wrote Herr Ribbentrop, was to "bring the elements pressing for America's entry into the war (changed to "prolongation and extension of the war") to their senses." The Soviet Union, in a counter-proposal of November 9, would subscribe to the Tripartite Pact as a separate party, declare respect for the "natural spheres of influence" of Germany, Italy, Japan and the Soviet Union, none of which would join any combination directed against any of them. Secret protocols set forth "the territorial aspirations" of the four and provided for adjustments with Turkey. Nothing came of the proposal.

Hitler's directive for Operation "Barbarossa," "quick campaign to crush Soviet Russia," was dated December 18, 1940; by March rumors of its imminence were rife and by May its exact date, June 22, was quoted in the gossip picked up by intelligence agents.

A dozen times in these ten months Hitler explained to someone that the war was won. Typically he told Foreign Minister Matsuoka on March 27, 1941, that "the position of England was no longer recoverable. Thus the war had been decided and the Axis Powers had become the dominant combination." Matsuoka saw the Führer again on April 4 after the Japanese had seen Mussolini. The Italian regarded America as enemy No. 1, with the Soviet Union next. The Japanese thought war with the United States was unavoidable and asked German aid, "for the Japanese Navy must make preparations at once for a conflict with the United States." (Vol. XII, p. 456.) The Germans considered war with the United States undesirable; America's addiction to England made it likely, though in no case could it establish another front against Germany's ability to sink shipping. Hitler's conclusions were derived from the extensive reports from the Washington Embassy which gave a version of President Roosevelt's fireside chats and messages to a "terrorized Congress" that produced the Lend-Lease Act and revision of neutrality, of the closing of the consulates and the vicissitudes of Nazi propaganda in the United States.

Meetings at Montoire in October, 1940, between Hitler and Marshal Pétain and Laval assumed a co-operation of France under the armistice which neither Laval nor Admiral Darlan could materialize. The dismissal of Laval on December 13, 1940, as vice president destroyed a "mutual confidence" that was developing according to a directive of the German Armistice Commission (February 8, 1941), though protocols for military

and naval co-operation in Syria and Iraq, North Africa, West and Equatorial Africa, signed on May 28, in the end were made ineffective.

The Führer and the Duce met every few weeks and exchanged numerous letters. On almost all occasions the Führer told the Duce how to act, and sometimes he did as he was told. At the meetings of Hitler and Mussolini their Foreign Ministers were invariably present and also compared notes. The combined records of these conversations in these volumes together constitute a fairly good conspectus of their diplomatic history. Italy made war by itself on Greece on October 28, 1940, and secured a capitulation on April 23, 1941, with the help of Germany.

Operation "Barbarossa" was launched at 4 a.m., June 22, 1941, by reading a declaration to the Soviet Foreign Minister announcing that the *Wehrmacht* opposed Soviet concentration of "all its forces" at the German border and that the Soviets were attempting to "undermine Germany and Europe." The Führer wrote the Duce that further waiting would lead to disaster.

DENYS P. MYERS

Milletlerarası Münasebetler Türk Yıllığı, 1961. Ankara: Ajans-Türk Press, 1963. pp. v, 254. T.L. 25.

One of the standards for measuring the maturity of a publication is the manner in which controversial data is presented. To the credit of the editors, the second volume of the *Turkish Yearbook of International Relations*¹ meets this criterion in an exemplary way. Thus, in several articles in which similar material is examined, the different conclusions of the authors are noteworthy. For example, in "Turkey's Quest for Security through Defensive Alliances," a paper in two parts: the era of "Survival and Belligerent Neutrality," 1919-1945, and the postwar years of "stand[ing] and fall[ing] with the West" (p. 14), Professor Metin Tamkoc, in the first section, analyzes the 1939 Tripartite Treaty of Mutual Assistance and Turkish-Soviet relations. Although one of the terms of the treaty—a provision which has been overlooked—required "all aid and assistance" by Turkey if the Anglo-French Powers became involved in a war which extended to the Mediterranean, Turkey remained neutral until the early part of 1945.² In explaining her neutrality, Dr. Tamkoc queries whether, on the basis of the then existing military and political circumstances, such as the "great popularity" which Germany enjoyed among the Turks and the opinion that Ankara "could not expect any benefit" from an Allied victory, Turkey could be "blamed for not honoring the terms" of this pact (p. 13). Indeed, since the treaty relieved Turkey from her obligations if they involved her in a conflict with Russia, and since her military might was limited, the agreement is not regarded

¹ The 1960 edition is reviewed in 57 A.J.I.L. 463 (1963).

² For the text of the treaty, see 200 L.N. Treaty Series, No. 4689, p. 167 *et seq.* (1940-1941), Art. 2 (1).

as an "all out commitment" toward the West (p. 11). Yet, Dr. Türkkaya Ataöv in "Turkish Foreign Policy: 1923-1938," views these events in a rather different manner. Noting that after the Montreux Conference of 1936 the Turks became Anglophiles, recognized Germany as a "growing menace" (p. 131), and Italy, after the attack on Ethiopia, as the Power to be "most feared" (p. 137), he concludes that Ankara entered into "full commitments with England and France with the Treaty of October 19, 1939" (p. 142).

In like fashion, Turkish-Soviet relations are considered somewhat differently by the two contributors. Chronologically, of course, Dr. Tamkoc has taken his work further than Dr. Ataöv, and in his second section relates the dangers which the Soviet Union has posed since 1945. This description of the Communist threat is well supplemented in an article by Professor Abadan on "*Les Activités Subversives en Turquie*," in which both external and internal pressures are set forth. Finally, Turkey's postwar efforts to join the Western alliance system—a system which, while having strengthened Turkey's defenses, in light of the vicious circle theory is said to have made her less secure than ever—are noted and the observation drawn that Turkey is not an equal partner of, but *de facto* dependent on, the United States.

Three other articles of a general nature are presented: a study of those provisions of the 1961 Constitution which bear on international relations, a piece in Turkish dealing with the politics of Atatürk, and an enlightening contribution on "Early Foreign Relations of the Turks." To this are added two papers on more specific issues, namely, Turkey's 1957 position on the Cyprus question and the 1961 United Nations Conference on the Elimination or Reduction of Future Statelessness. A summation of the 1961 symposium on teaching international politics, a chronology and a bibliography round out the volume. The *Yearbook* thus has certainly proved its usefulness and is now an established journal whose subsequent issues should be looked upon with anticipation and favor.

GUENTER WEISSBERG

Turkish Participation in the United Nations 1945-1954. By Mehmet Gönlübol. Ankara: Ankara Üniversitesi Basımevi, 1963. pp. viii, 180. T.L. 20.00.

Prepared in 1955 but published in 1963, Dr. Gönlübol's volume is a synopsis of the official Turkish behavior in the United Nations during the period 1945-1954 as evidenced by the positions taken and the votes cast by the Turkish Delegation to that organization. In his survey of those issues before the principal organs of the United Nations in which Turkey has actively participated, the author, a member of the Faculty of Political Science at the University of Ankara, correlates Turkish behavior with the political history and the constitutional law of the world organization rather than with the domestic developments in Turkey. Little

attention is paid to the factors which determine that country's foreign policy objectives. In fact, the study is based primarily on the Official Records and related documents of the principal organs of the United Nations, in spite of the fact that the author is the first to recognize that such records do not tell the whole story of a government's participation in the organization.

In a format quite similar to *Everyman's United Nations*, Dr. Gönlübol covers in six chapters the official Turkish view on: the drafting of the Charter at the U.N. Conference on International Organization, pacific settlement of disputes, collective security, economic co-operation and human rights; and legal and organizational questions. In his very brief concluding section, the author refers to Turkey's position respecting voting blocs and her vested interest in the United Nations. The result is a fragmental account rather than an analysis of the official behavior of a small and developing country in the various bodies of the world organization.

The author is cautious and even reluctant to draw conclusions. The study offers very few interpretations within its self-imposed limits and purpose: "... to survey the views held and the positions taken by Turkey on questions discussed in the bodies of the United Nations from its inception through the Eighth Assembly, and to make a critical analysis of these views and the positions in the light of the constitutional law of the organization and the prevailing world political and economic conditions." No attempt has been made, for example, to consider the effect on her participation in the United Nations of Turkey's unique position as an Asian nation by geography and culture and as a European country by political choice and institutional affiliation. Similarly, the author has not probed into the reasons why Turkey, a solid supporter of the United Nations, has not asserted herself with the strength of her convictions but has remained a rather silent participant in its organs. Perhaps, a consideration of the dilemma posed by her unique position, i.e., a Near Easterner with a non-Christian tradition among her Western partners, and an ally of the West with a secular outlook among the Moslem Afro-Asians, might have thrown some light on why Turkey has been a follower rather than an initiator in the councils of the United Nations.

The work is useful, however, in providing a record of Turkish participation in the United Nations for the period 1945-1954. The only other work on this subject was prepared by the Institute of International Relations, University of Ankara, for the Carnegie Endowment Series of *National Studies on International Organization* (1961).¹ That study provides the historical perspective in which to place Dr. Gönlübol's account. The two volumes together point out to both the specialist on Turkey and the student of the United Nations the areas which require further exploration.

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¹ Reviewed in 56 A.J.I.L. 584 (1962).

BRIEFER NOTICES

The Antitrust Structure of the European Common Market. Edited by Joseph R. Crowley. (New York: Fordham University Press, 1963. pp. 179. \$3.75.) This collection of six papers, presented at the Fordham University Law School Fourth Annual Institute on Corporate Counsel, demonstrates both the perennial legal fascination of the European Common Market's venture into anti-trust and the fallaciousness of definitive legal predictions in this important and still largely speculative area.

The papers of Professor Ernst Wolf (University of Basel) on the Role of the Court of the European Communities, of G. J. Linssen (of the Common Market's Directorate of Competition) on the Application of Articles 85 and 86 of the Rome Treaty, and of Professor Eugenio Minoli (University of Modena) on Industry's View of Trade Regulation in the European Economic Community, remain authoritative, because they deal with the general institutional and procedural framework within which the European Common Market operates. Professor Minoli's article is instructive because it sets forth in short compass the enlightened European industry approach towards public regulation in the interest of competition, an approach which is at variance with that of U. S. industry and is usually overlooked in legal discussions. Professor Wolf's paper is valuable to the general student of international organization because it outlines the broad functions of the Court of the European Communities before discussing in detail the three specific contexts in which the Court may enter the anti-trust area.

The papers of the two private practitioners who have contributed to this symposium, Robert Barnard of Washington, D. C., and Loftus Becker of Paris, discuss mainly the anti-trust status of patent license agreements and distributorship agreements, largely in the light of four "communications" which the Commission of the Common Market was then proposing to issue. Two of the "communications" were withdrawn and the other two substantially revised the very month the Fordham Institute was held; the revised "communications" appear in the form of an addendum supplied from Brussels. Many of the legal problems dealt with in these two papers remain acute but unresolved, largely because the dependence of the "European-minded" secretariat of the European Economic Community on divergent national policy determinations has become more evident and has slowed down the tempo of specific anti-trust policy formulation.

The introductory paper by Wilbur L. Fugate of the Justice Department, outlining the Anti-trust Division's involvement in the field of foreign commerce, is now slightly out of date in that the Supreme Court has decided the *Panagra* and *Singer* cases, and the District Court the *Swiss Watchmakers* case, but serves a helpful purpose in aligning U. S. and European anti-trust law with related international legal and economic developments.

While this is not a "must" for the international business practitioner's bookshelf, it is a useful addition thereto.

SIGMUND TIMBERG

Foreign Policies in a World of Change. Edited by Joseph E. Black and Kenneth W. Thompson. (New York: Harper and Row, 1963. pp. x, 756. Index. \$8.75.) This volume contains essays on the foreign policies of twenty-four nations: all the major Powers of the world as well as some significant smaller ones, such as Switzerland, the Union of South Africa and Yugoslavia. The authors are either scholars who try to give an objective account of a nation's diplomatic traditions and goals, or out-

right advocates of their nations' conduct of foreign affairs; thus the two co-authors of the chapter on the Soviet Union present orthodox Soviet views on disarmament, Germany, the "struggle for peace," et cetera, and Habib Bourguiba, Jr., argues for his father's foreign policy. One of the merits of this volume is the serious analysis of the problems faced by many of the new nations and by those of Latin America, where the tensions between a legalistic tradition and present nationalist realities are mounting. Another merit lies in the sections devoted by the authors to the often determining rôle of history and to the machinery that elaborates foreign policy. Inevitably, the results are uneven. Some of the chapters are curiously bland—those about England and the United States in particular; others try to cover too much ground in far too short a space, but many, like Professor Bracher's chapter on West Germany and Professor Coleman's on Nigeria, are acute and sophisticated essays that lift the volume above the level of ordinary textbooks, even though the "comparative" ambitions of the authors strike this reader as unfulfilled, not so much because of the absence of an intellectual framework common to all, as because of the diversity of countries and problems surveyed.

Foreign Policy Decision-Making. An Approach to the Study of International Politics. Edited by Richard C. Snyder, H. W. Bruck and Burton Sapin. New York: The Free Press of Glencoe, Inc., 1962. pp. x, 274. \$5.00.) This volume contains, with an introduction by Professor Snyder, four essays previously published. The main one is the well-known essay on decision-making as an approach to the study of international politics, which had appeared in 1954. The articles by Herbert McCloskey and Richard A. Brody are critical evaluations of the decision-making scheme by comparison with other theoretical approaches. One essay by Professors Snyder and Glenn D. Paige applies the scheme to the U. S. decision to resist aggression in Korea. This piece strikes the reviewer as a perfect demonstration of the disadvantages of the scheme. Its cumbersome complexity seems to condemn the scholar who wants to use it to a choice between a scrupulous application which may get him lost in a labyrinth of hypotheses and relations, and a daring and discriminating ditching of much of the scheme—in which case he might well have resorted to some other approach in the first place.

STANLEY HOFFMANN

La Conclusion des Traités Internationaux en Israël. By Ruth Lapidoth (Eschelbacher). (Publications de la Revue Générale de Droit International Public, Nouvelle Série, No. 6. Paris: Editions A. Pedone, 1962. pp. 110. Index.) This is a thorough study of the power to ratify treaties in Israel by Dr. Lapidoth of the Hebrew University of Jerusalem. After a brief survey of the different theories concerning this power under international law and a summary of the various domestic law systems (including the situation under the Palestine Mandate), the author examines the Israeli practice. Under the latter the Government has the exclusive power to ratify treaties, and parliamentary authorization or approval is not necessary. Dr. Lapidoth concludes that this practice is not compatible with the relevant Israeli legislation (Israel has no formal written constitution). Nor does she consider as sufficient the means of control over the Executive available to the legislative body: motion of censure, necessity of legislation where the treaty modifies domestic law or where appropriations are required. This may be so, but other countries which have also failed to adopt

what Professor Charles Rousseau, in accord with the author, considers the "solution which the logic . . . of the parliamentary régime postulated" (Preface), namely, parliamentary approval or authorization, are nevertheless regarded as good democracies.

From the point of view of the author, the question of the international validity of treaties ratified in disregard of domestic law arises. According to draft Articles 4 and 31 on the Law of Treaties recently adopted by the International Law Commission, this disregard does not affect the validity of the treaties in the case of Israel, since they are ratified by an organ which is considered to be furnished with the necessary authority, and one can hardly speak of a "manifest" violation when the government acts according to its interpretation of the law which is not seriously challenged by the legislature.

SALO ENGEL

Annual Review of United Nations Affairs 1961-1962. Edited by Richard N. Swift. (Dobbs Ferry, N. Y.: Oceana Publications, 1963. pp. xx, 236. Index. \$6.00.) In an attempt to vary the presentation of the *Annual Review*, the editors have adopted a number of techniques, some of which have proved more successful than others. Thus, the first five volumes, covering the period from 1949 to 1953, comprise the informal speeches delivered by United Nations officials at conferences of the Institute for Annual Review of United Nations Affairs, and include brief synopses of the subsequent panel discussions. Two succeeding issues consist of analytical articles on the Organization's work, while the eighth and ninth publications contain excerpts from official statements made by representatives of United Nations Members and by international officials. During the past two years the editor happily has returned to the original format, although these books, unlike earlier ones, summarize the participants' comments in more detail. The current volume, dedicated to the memory of Mrs. Franklin D. Roosevelt, encompasses eight chapters in which administrative, political, social, economic, humanitarian, financial and legal matters are surveyed.

If the underlying themes of United Nations activities in 1960-1961 were Africa and the authority of the Secretary General, then those of 1961-1962 were the recurring problems of the Congo and the financial difficulties which arose from the establishment of UNEF and ONUC. All of these events have indeed challenged the very foundation of the Organization and have altered the complexion and operation of the United Nations, for, as history reveals and as William Jordan's contribution notes, "institutional changes" are "likely to come about mainly in connection with the solution of grave crises" (p. 56). Consequently, these occurrences are described in the volume under examination. The remarks at the end of Bruce Turner's article on the fiscal question, an address in which the Controller points out that the Organization is close to the stage in which "financial facts of life could determine political action" (p. 194), set forth standard schemes for raising independent sources of revenue. No mention is made, however, of the possibility of a United Nations lottery, which at one and the same time could go far in alleviating the monetary situation and in providing millions of individuals with a direct and voluntary opportunity of assisting the United Nations.

In an analysis by Lin Mousheng, the human rights program, as it has developed over some sixteen years, is vividly portrayed and the observation is drawn that the Declaration of Human Rights may become the "basis of a common law of mankind" (p. 106). Such a statement alone

suffices to place emphasis on the lively discussions which follow the short paper on the International Law Commission and the International Court. And in this regard, the exchange of views between Professors McDougal and Lissitzyn on the objectives and functions of a modern system of international law are particularly noteworthy and significant.

GUENTER WEISSBERG

The Law of War and Peace. De Jure Belli ac Pacis Libri Tres. By Hugo Grotius. (Reprint from *The Classics of International Law* edited by James Brown Scott. Essay and Monograph Series, The Liberal Arts Press. Indianapolis and New York: Bobbs-Merrill Co., 1963. pp. xlv, 946. Indices.) The Liberal Arts Press has reproduced, in an offset reprint, Vol. II of the Carnegie Endowment for International Peace publication (Oxford University Press, 1925) of Hugo Grotius' *Law of War and Peace*, translated by Francis W. Kelsey, with the collaboration of Arthur E. E. Boak, Henry A. Sanders, Jesse S. Reeves, and Herbert F. Wright.¹ This work, which was No. 3 in the series of *Classics of International Law* issued by the Endowment upon the initiative of James Brown Scott, the General Editor of the series, was originally published in quarto format in two volumes, the first volume being a photographic reproduction of the 1646 edition of *De Jure Belli ac Pacis*.

The present volume in octavo format not only fills the need for a long out-of-print classic of international law, but its convenient size may easily be accommodated on the crowded library shelves of students and practitioners of international law. Many readers of the JOURNAL need not be reminded of the pages of the JOURNAL and of the PROCEEDINGS of the American Society of International Law that have been devoted to Hugo Grotius and his works. To the younger members of the profession, to whom Grotius may only be a name, the perusal of this legal masterpiece as now made available should give much food for reflection in the light of modern times.

ELEANOR H. FINCH

Federalism in the Commonwealth. A Bibliographical Commentary. Edited by William S. Livingston. (New York: Oxford University Press; London: Cassell & Co., Ltd., 1963. pp. xviii, 237. \$4.80.) The Commonwealth of Nations over the past decade and a half has given birth to a substantial number of new, independent members that have frequently adopted a federal rather than a unitary political structure. In this volume Professor Livingston and his colleagues present bibliographical commentaries on the mature federal systems of Australia and Canada, and the emerging or still-born federal systems of the West Indies (which was dissolved on May 31, 1962, the date on which it was scheduled to receive independence), India, Pakistan, Malaya, Nigeria, and Rhodesia and Nyasaland. The commentaries, which vary in length, are comprehensive in their scope and treat the phenomenon of federalism in its broadest aspects, including not only the legal arrangements but also the political, economic, and social problems extant in each federal state. Bibliographical citations include governmental and non-governmental documents and reports, monographs, biographies, autobiographies, articles in the learned journals, and unpublished materials such as doctoral dissertations. Mention is also made of libraries and other depositories that have substantial collections of relevant materials and documents. Although most of the citations refer

¹ Reviewed by Dr. C. van Vollenhoven in 21 A.J.I.L. 628 (1927).

to materials in the English language, there are occasional references to materials in other languages.

Each author integrates the bibliographical citations with perceptive and concise accounts of the significant political developments and candid appraisals of the subject matter and merits of each citation. Mention is sometimes made of the lacunae in the current knowledge and the developments and problems that invite future research. The reader's facility in using the volume as a reference work is enhanced by the topical arrangement of each commentary and the general index of authors cited.

This collaborative effort by specialists in their field will be appreciated by all students of the Commonwealth of Nations and the workings of federal systems and will provide a useful guide for the study of both phenomena.

DON C. PIPER

Persönlichkeitsrechtliche Fragen des Internationalen Rechts. Edited by Ignaz Seidl-Hohenveldern and Heinrich Nagel. (Schriftenreihe der Deutschen Gruppe der AAA, Band II. Baden-Baden: Verlag August Lutzeyer, 1962. pp. 103. DM. 7.80.) The second volume, made up of five essays, by the German section of former auditors at the Hague Academy, appearing five years after the first volume, concerns itself with the human being in his relations to international law. Familiar ground is covered, with three of the essays employing a narrative style with a limited measure of analysis probably dictated by limitations on length. The one essay that is strikingly different is the metaphysically grounded discussion by Albert Auer of "*Der Mensch als Telos des Völkerrechts*." Ernst Schlachter's short essay on the right of citizens and corporations of the Common Market countries to settle within another Common Market country is presented in essentially outline form most useful as a suggestion for more thorough studies.

Among the essays taking a narrative-analytical approach, that by Heinrich Nagel deals with reciprocity in the execution of foreign judgments. Particular attention is given to pertinent German practice as it affects the interests of individuals.

Potentially most probing and certainly most provocative of thought are the essay by Heinrich Kipp on international law as it relates to the human personality, and that by Ignaz Seidl-Hohenveldern on the protection of personal honor in international law. Unfortunately, both essays provoke more than they explain. For example, Professor Kipp tells us that the great mistake of 19th-century theory was to play down the relationship of men to international law. What he does not do is to probe the sources of the error, whether in the separation of public from private international law, in a clinging by national authorities to every jot and tittle of power, or in the passage of international society through some identifiable stage of development through which at least the older national societies have passed. In Professor Seidl-Hohenveldern's essay the term *Ehre* allows a range of reference from respect for diplomats and for women in time of war to freedom of expression and information. Well done as the essay is, it begs a more concentrated focus upon honor which, traced through pertinent historical periods, would have provided us with a clearer view of the evolution of value concerning the human being as reflected cross-nationally in international law. It is to be hoped that either Professors Kipp and Seidl-Hohenveldern or other scholars will pursue the investigations suggested, whether intentionally or not, by these two essays.

WESLEY L. GOULD

Anuario de Derecho, Universidad de Panama. Vol. 5, 1961-1962. (Panama: University of Panama, 1963. pp. 496.) This annual collection of articles, texts of laws and relevant documents, regularly published by the Faculty of Law and Political Science of the University, is a current source of materials on all aspects of Panamanian law. This issue is of special interest because of the section on *Relations with the United States* (pp. 233-259.) The articles on the sovereignty of the Canal Zone and the right to fly the Panamanian flag in the Zone illuminate our hindsight. The riots which occurred on the border of the Zone in January, 1964, might well have been foreseen from a careful reading of the 1962 *Anuario*. Professor Eloy Benedetti points out gaps (*lagunas*) in the legal system governing the inhabitants of the Zone; he blames this on the impasse between the two nations over the question of sovereignty and the interpretation of Article III of the Treaty of 1903. He notes that the proposed treaty with Colombia (Herran-Hay), which formed the basis of the subsequent treaty with Panama, did not include the clause under which the United States could exercise rights "as if sovereign," as Colombia had reserved all rights not expressly conceded.

Relevant documents which are reproduced include the Resolution of the National Assembly of Panama dated November 16, 1961, stating the fervent hope that a new treaty would be substituted for the Treaties of 1903, 1936 and 1955. It spells out the thirteen specific points which represent the minimum aspirations of the people of Panama. There is also reproduced the note of September 29, 1960, from Moreno to Farland in reply to Note No. 522 of June 18, 1959, from the then Ambassador Harrington concerning the *Shell* case decided by the Supreme Court of Panama on August 14, 1958. This case held that the Republic of Panama had jurisdiction to tax petroleum sold in the Canal Zone. Finally the section contains the exchange of letters between Presidents Chiari and Kennedy in which the President of Panama blamed all of the misunderstandings and errors of the past on the alleged fact that the 1903 Treaty was never negotiated (*negociada*). In his letter of November 2, 1961, President Kennedy recognized that differences do exist and ought to be discussed (*discutidas*) frankly and in detail. He expressed the hope that a complete review (*reexamen*) of our present and future needs with respect to the facilities of the Canal would be finished within a very few months. Procrastination apparently is up to its old thievery, this time of friendly relations between the United States and one of its Latin American allies.

WILLIAM S. BARNES

Law and Politics in Inter-American Diplomacy. By C. Neale Ranning. (New York and London: John Wiley & Sons, 1963. pp. vii, 167. Index. \$5.95.) In this valuable and thought-provoking book, Dr. Ranning, an Associate Professor of Political Science at Tulane University, examines some leading areas of inter-American regional law and the catalytic effect on this law of the vast social revolution taking place in Latin America. By demonstrating that law and politics are inseparable and that, consequently, it is neither possible nor desirable to insulate inter-American diplomacy from national politics, the author shows that no enduring principles of regional international law can be posited unless those principles harmonize the totality of all the sociological and political factors involved. He does not deny the meaningfulness and significance of legal propositions, but rather suggests that these propositions cannot be intelligently evaluated without a knowledge of the determinative rôle which

political factors have played or do play in the efforts of the nations of the Western Hemisphere diplomatically to adjust the region's legal rules to the demands of this century of transition.

Within the limits of a volume of comparatively modest proportions, the author presents a precise and lively analysis of such diverse legal questions as the recognition of governments, the international standard concerning the treatment of aliens, the problem of intervention, the question of the breadth of the territorial seas, diplomatic asylum, the existence of European colonies in the Hemisphere, and the claims to Antarctica. He shows no tendency to gloss over the underlying political differences that have arisen between the United States and Latin America or among the Latin American nations themselves. And one cannot quarrel with his conclusion that this Hemisphere, "which has talked so much about ordering its affairs according to generally accepted rules of conduct now stands at a crucial juncture" (p. 161). Either whole-hearted diplomatic efforts must be made to develop a more viable set of rules to govern inter-American relations or the long struggle for order and stability in this Hemisphere will end in bitter failure.

A. J. THOMAS, JR.

Tres Momentos en la Controversia de Límites de Guayana. El Incidente del Yuruan. Cleveland y la Doctrina Monroe. By Enrique Bernardo Núñez. 2d ed. (Publicaciones del Ministerio de Relaciones Exteriores. Caracas: Imprenta Nacional, 1962. pp. 117.) A diplomatic history of the Anglo-Venezuelan boundary dispute, this book explores the inadequacies of both disputants. The work's principal value is that it integrates the personal and the legal aspects of diplomacy. Through the personalities involved, the author considers six key episodes in the history of the dispute—the first occurred in 1844–1845, the last was the arbitral decision of 1899—and attempts to show how and why the boundary was settled in a manner considered unjust to Venezuela. He demonstrates how the system, resources and sophistication which the nineteenth-century British Foreign Office could concentrate upon any specific crisis were applied to the Guiana boundary controversy. Núñez notes candidly the inadequate policies, system and resources which led the Venezuelan Government into irretrievable lapses which eventually cost Venezuela considerable territory.

This second edition makes Núñez' study available in book form (it was first published in the Caracas periodical *El Nacional* in 1944–1945) and rounds it out with (Appendix A) Otto Schoenrich's subsequent exposé of the memorandum of the late Severo Mallet-Prevost (43 A.J.I.L. 523 (1949)), and (Appendix B) a statement of the current Venezuelan position (1962) by President Rómulo Betancourt. This last decries the arrogance of a colonial process which wrested the border area from Venezuela in the nineteenth century and now gives it away, in the name of self-determination, to Cheddi Jagan's British Guiana. Betancourt indicates that, although the Venezuelan Government supports autonomy for British Guiana, it considers some of the border area to be *Venezuela irredenta*.

WAYNE M. CLEGERN

March to Calumny: The Story of American POW's in the Korean War. By Albert D. Biderman. (New York and London: Macmillan Co., 1963. pp. x, 326. Index. \$5.95.) The basic objective of the author of *March to Calumny* was to correct the derogatory impression created in the United

States and throughout the world by the writings of one Eugene Kinkead, a reporter by profession, and to only a slightly lesser degree by the speeches and writings of Major William Mayer, an Army psychiatrist, that the conduct of American military personnel, especially of the Army, captured by the Communists in Korea and held as prisoners of war was, with rare exception, completely reprehensible and indicative "of the moral decay of American society."

It is always difficult to write a book the main theme of which is to criticize another volume on the same subject, and *March to Calumny* does not completely surmount this difficulty. The author himself concedes that "[S]cholars of the Korean prisoner-of-war episode were understandably not disposed to produce a book of scholarly rebuttal to unscholarly writings on the topic" (p. 6). He probably would have better accomplished his purpose, which was undoubtedly praiseworthy, had he written his book as an original enterprise. He could then have reserved a chapter toward the end to point out the errors of Mr. Kinkead's efforts. He feels strongly that those efforts represent inadequate research, with incorrect factual material interpreted on the basis of unstated criteria which result in improper conclusions. He himself reaches the rather devastating conclusion that the works of Kinkead, Mayer, *et al.*, were far more effective propaganda for the Communists than their own (a fact which the Communists themselves understood and used profitably) and were harmful to the American image in both Allied and neutral countries (pp. 81 and 122).

Chapters of particular interest are those concerned with "Collaboration and Resistance" (IV), "What Did Prisoners Resist and Why" (V), "The Record of Escapes" (VI), "Death Rates, Prisoner Treatment, and Prisoner Conduct" (VII), and "Mistreatment, Coercion, and Atrocities" (VIII). The author is an able researcher, and the facts and statistics which he marshals and the logic with which he interprets them lead inescapably to the conclusion that a great disservice was done to this country by the publication of many of the unwarranted conclusions about both the American prisoners of war who died in Communist prisoner-of-war camps in Korea and those who survived that ordeal only to find themselves damned in the public mind soon after their return home.

The military services would do well to include *March to Calumny* on the required reading lists at their higher-level schools.

HOWARD S. LIEVIE

The Ukrainian-Polish Problem in the Dissolution of the Russian Empire, 1914-1917. By Oleg S. Pidhaini. (Toronto and New York: New Review Books, 1962. pp. 125. Index.) This slender volume, apparently intended to serve as an introduction to a larger study of the Ukraine in the 1917-1920 period, represents an effort for a succinct historical review of a confused and confusing place and time. On the whole, the effort may be considered successful. Mr. Pidhaini presents a plausible analysis of the origins and development of the Polish-Ukrainian border dispute against the backdrop of World War I and the Russian Revolution. The conflict of Polish drives to restore "historical Poland" as it existed prior to 1772 and the Ukrainian policy of self-determination, emerged at the end of the first World War, when the international climate appeared ripe for demands for self-government.

Statehood for Poland was first promised by both Germany and Austria-Hungary, then offered by Russia, and finally accepted by France, Italy

and Great Britain in September, 1917; "the state of the Ukraine," on the other hand, met a different fate. By March, 1917, the Ukrainians organized the *Rada*, an all-Ukrainian political body. In April the *Rada* requested autonomy for the Ukraine from the new Russian Provisional Government, and in July the Ukraine had acquired its first government since the eighteenth century. When in November the Bolsheviks overthrew the Provisional Government, however, they issued an ultimatum to the *Rada*: It must disarm its forces; if it did not comply within 48 hours, the Bolsheviks would attack. The *Rada*, unwilling to risk war, accepted the ultimatum.

And here the book ends. Poland had no definite border as yet, but its claim for statehood was understood, recognized and supported. The Ukrainian National Republic, on the other hand, with a border well drawn and established, was doomed.

JAN F. TRISKA

The Year Book of World Affairs, 1962. Vol. 16. Edited by George W. Keeton and Georg Schwarzenberger. (London: Stevens & Sons, Ltd.; New York: Frederick A. Praeger, 1962. pp. xxvi, 344. Index. \$12.50; £3 3s.) A larger portion of this *Year Book* was devoted to international law in 1962 than had been the case in the preceding years. Three of its twelve articles treat current legal topics, and several others deal with major international policy issues which have legal significance. Ignaz Seidl-Hohenveldern examines the one-sided advantages accruing to state-trading countries under traditional international law, and reviews some countervailing legal doctrines. Guenter Joetze analyzes the provisions of the interzonal trade agreements applied between the two sides in Germany since 1951. He concludes that the agreements are in substance governed by international law, a view tenable only under a declarative theory of recognition, given the refusal of the Federal Republic to recognize a second German state or indeed to treat the agreements as international. Milos Radojkovic, writing in French, considers the legality of employing or testing nuclear weapons, which he denies on grounds of textual analogy and principle, without facing the military and technological conditions which underlie the actual policies and doctrines of the nuclear Powers. These realities, by contrast, are reflected in the cautiously optimistic thoughts on the nuclear deterrent by Marshal Sir Dermot Boyle of the R.A.F., as military relations in the Western Hemisphere are reflected in D. A. Graber's review of recent U. S. policies concerning intervention, especially in Cuba, down to 1961. Susan Strange suggests policy changes in world trade between the industrialized and underdeveloped countries. The remaining articles again deal with recent national and regional political developments, centering this time on Western Europe and the Islamic East.

KURT WILK

Rapports Belges au VIe Congrès International de Droit Comparé. Edited by the Inter-University Center of Comparative Law. (Brussels: Établissements Émile Bruylant, 1962. pp. vi, 471. Fr. 400, paper; Fr. 630, cloth.) This book presents reports prepared by Belgian jurists for the Sixth International Congress of Comparative Law in Hamburg in 1962. Nicely edited, it adds another volume to the growing collection of contributions to the science of comparative law submitted at the periodical (every four years) great meetings of jurists from all over the world.

It may be mentioned, in passing, that unfortunately, the American group is one of the few which did not succeed in publishing its papers.

The book contains nineteen studies, all written in French, on many aspects of law, primarily in the Belgian system. In a short review of the volume, it is utterly impossible to do justice to the many fine discussions it includes. All that can be done is to mention their topics and some of the authors. The first paper deals with Belgian legal history. Two are devoted to jurisprudence, three each to commercial law and international law (public and private). Two papers are in the field of civil law and procedure; the others draw their topics from air law, labor law, and some other fields. Among the contributors, some are internationally known. One should mention Dean Gilissen of Brussels, instrumental in organizing the International Association of Legal History; Professor Limpens of Brussels and Ghent, Director of the Inter-University Center of Comparative Law; Professor Van Reepinghe of Louvain, one of the best orators in Belgium; Professor Nys of Brussels, well-known expert on air law, member of the Legal Committee of the I.C.A.O.

The length of the papers is uneven. The shortest one (seven pages), on the problem of simultaneous contract and tort liability, was written by Professor Van Ryn of Brussels. The longest, on constitutional tendencies of newly independent countries, prepared by Professor Ganshof van der Meersch of Brussels, is printed on forty-eight pages, and has a supplement nearly equally long. It includes the basic laws of the Republic of the Congo (Léopoldville).

As other similar publications, this volume presents a wealth of materials of interest to jurists in nearly every branch of the law. It should find a place on the shelves of every library having a section on foreign and comparative law.

W. J. WAGNER

American Immigration Policies: A History. By Marion T. Bennett. (Washington, D. C.: Public Affairs Press, 1963. pp. xiv, 362. Index. \$6.00.) This comprehensive study of legislation for the control of immigration focuses on the existing basic law, the McCarran-Walter Act of 1952; what it does and does not do; and developments since its enactment. As prelude, there is a hundred-page sketch of the historical evolution of legislative policy; and as appendix, a copious documentation in the way of references, statistical tables, bibliography and statutory chronology. The book's aim is general public enlightenment; to this worthy design its lay author, former Congressman from Missouri (1943-1949) and now Commissioner at the Court of Claims, brings an easy non-technical style, a keen interest in the domestic policy and politics of his subject, and an evidently considerable study.

The national-origins quota system maintained in the 1952 law comes in for major attention, leading to the implicit conclusion that in fact this "system" has been more symbolic than real. Both through less-publicized provisions of the law and through special-purpose acts passed from time to time, the pattern of subsequent immigration has little conformed with the allocations prescribed. The author rather expects that sooner or later Congress will be persuaded to overhaul the quota feature. Misgivings on his part about the more extreme of the revision proposals currently bruited are discernible; but he has presented the facts from which readers professing the open mind can independently judge how much sense the quotas make in their present form, and from which also those of immutably fixed views one way or the other can take comfort.

HERMAN WALKER

The Legal Aspects of the Hungarian Question. By Joseph Alexander Szikszoy. (Doctoral Thesis, No. 147, University of Geneva. Ambilly-Annemasse, France: Les Presses de Savoie, 1963. pp. 219.) The study under review wishes to throw light, from a legal point of view, on the complicated, kaleidoscopic developments of the Hungarian Revolution of 1956 and of its aftermath. Their presentation by the author, a member of the Washington, D. C., Bar, is based on carefully sifted incontrovertible factual material, and the legal conclusions drawn from these events are cautious, sober, objective, and generally convincing. One of the noteworthy features of this work is that it widely uses Soviet and Hungarian sources; in fact, many of the legal deductions rely on exactly such sources.

The Hungarian Question, though on the agenda of and discussed by the U. N. General Assembly from 1956 through 1962, is a somewhat "neglected child" of international jurists. Even this JOURNAL devoted only a marginal comment (by Quincy Wright, "Intervention 1956," on p. 275 of the April, 1957, issue) to this problem. No wonder that comparisons made by international lawyers between the Hungarian events and those of Guatemala or Cuba are mostly based on an erroneous understanding of the former. A reader of the book under review probably would be surprised to learn about the "legal" position of Soviet forces in Hungary prior to the Revolution, or why a recognition of the Nagy government was not called for (it has been a government recognized by all, including the Soviet and the United States governments); it might be similarly interesting to read about the unconstitutionality of the Kádár government until June, 1957, according to the Hungarian Constitution and its own admissions.

The legal aspects of the proceedings before the United Nations, especially the jurisdictional aspect, are analyzed and evaluated by the author with great thoughtfulness and outstanding success. The book, however, fails to elaborate on the United States' attitude toward the Kádár regime, an attitude which appears to represent a mere *de facto* recognition only (to the time of the present writing). The reference to the Estrada doctrine must strike the reader as most pertinent to the situation under discussion.

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ELEANOR H. FINCH

OFFICIAL DOCUMENTS *

UNITED NATIONS

DRAFT INTERNATIONAL COVENANTS ON HUMAN RIGHTS **

*Adopted by the Third Committee at the Tenth to Eighteenth
Sessions of the General Assembly¹*

DRAFT COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

PREAMBLE²

The States Parties hereto

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of states under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and

* Selected and prepared by Richard R. Baxter of the Board of Editors.

** This is a composite text, drawn from a number of U.N. documents, as noted in the footnotes. The text, including the numbered footnotes, was appended to a note (file no. SO 221/9 (1-8-3)) from the U.N. Secretary General to the Permanent Representative of the United States of America to the United Nations, dated Feb. 11, 1964.

¹ Mention may also be made of the fact that the General Assembly, at its Fifth Session in 1950, adopted the following article for inclusion in the draft Covenant (General Assembly Resolution 422 (V)):

“Article . . .

“The provisions of the present Covenant shall extend to or be applicable equally to a signatory metropolitan State and to all the territories, be they Non-Self-Governing, Trust, or Colonial Territories, which are being administered or governed by such metropolitan State.”

The above text was included by the Commission on Human Rights as Article 28 of the draft Covenant on Economic, Social and Cultural Rights and Article 53 of the draft Covenant on Civil and Political Rights.

² Cf. A/8077, par. 26 (Official Records of the General Assembly, Tenth Session, Annexes, agenda item 28 (Part I)).

to the community to which he belongs, is under responsibility to strive for the promotion and observance of the rights recognized in this Covenant, Agree upon the following articles:

PART I

ARTICLE 1³

1. All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.

2. The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. All the States Parties to the Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the United Nations Charter.

PART II

ARTICLE 2⁴

1. Each State Party hereto undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in this Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties hereto undertake to guarantee that the rights enunciated in this Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in this Covenant to non-nationals.

ARTICLE 3⁵

The States Parties to the Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in this Covenant.

³ Identical in both draft Covenants: A/3077, par. 77.

⁴ A/5365, Annex (Official Records of the General Assembly, Seventeenth Session, Annexes, agenda item 43).

⁵ *Ibid.*

ARTICLE 4 ⁶

The States Parties to this Covenant recognize that in the enjoyment of those rights provided by the state in conformity with this Covenant, the state may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

ARTICLE 5 ⁷

1. Nothing in this Covenant may be interpreted as implying for any state, group or person, any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in this Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

ARTICLE 6 ⁸

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to this Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

ARTICLE 7 ⁹

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work, which ensure, in particular:

(a) Remuneration which provides all workers as a minimum with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; and

⁶ *Ibid.*

⁷ *Ibid.*

⁸ A/3525, par. 30 (Official Records of the General Assembly, Eleventh Session, Annexes, agenda item 31).

⁹ A/3525, par. 53.

- (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

ARTICLE 8¹⁰

1. The States Parties to the present Covenant undertake to ensure:
 - (a) The right of everyone to form trade unions and join the trade union of his choice subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedom of others;
 - (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
 - (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or of the police, or of the administration of the state.

3. Nothing in this article shall authorize States Parties to the International Labour Convention of 1948 on Freedom of Association and Protection of the Rights to Organise to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

ARTICLE 9¹¹

The States Parties to the present Covenant recognize the right of everyone to social security including social insurance.

ARTICLE 10¹²

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society,

¹⁰ A/3525, par. 75.

¹¹ A/3525, par. 85.

¹² A/3525, par. 119.

particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses;

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits;

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

COMBINED ARTICLES 11 AND 12¹³

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; and

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

ARTICLE 13¹⁴

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child;

¹³ A/3525, par. 144; A/5655, Annex.

¹⁴ A/3525, par. 157.

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

ARTICLE 14¹⁵

1. The States Parties to the Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education, in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools other than those established by the public authorities which conform to such minimum educational standards as may be laid down or approved by the state and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the state.

¹⁵ A/3764 and Add. 1, par. 50 (Official Records of the General Assembly, Twelfth Session, Annexes, agenda item 33).

ARTICLE 15 ¹⁶

Each State Party to the Covenant which, at the time of becoming a party to this Covenant, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

ARTICLE 16 ¹⁷

1. The States Parties to the Covenant recognize the right of everyone:

- (a) To take part in cultural life;
- (b) To enjoy the benefits of scientific progress and its applications;
- (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

DRAFT COVENANT ON CIVIL AND POLITICAL RIGHTS

PREAMBLE ¹⁸

The States Parties hereto,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of states under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

¹⁶ A/3764 and Add.1, par. 67.

¹⁷ A/3764 and Add.1, par. 84.

¹⁸ Cf. A/3077, par. 26 (Official Records of the General Assembly, Tenth Session, Annexes, agenda item 28 (Part I)).

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under responsibility to strive for the promotion and observance of the rights recognized in this Covenant, *Agree* upon the following articles:

PART I

ARTICLE 1¹⁹

1. All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.

2. The peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. All the States Parties to the Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the United Nations Charter.

PART II

ARTICLE 2²⁰

1. Each State Party hereto undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in this Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each state undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of this Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in this Covenant.

3. Each State Party hereto undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy;

¹⁹ Identical in both draft Covenants: A/3077, par. 77.

²⁰ A/5655, Annex.

(c) To ensure that the competent authorities shall enforce such remedies when granted.

ARTICLE 3 ²¹

The States Parties to the Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in this Covenant.

ARTICLE 4 ²²

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties hereto may take measures derogating from their obligations under this Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the Covenant availing itself of the right of derogation shall inform immediately the other States Parties to the Covenant, through the intermediary of the Secretary-General, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

ARTICLE 5 ²³

1. Nothing in this Covenant may be interpreted as implying for any state, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in this Covenant.

2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any Contracting State pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

PART III

ARTICLE 6 ²⁴

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

²¹ A/5365, Annex (Official Records of the General Assembly, Seventeenth Session, Annexes, agenda item 43).

²² A/5655, Annex.

²³ A/5365.

²⁴ A/3764 and Add. 1, par. 121 (Official Records of the General Assembly, Twelfth Session, Annexes, agenda item 33).

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with law in force at the time of the commission of the crime and not contrary to the provisions of this Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the Covenant.

ARTICLE 7²⁵

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

ARTICLE 8²⁶

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.

2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;

(b) The preceding sub-paragraph shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;

(c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

(i) Any work or service, not referred to in sub-paragraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;

(ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;

²⁵ A/4045, par. 22 (Official Records of the General Assembly, Thirteenth Session, Annexes, agenda item 32).

²⁶ A/4045, par. 31.

- (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
- (iv) Any work or service which forms part of normal civic obligations.

ARTICLE 9 ²⁷

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that such court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

ARTICLE 10 ²⁸

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons;

(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.

3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

ARTICLE 11 ²⁹

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

²⁷ A/4045, par. 67.

²⁸ A/4045, par. 86.

²⁹ A/4045, par. 91.

ARTICLE 12 ⁸⁰

1. Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order ("ordre public"), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in this Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

ARTICLE 13 ⁸¹

An alien lawfully in the territory of a State Party to the Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

ARTICLE 14 ⁸²

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order ("ordre public") or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juveniles otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

⁸⁰ A/4299, par. 19 (Official Records of the General Assembly, Fourteenth Session, Annexes, agenda item 34).

⁸¹ A/4299, par. 29.

⁸² A/4299, par. 64.

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself, or to confess guilt.

4. In the case of juveniles, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

ARTICLE 15⁸³

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequently to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

⁸³ A/4625, par. 21 and Annex (Official Records of the General Assembly, Fifteenth Session, Annexes, agenda item 34).

ARTICLE 16 ⁸⁴

Everyone shall have the right to recognition everywhere as a person before the law.

ARTICLE 17 ⁸⁵

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

ARTICLE 18 ⁸⁶

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to ensure the religious and moral education of their children in conformity with their own convictions.

ARTICLE 19 ⁸⁷

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in the foregoing paragraph carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and are necessary, (1) for respect of the rights or reputations of others, (2) for the protection of national security or of public order ("ordre public"), or of public health or morals.

⁸⁴ A/4625, par. 29 and Annex.

⁸⁵ A/4625, par. 41 and Annex.

⁸⁶ A/4625, par. 58 and Annex.

⁸⁷ A/5000, par. 35 and Annex (Official Records of the General Assembly, Sixteenth Session, Annexes, agenda item 35).

ARTICLE 26 ³⁸

(To follow directly after Article 19)

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

ARTICLE 20 ³⁹

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order ("ordre public"), the protection of public health or morals or the protection of the rights and freedoms of others.

ARTICLE 21 ⁴⁰

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order ("ordre public"), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Convention of 1948 on Freedom of Association and Protection of the Right to Organise, to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

ARTICLE 22 ⁴¹

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to this Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

³⁸ A/5000, par. 50 and Annex.

³⁹ A/5000, par. 55 and Annex.

⁴⁰ A/5000, par. 73 and Annex.

⁴¹ A/5000, par. 88 and Annex.

ARTICLE 22 *bis* ⁴²

(New article to follow directly after Article 22)

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as required by his status as a minor, on the part of his family, the society and the state.

2. Every child shall be registered immediately after birth and shall have a name.

3. Every child has the right to acquire a nationality.

ARTICLE 23 ⁴³

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 of this Covenant and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) Of access, on general terms of equality, to public service in his country.

ARTICLE 24 ⁴⁴

All persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ARTICLE 25 ⁴⁵

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

⁴² A/5655, Annex.

⁴⁴ A/5000, par. 115 and Annex.

⁴³ A/5000, par. 98 and Annex.

⁴⁵ A/5000, par. 126 and Annex.

AFRICAN STATES

CHARTER OF THE ORGANIZATION OF AFRICAN UNITY

*Signed at Addis Ababa, May 25, 1963*¹

We, the Heads of African States and Governments assembled in the City of Addis Ababa, Ethiopia;

CONVINCED that it is the inalienable right of all people to control their own destiny;

CONSCIOUS of the fact that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples;

CONSCIOUS of our responsibility to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour;

INSPIRED by a common determination to promote understanding among our peoples and co-operation among our states in response to the aspirations of our peoples for brotherhood and solidarity, in a larger unity transcending ethnic and national differences;

CONVINCED that, in order to translate this determination into a dynamic force in the cause of human progress, conditions for peace and security must be established and maintained;

DETERMINED to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of our states, and to fight against neo-colonialism in all its forms;

DEDICATED to the general progress of Africa;

PERSUADED that the Charter of the United Nations and the Universal Declaration of Human Rights, to the principles of which we reaffirm our adherence, provide a solid foundation for peaceful and positive co-operation among states;

DESIROUS that all African States should henceforth unite so that the welfare and well-being of their peoples can be assured;

RESOLVED to reinforce the links between our states by establishing and strengthening common institutions;

HAVE agreed to the present Charter.

ESTABLISHMENT

ARTICLE I

1. The High Contracting Parties do by the present Charter establish an Organization to be known as the ORGANIZATION OF AFRICAN UNITY.

2. The Organization shall include the Continental African States, Madagascar and other Islands surrounding Africa.

¹ Proceedings of the Summit Conference of Independent African States, Addis Ababa, May, 1963, Vol. 1, sec. 1, pp. 1-7 (separately pagged).

According to information received from the Office of the Legal Adviser, Department of State, all 24 African states (excluding the Republic of South Africa) are now parties to the Charter of the Organization of African Unity. Kenya and Zanzibar are the two states most recently admitted.

PURPOSES

ARTICLE II

1. The Organization shall have the following purposes:
 - a. to promote the unity and solidarity of the African States;
 - b. to co-ordinate and intensify their co-operation and efforts to achieve a better life for the peoples of Africa;
 - c. to defend their sovereignty, their territorial integrity and independence;
 - d. to eradicate all forms of colonialism from Africa; and
 - e. to promote international co-operation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.
2. To these ends, the Member States shall co-ordinate and harmonise their general policies especially in the following fields:
 - a. political and diplomatic co-operation;
 - b. economic co-operation, including transport and communications;
 - c. educational and cultural co-operation;
 - d. health, sanitation, and nutritional co-operation;
 - e. scientific and technical co-operation; and
 - f. co-operation for defense and security.

PRINCIPLES

ARTICLE III

The Member States, in pursuit of the purposes stated in Article II, solemnly affirm and declare their adherence to the following principles:

1. the sovereign equality of all Member States;
2. non-interference in the internal affairs of states;
3. respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence;
4. peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration;
5. unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part of neighbouring states or any other state;
6. absolute dedication to the total emancipation of the African territories which are still dependent;
7. affirmation of a policy of non-alignment with regard to all blocs.

MEMBERSHIP

ARTICLE IV

Each independent sovereign African State shall be entitled to become a Member of the Organization.

RIGHTS AND DUTIES OF MEMBER STATES

ARTICLE V

All Member States shall enjoy equal rights and have equal duties.

ARTICLE VI

The Member States pledge themselves to observe scrupulously the principles enumerated in Article III of the present Charter.

INSTITUTIONS

ARTICLE VII

The Organization shall accomplish its purposes through the following principal institutions:

1. the Assembly of Heads of State and Government;
2. the Council of Ministers;
3. the General Secretariat;
4. the Commission of Mediation, Conciliation and Arbitration.

THE ASSEMBLY OF HEADS OF STATE AND GOVERNMENT

ARTICLE VIII

The Assembly of Heads of State and Government shall be the supreme organ of the Organization. It shall, subject to the provisions of this Charter, discuss matters of common concern to Africa with a view to coordinating and harmonizing the general policy of the Organization. It may in addition review the structure, functions and acts of all the organs and any specialized agencies which may be created in accordance with the present Charter.

ARTICLE IX

The Assembly shall be composed of the Heads of State and Government or their duly accredited representatives and it shall meet at least once a year. At the request of any Member State and approval by the majority of the Member States, the Assembly shall meet in extraordinary session.

ARTICLE X

1. Each Member State shall have one vote.
2. All resolutions shall be determined by a two-thirds majority of the Members of the Organization.
3. Questions of procedure shall require a simple majority. Whether or not a question is one of procedure shall be determined by a simple majority of all Member States of the Organization.
4. Two-thirds of the total membership of the Organization shall form a quorum at any meeting of the Assembly.

ARTICLE XI

The Assembly shall have the power to determine its own rules of procedure.

THE COUNCIL OF MINISTERS

ARTICLE XII

1. The Council of Ministers shall consist of Foreign Ministers or such other Ministers as are designated by the governments of Member States.

2. The Council of Ministers shall meet at least twice a year. When requested by any Member State and approved by two-thirds of all Member States, it shall meet in extraordinary session.

ARTICLE XIII

1. The Council of Ministers shall be responsible to the Assembly of Heads of State and Government. It shall be entrusted with the responsibility of preparing conferences of the Assembly.

2. It shall take cognisance of any matter referred to it by the Assembly. It shall be entrusted with the implementation of the decision of the Assembly of Heads of State and Government. It shall co-ordinate inter-African co-operation in accordance with the instructions of the Assembly and in conformity with Article II (2) of the present Charter.

ARTICLE XIV

1. Each Member State shall have one vote.
2. All resolutions shall be determined by a simple majority of the members of the Council of Ministers.
3. Two-thirds of the total membership of the Council of Ministers shall form a quorum for any meeting of the Council.

ARTICLE XV

The Council shall have the power to determine its own rules of procedure.

GENERAL SECRETARIAT

ARTICLE XVI

There shall be an Administrative Secretary-General of the Organization, who shall be appointed by the Assembly of Heads of State and Government. The Administrative Secretary-General shall direct the affairs of the Secretariat.

ARTICLE XVII

There shall be one or more Assistant Secretaries-General of the Organization, who shall be appointed by the Assembly of Heads of State and Government.

ARTICLE XVIII

The functions and conditions of services of the Secretary-General, of the Assistant Secretaries-General and other employees of the Secretariat shall be governed by the provisions of this Charter and the regulations approved by the Assembly of Heads of State and Government.

1. In the performance of their duties the Administrative Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each member of the Organization undertakes to respect the exclusive character of the responsibilities of the Administrative Secretary-General and the Staff and not to seek to influence them in the discharge of their responsibilities.

COMMISSION OF MEDIATION, CONCILIATION AND ARBITRATION

ARTICLE XIX

Member States pledge to settle all disputes among themselves by peaceful means and to this end decide to establish a Commission of Mediation, Conciliation and Arbitration, the composition of which and conditions of service shall be defined by a separate Protocol to be approved by the Assembly of Heads of State and Government. Said Protocol shall be regarded as forming an integral part of the present Charter.

SPECIALIZED COMMISSIONS

ARTICLE XX

The Assembly shall establish such Specialized Commissions as it may deem necessary, including the following:

1. Economic and Social Commission;
2. Educational and Cultural Commission;
3. Health, Sanitation and Nutrition Commission;
4. Defence Commission;
5. Scientific, Technical and Research Commission.

ARTICLE XXI

Each Specialized Commission referred to in Article XX shall be composed of the Ministers concerned or other Ministers or Plenipotentiaries designated by the governments of the Member States.

ARTICLE XXII

The functions of the Specialized Commissions shall be carried out in accordance with the provisions of the present Charter and of the regulations approved by the Council of Ministers.

THE BUDGET

ARTICLE XXIII

The budget of the Organization prepared by the Administrative Secretary-General shall be approved by the Council of Ministers. The budget shall be provided by contributions from Member States in accordance with the scale of assessment of the United Nations; provided, however, that no Member State shall be assessed an amount exceeding twenty percent of the yearly regular budget of the Organization. The Member States agree to pay their respective contributions regularly.

SIGNATURE AND RATIFICATION OF CHARTER

ARTICLE XXIV

1. This Charter shall be open for signature to all independent sovereign African States and shall be ratified by the signatory states in accordance with their respective constitutional processes.

2. The original instrument, done, if possible in African languages, in English and French, all texts being equally authentic, shall be deposited with the Government of Ethiopia which shall transmit certified copies thereof to all independent sovereign African States.

3. Instruments of ratification shall be deposited with the Government of Ethiopia, which shall notify all signatories of each such deposit.

ENTRY INTO FORCE

ARTICLE XXV

This Charter shall enter into force immediately upon receipt by the Government of Ethiopia of the instruments of ratification from two thirds of the signatory states.

REGISTRATION OF THE CHARTER

ARTICLE XXVI

This Charter shall, after due ratification, be registered with the Secretariat of the United Nations through the Government of Ethiopia in conformity with Article 102 of the Charter of the United Nations.

INTERPRETATION OF THE CHARTER

ARTICLE XXVII

Any question which may arise concerning the interpretation of this Charter shall be decided by a vote of two thirds of the Assembly of Heads of State and Government of the Organization.

ADHESION AND ACCESSION

ARTICLE XXVIII

1. Any independent sovereign African State may at any time notify the Administrative Secretary-General of its intention to adhere or accede to this Charter.

2. The Administrative Secretary-General shall, on receipt of such notification, communicate a copy of it to all the Member States. Admission shall be decided by a simple majority of the Member States. The decision of each Member State shall be transmitted to the Administrative Secretary-General, who shall, upon receipt of the required number of votes, communicate the decision to the state concerned.

MISCELLANEOUS

ARTICLE XXIX

The working languages of the Organization and all its institutions shall be, if possible African languages, English and French.

ARTICLE XXX

The Administrative Secretary-General may accept on behalf of the Organization gifts, bequests and other donations made to the Organization, provided that this is approved by the Council of Ministers.

ARTICLE XXXI

The Council of Ministers shall decide on the privileges and immunities to be accorded to the personnel of the Secretariat in the respective territories of the Member States.

CESSATION OF MEMBERSHIP

ARTICLE XXXII

Any state which desires to renounce its membership shall forward a written notification to the Administrative Secretary-General. At the end of one year from the date of such notification, if not withdrawn, the Charter shall cease to apply with respect to the renouncing state, which shall thereby cease to belong to the Organization.

AMENDMENT OF THE CHARTER

ARTICLE XXXIII

This Charter may be amended or revised if any Member State makes a written request to the Administrative Secretary-General to that effect; provided, however, that the proposed amendment is not submitted to the Assembly for consideration until all the Member States have been duly notified of it and a period of one year has elapsed. Such an amendment shall not be effective unless approved by at least two-thirds of all the Member States.

IN FAITH WHEREOF, We, the Heads of African State and Government, have signed this Charter.

Done in the City of Addis Ababa, Ethiopia this 25th day of May, 1963.

STATE BREACHES OF CONTRACTS WITH ALIENS AND INTERNATIONAL LAW

BY CHITTHARANJAN F. AMERASINGHE *

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I

It has not been established with sufficient clarity and certainty whether a state commits a breach of international law by breaking a contract made by it with an alien. The question needs an answer.¹ It is not one of an entirely theoretical nature. On the answer to it will depend many important consequences. There are four of special significance. First, if the breach of contract is characterized as a breach of international law, the final arbiter of the question whether there had been a breach of contract and of the extent of that breach would be an international court whether as a court of last resort or otherwise.² This is the natural consequence of the fact that it is the organs of enforcement of international society that have the power of finally determining questions relating to the breach of legal norms belonging to that society. Municipal courts would not have the final decision. Secondly, the norms applicable by an international court in making such a decision would be the norms of international law and not necessarily the rules of a municipal system of law.³ International rules should, of course, be applied in determining whether there has been a breach of international law. Thirdly, questions of evidence and procedure relating to the contract would be governed by international law.

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¹ Reference to breach of contract by a state in this paper must be understood to be confined to breaches of contracts of this kind only, unless otherwise stated. Contracts between two states and contracts between aliens and nationals are excluded from this article, and so are public bonds.

² The rule of international law requiring local remedies in the delinquent state to be exhausted would necessitate reference of the particular issue to the local courts, where such reference was possible and not obviously futile, right up to the top of the hierarchy: see the *Panavezys-Saldutiskis Railway Case*, P.O.I.J., Ser. A/B, No. 76 (1939), and the *Finnish Ships Arbitration*, 3 Int. Arb. Awards 1479. Then the international tribunal would be a final court. But where there are no such remedies, or the requirement has been waived with the consent of the delinquent state, the international tribunal will be the first and final court.

³ That such principles do exist requires no proof, and is supported by the facts that (1) often states do ask tribunals to apply "principles of international law, equity and justice" in determining questions of contract submitted for arbitration, see U. S.-Mexico General Claims Convention, 1923, Art. I, Treaty Series 1078, 48 U. S. Stat. 1730; and (2) tribunals have purported to apply such principles in making decisions under these compromises: see the *Illinois Central Railroad case*, note 30 below; and Meron, "Repudiation of Ultra Vires State Contracts and the Responsibility of States," 6 Int. and Comp. Law Q. 273 (1957).

These may give international courts wider powers, particularly with respect to the obligations of this kind of a *state* party to a contract, than a municipal court may have. Fourthly, the remedial obligations and the manner of their fulfillment would be determined according to international law and not necessarily according to any municipal law. There is no reason why, for instance, an international tribunal should not decide that the contract be specifically performed rather than compensation be paid, since that is a remedy contemplated by international law, irrespective of what remedy the municipal law has given and, indeed, whether it has given a remedy at all. The Permanent Court of International Justice has stated quite clearly the principle of reparation in international law:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.⁴

As applied to a breach of contract by a state, it would mean that the rights under the contract would be restored. Specific performance would be granted except where this is impossible. It is only where the impossibility of performance is proved that compensation would be substituted.

II

Text-Writers

On the question whether a breach of contract by a state party to a contract made with an alien is *per se* a breach of international law, there is little direct authority in the way of pronouncements by international tribunals, as will be seen later.⁵ The matter is further complicated by the patent lack of agreement among writers. Some hold the opinion that such a breach of contract is *per se* a breach of international law.⁶ This

⁴ Case Concerning the Factory at Chorzów (Claim for Indemnity—Merits), P.O.I.J., Ser. A, No. 17 at p. 47 (1928). The case concerned the illegal taking of property by a state. The wording and spirit of the above passage, however, indicate that the Court was speaking of illegal acts in general.

⁵ See p. 891 below.

⁶ See, e.g., 1 Fauchille, *Traité de Droit International Public* 529 (8th ed., 1925); Clarke, "Intervention for Breach of Contract or Tort committed by a Sovereignty," 1910 Proceedings, Am. Soc. Int. Law 149, 155; 1 Oppenheim-Lauterpacht, *International Law* 844 (8th ed., 1954); Hershey, *Essentials of International Law* 261 (1927); Cavaré, *La Protection des Contractuels Reconus par les Etats à des Etrangers à les Exceptions des Emprunts* 27 (1956); Brandon, "Legal Deterrents and Incentives to Private Foreign Investments," 48 *Grotius Society Transactions* 89, 54, 55 (1957). See

view seems mainly to derive from the notion that there should be no distinction between an act by a state alleged to be a tort and one which is alleged to be a breach of contract. If the former, it is argued, is regarded as a breach of international law, then why should not the latter?'

Among more recent writers, Mann suggests, *de lege ferenda* apparently:

It may be that a workable solution of the problem can be found only by generalizing an established principle of international law and at the same time taking a leaf out of the American Constitution and out of the books of authority to which it has given life: without prejudice to its liability for any other tort (such as denial of justice, discrimination, expropriation), the state shall be responsible for the injuries caused to an alien by the non-performance of its obligations stipulated in a contract with that alien if and insofar as such non-performance results from the application of a state's law enacted after the date of the contract, this shall not apply where the law so enacted is required for the protection of public safety, health, morality or welfare in general.⁸

This view is proposed as a modification of what Mann believes to be the present state of international law, namely that breach of contract with an alien by a state party to it is not *per se* a breach of international law.⁹ The proposal relates to a specific method of breaking a contract and does not introduce a rule that a breach of such contract is always *per se* a breach of international law. Professor Jennings examines the theory of breach of state contracts with aliens in the context of international law and comes to the conclusion that

There is nothing in the structure of international law and nothing in the relationship between international law and municipal law that inhibits the recognition of international law remedies which relate directly to the contract.¹⁰

However, he seems to leave it open whether a breach of such a contract should always *per se* be a breach of international law, when he says:

This is not to deny that there may be situations where the contracting state is entitled to change the law though the result be to the detriment of the alien contractor. The point is that the definition of these situations must itself be a question of international law.¹¹

The assumption made by both these writers as to the present law, however, is in keeping with the views of several other writers who regard a

also Schwebel, "International Protection of Contractual Arrangements," 1959 Proceedings, Am. Soc. Int. Law 266.

⁷ Clarke, *loc. cit.* 155; 1 Fauchille, *op. cit.* 529, who says: "Si la responsabilité des États peut avoir pour origines des actes d'un caractère *délictuel*, elle peut résulter également d'obligations contractuelles. L'inexécution d'un engagement qu'ils ont souscrit constitue en effet un manquement à la parole donnée, c'est à dire une violation d'un de leurs devoirs internationaux. . . ."

⁸ "State Contracts and State Responsibility," 54 A.J.I.L. 572, 590 (1960).

⁹ *Ibid.* 577-588.

¹⁰ "State Contracts in International Law," 37 Brit. Yr. Bk. Int. Law 156, 181 (1961).

¹¹ *Ibid.* 182.

breach of contract by a state *per se* as at the most a simple breach of municipal law without being a breach of international law as well. They require something more than a mere breach of contract by the state to give rise to a breach of international law.¹²

Hyde writes:

It may be doubted, however, whether the mere breach of a promise by a contracting state with respect to an alien is generally looked upon as amounting to internationally illegal conduct, or as constituting the violation of a legal obligation towards the state of which he is a national. . . . In the estimation of statesmen and jurists international law is probably not regarded as denouncing the failure of a state to keep such a promise, until, at least, there has been a refusal . . . to adjudicate locally the claim arising from the breach. . . .¹³

Dunn makes a distinction between the situation where a state breaks a contract with an alien by the exercise of sovereign power and other situations.¹⁴

It is possible to take the view that whether or not a breach of contract by a state is *per se* a breach of international law depends on whether the government of the state concerned was acting as a sovereign and supreme power or in a private capacity in *entering* into the contract. As an absolute criterion of international responsibility the distinction is both vague¹⁵ and difficult to justify for the purpose in hand. Does it really matter in what capacity the contracting state was acting in *making* a contract when it is a question of determining whether an act alleged to be a breach of the contract is a breach of international law or not? The distinction is predicated on the notion that where the state acts in its sovereign capacity it generally does not subject itself to judicial process in its own courts and may avoid its obligations, whereas when it acts in a private capacity there is generally redress through the local courts. This is, in fact, not a true representation of the actual situation in states, especially in regard to the Anglo-American jurisdictions. What is more, in practice, where the dis-

¹² *E.g.*, 2 Hyde, *International Law Chiefly as Interpreted by the United States* 988; Jessup, *A Modern Law of Nations* 104, 109 (1948); 8 Whiteman, *Damages in International Law* 1555, 1558 (1948); Borchard, *Diplomatic Protection of Citizens Abroad*, Ch. VII; 1 Westlake, *International Law* 331 (2nd ed., 1910); Decencière-Ferrandière *La Responsabilité Internationale des Etats* 174 (1925); Hoijer, *La Responsabilité Internationale des Etats* 117 (1930); Feller, *The Mexican Claims Commissions* 174 (1935); 3 Dahm, *Völkerrecht* 210, note 2; Dunn, *The Protection of Nationals* 165 (1932).

¹³ 2 Hyde, *op. cit.* 990.

¹⁴ Dunn, *op. cit.* 165.

¹⁵ The distinction has been used by European continental jurisdictions and to a certain extent by U. S. courts in the law of sovereign immunity to determine whether a foreign sovereign is entitled to immunity from suit and has taken the form of distinguishing between acts *iure gestionis* and acts *iure imperii*. But they have experienced difficulty in applying it to particular situations and, indeed, the answers that the courts of the different countries have arrived at in similar situations have been conflicting. See Lauterpacht, "The Problem of Jurisdictional Immunities of Foreign States," 28 *Brit. Yr. Bk. Int. Law* 220 (1951). Moreover, it must be remembered that this distinction has not been accepted by common law jurisdictions; see *The Porto Alexandre*, [1920] P. 30.

tion obtains, the presence of local remedies does not *always* coincide with the private nature of the contract nor does the absence of remedies *always* coincide with the sovereign nature of the contract, so that that basis of distinction is not an altogether logical one. Also, there seems to be no good reason of policy for adopting the distinction between contracts made in a state's sovereign capacity and those made in its private capacity for this purpose. However, the distinction between the absence and presence of legal remedies which is the premise from which such a view would seem to derive may be more relevant to our problem. It is the same distinction that is inherent in Hyde's thesis stated above, that international law does not denounce a breach of contract by a state until at least there has been a refusal to adjudicate locally.

For our purposes, then, the opinions of text-writers may be conveniently divided into two schools: those that maintain that a breach of contract by a state is *per se* a breach of international law and those that require something more than a mere breach of contract for a breach of international law to arise.

Societies of international lawyers have also expressed opinions on this question. For instance, in 1958 the American Branch of the International Law Association expressed the following view:

The unsoundness of treating the legal rights arising from contracts between states and aliens as being of a lower order than those arising from agreements between governments or their agencies merits further illustration. Afghanistan recently granted the Soviet Techno-export Organization rights to explore for oil in Afghanistan. A breach by Afghanistan of the pertinent agreement would be a breach of international law. But a contract with a privately owned oil company, for the same object, of the same substance, upon the same terms, breached in the same way, by the same state would not be a breach of international law in the eyes of the formalists.¹⁰

The view here implicitly advocated is in favor of regarding breach of contracts with aliens by a state as *per se* a breach of international law.

State Practice

State practice is no more helpful in deriving the appropriate rule. On the one hand, there stands the argument adduced by Switzerland in the *Losinger & Co.* case that a state must be bound by its obligations to an alien under a contract as at the time the contract was made, since the contrary argument would enable a state to free itself of its obligations by enacting special laws:

La validité d'une obligation assumée par un État doit évidemment s'apprécier d'après la législation en vigueur au moment où l'obliga-

¹⁰ 1957-1958 Proceedings and Committee Reports of the American Branch of the International Law Association 70, 71. For expressions of opinion by other international societies of lawyers see 44 *Annuaire de l'Institut de Droit International* 251 ff. (II), and Report of the Conference of the International Bar Association, 1958.

tion est née. Cette règle de simple bon sens ne souffre aucune discussion.¹⁷

In other words, the contract was regarded as giving rise to an international obligation, and the breach of contract was seen as a direct breach of international law. This argument was naturally opposed by Yugoslavia, the defendant in that case. Unfortunately the Permanent Court of International Justice did not find it necessary to proceed to a decision of the issue.¹⁸

In the recent *Norwegian Loans* case, a similar argument was raised by France in a case involving public loans, the argument being formulated in general terms so as to cover contracts generally. It was submitted that

lorsqu'un État a conclu avec un particulier étranger un contrat quelconque, il ne peut l'en dépouiller, directement ou indirectement, sans engager sa responsabilité à l'égard de l'État protecteur de cet étranger.¹⁹

Norway opposed this formulation of the rule.²⁰ Here too the International Court of Justice was not required to proceed to judgment on the issue.

In the *Anglo-Iranian Oil Company* case, the United Kingdom memorial argued in a fashion similar to Switzerland and France when it said:

a fortiori the principle of respect for acquired rights in the matter of concessions must be regarded as binding upon the Government or Governments of the State granting them when there has been no change of sovereignty over the territory where the concession operates.²¹

But apart from these instances of legal argument, there is little or no evidence in the practice of states of the view that a breach of a contract with an alien by a state is *per se* a breach of international law. The United States does not seem to espouse that view. In general the United States does not assist its citizens in contract claims of this kind except where there is "an arbitrary wrong," lack of good faith or abuse, *i.e.*, where there is some other additional element making the breach of contract a breach of international law.²² In British practice Harding, Q. C., advised the British Government not to protect British subjects who enter into contracts with a foreign government "unless and until they have suffered a denial or flagrant perversion of justice or some gross

¹⁷ P.C.I.J., Ser. C, No. 78, p. 32.

¹⁸ See also the Belgian argument in the *Electricity Company of Sofia* case, P.C.I.J., Ser. C, No. 88, p. 54.

¹⁹ 2 I.C.J. Pleadings, Oral Arguments and Documents 61. See also *ibid* 63, 181, 182, and 1 Pleadings, Oral Arguments and Documents 84, 404.

²⁰ 1 *ibid*. 485; 2 *ibid*. 134.

²¹ Pleadings, Oral Arguments and Documents 84.

²² See 4 Moore, *Digest of International Law* 289, 705, 723 (1906); 5 Hackworth, *Digest of International Law* 611 (1942). For other American practice, see 2 Wharton, *A Digest of the International Law of the United States* 654 (1886), and material in J. G. Wetter, "Diplomatic Assistance to Private Investment," 29 *University of Chicago Law Rev.* 275 (1962).

wrong."²³ The Latin American states naturally take the view that a mere breach of contract with an alien by a state is not *per se* a breach of international law.²⁴ Their attitude was significantly stated at the Hague Peace Conference of 1907. For instance, Argentina maintained that

With regard to debts arising from ordinary contracts between the citizen or subject of a nation and a foreign Government, recourse shall not be had to arbitration except in the specific case of denial of justice by the courts of the country which made the contract, the remedies before which courts must first have been exhausted.²⁵

Salvador and Ecuador expressed similar views.²⁶

It is significant then that at the Hague Codification Conference of 1930, the basis of discussion relating to contracts was formulated in such a way as to avoid the assumption that the breach by a state of a contract with an alien is always *per se* a breach of international law. That basis of discussion reads:

A state is responsible for damage suffered by a foreigner as the result of the enactment of legislation which directly infringes rights derived by the foreigner from a concession granted or contracts made by the state.²⁷

Draft conventions so far attempted do not expressly embody the rule that a breach of contract with an alien by a state is *per se* a breach of international law, perhaps for the reason that there is no clear agreement on such a rule among states nor is it borne out by the practice of states.²⁸ On the contrary the Draft Convention prepared by Garcia Amador for the International Law Commission contains a rule which presupposes that such an act is not *per se* always a breach of international law.²⁹

III

In view of the uncertainty evidenced among text-writers and in direct state practice the material to be gathered from international decisions assumes particular importance as would any practice that may have been established by treaties.

²³ 2 McNair, *International Law Opinions* 202. For British practice see, further, Hall, *International Law* 334-336 (8th ed., 1924); 2 Phillimore, *Commentaries upon International Law* (3rd ed., 1888).

²⁴ Drago, 1 A.J.I.L. 692 (1907). See also, for the practice of states, Dulon, 88 Am. Law Rev. 648; for France, *Journal officiel* du 8 Juin 1907, *Débats Parlementaires*, *Chambre des Députés* 1231; for Germany, 1 Martens, *Völkerrecht* 379 (1883). Further, see *The Suez Canal Problem*, U. S. State Dept. Pub. 6392.

²⁵ Scott (ed.), *Reports to the Hague Conferences of 1899 and 1907*, p. 492 (1917).

²⁶ *Ibid.* 494, 495.

²⁷ 2 I.L.C. Yearbook (1956) 223, citing from L.N. Doc. C.75, M.69, 1929. V.

²⁸ These drafts are conveniently collected in the Annexes to the Report of the International Law Commission on State Responsibility, 2 I.L.C. Yearbook (1956) 221-230. For another convention, see the *Abs-Shawcross Convention*, 1961 *Current Legal Problems* 213.

²⁹ Art. 7. 2 I.L.C. Yearbook (1957) 116-117.

*The Assumption of Jurisdiction in Contract Cases by
International Tribunals*

Cases concerning the establishment of jurisdiction of an international tribunal in contract cases must be distinguished from those which involve or discuss the question of the nature of a breach of contract with an alien by a state. Jurisdiction in a case alleging a breach of contract by a state depends on the instrument creating the tribunal, a treaty between the claimant state whose national alleges injury and the defendant state. The question is one of interpreting a treaty.³⁰ Although the tribunal may decide that the treaty does give it jurisdiction over such a claim, it does not follow that the breach of contract for that reason alone is a breach of international law giving rise to state responsibility. Nor, conversely, is it true to say that there must be a breach of international law giving rise to state responsibility to give a tribunal jurisdiction.³¹ Even a stipulation in the *compromis* that claims should be decided according to "principles of international law" does not change this conclusion. Such a stipulation has been interpreted to mean that the claims must only have an international character. Claims between the citizens of one country and the government of another are of this character. Thus claims alleging a breach by a state of a contract with an alien would come within this concept, and tribunals have assumed jurisdiction in such cases.³² Also clear is the fact that in such cases tribunals have not been interested in establishing whether the breach of contract was a breach of international law entitling the claimant to redress for such a breach. Instead they have granted compensation for a breach of contract if it could be established.³³ Thus in the *Illinois Central Railroad Co.* case (U. S. v. Mexico),³⁴ the United States claimed damages and interest on behalf of the above company for non-payment of the price of 91 locomotive engines on a contract with the Mexican Government Railway Administration. The defense argued that, since the claim was based on the non-performance of a contractual obligation, it was outside the Commission's jurisdiction. The Convention constituting the Commission stated in Article I that the Commission should decide "all claims against one government by nationals of the other for losses or damages suffered by such nationals or their properties. . . . in accordance with the principles of international law, justice and equity."

³⁰ See *Illinois Central Railroad Co. case* (U. S. v. Mexico), U. S. and Mexican General Claims Commission Opinions 1926-1927, p. 15.

³¹ *Ibid.* at 17, interpreting Art. I of the General Claims Convention of 1923.

³² See the *Illinois Central Railroad Co. case*, where the tribunal discussed at length this concept of "international character."

³³ Thus, under the Convention between the U. S. and Mexico of April 11, 1839, the Commission sustained a claim in contract for the furnishing of a war vessel in the Samuel Chew Case, 4 Moore, *Digest of International Arbitrations* 3428 (1898) (cited hereafter as Moore). See also *Ibid.* Ch. 63 *passim*; 1 Hyde, *International Law* 1004 (2nd ed., 1945); Eagleton, *Responsibility of States in International Law* 160 (1928); Ralston, *The Law and Procedure of International Tribunals* 75 (1926); Borchard, *Diplomatic Protection of Citizens Abroad* 298 (1915).

³⁴ U. S. and Mexican Claims Commission Opinions 1926-1927, p. 15.

It was held that (1) the Commission had to derive its powers from a construction of the treaty; (2) there was no rule that contract claims were cognizable only in cases where some form of governmental responsibility was involved; and (3) the claims had to be of an international character and the present claim was of that character.

Furthermore, the fact that the governing instrument may specify that the claims should be decided in accordance with the principles of international law, equity and justice does not mean that a breach of international law must have occurred. It merely means that the parties to the instrument have chosen special principles to be applied in the settlement of their dispute.³⁵

On the other hand, there are cases in which arbitral tribunals have refused to take jurisdiction over contract claims. In the *Hubbell* case (U. S. v. Great Britain),³⁶ the claim was on behalf of a U. S. citizen against Great Britain concerning the adoption of a patent on an improvement in breach-loading firearms belonging to the claimant. Article XII of the Arbitration Treaty provided for the submission of "all claims . . . arising out of acts committed against the persons or property"³⁷ of citizens or subjects of either contracting party. The objections to the jurisdiction by the defendant were upheld on the ground that claims based on contract did not come within the terms of the treaty. In *Pond's* case (U. S. v. Mexico)³⁸ it was held that, under an instrument granting jurisdiction over "claims . . . arising from injuries to their persons or property by the authorities,"³⁹ although claims arising out of contracts came under the cognizance of the tribunal, "the validity of the contract should be proved by the clearest evidence, and . . . it should also be shown that gross injustice has been done by the defendant."⁴⁰ It is clear that in this case something more than a mere allegation of a breach of contract was required for jurisdiction to be assumed. What the additional requirements are is not clear; for the term "gross injustice" needs definition.⁴¹

These cases show that, first, instruments submitting disputes have differed in their wording, though the variation may only be very slight and, secondly, tribunals have interpreted instruments in different ways. No conclusion can be drawn which points to any uniform rule of interpreta-

³⁵ *Ibid.*

³⁶ 4 Moore 3484.

³⁷ Treaty of Washington, May 8, 1871 (Great Britain-U. S.), 1 Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements* 700 (1910).

³⁸ 4 Moore 3467.

³⁹ Treaty between U. S. and Mexico, 1868, Art. I, 1 Malloy, *op. cit.* 1128.

⁴⁰ 4 Moore 3467. See also the Leonard T. Treadwell and Co. case (U. S. v. Mexico), *ibid.* 3468, where jurisdiction over a claim based on a contract for the sale of arms and munitions was rejected on the same grounds.

⁴¹ In some cases the tribunal has made its jurisdiction depend on whether or not the claimant entered voluntarily into the contract. If he had, the tribunal had no jurisdiction: State Bank of Hartford case (U. S. v. Mexico), 4 Moore 3473. See also the Kearney case (U. S. v. Mexico), *ibid.* 3467, where, in the case of a contract for the supply of arms and munitions of war, the tribunal refused jurisdiction. These cases were decided by the same tribunal that decided Pond's case so that the notion of involuntariness may really be a part of the concept of "gross injustice."

tion which establishes a presumption that such contract claims are subject to the jurisdiction of international tribunals.⁴² Nor is any evidence forthcoming of any rule of interpretation based on the notion that a breach of contract is a breach of international law, a most important conclusion.

Treaties Conferring Jurisdiction over Contract Claims

In spite of the divergent interpretations given to arbitration treaties, it is clear that a large number of cases have held or assumed that the governing instrument purports to confer jurisdiction over claims based on breach of contract by the state party as such.⁴³ This means that in a large number of bilateral treaties states have regarded claims based on breach of contract by a state as *per se* cognizable by international tribunals.⁴⁴ Assuming that there was no rule of international law that the breach of contract with an alien by a state is *per se* a breach of international law, can it be said that these treaties represent a practice which has given rise to a new rule of international law that a breach by a state of a contract with an alien is *per se* a breach of international law giving rise to state responsibility? It must be noted that the numerical preponderance of those treaties that submit claims based on contract breaches *per se* to the jurisdiction of international tribunals over those that do not is not conclusive of the creation of a new rule of international law. There are factors, moreover, which clearly indicate that these treaties have not created a new rule of international law.

First, these treaties make no reference to a breach of international law as the basis on which claims are submitted to arbitration. They merely refer to "claims" by persons against the contracting state. These could very well be claims based on the breach of municipal law. For the creation

⁴² See the Illinois Central Railroad Co. case, U. S.-Mexican Claims Commission Opinions 1926-1927 at p. 16.

⁴³ See, for instance, the case of the Hermon, 4 Moore 8425; Eldredge's case, *ibid.* 8460; Manasse & Co.'s case, *ibid.* 8462; Boulton, Bliss and Dallett's case, Morris, Report of U. S. and Venezuelan Claims Commission 105.

⁴⁴ The following treaties are examples of this category. Contract claims were accepted under them: U. S.-New Granada, 1857, Art. 1, 1 Malloy, *op. cit.* 819; U. S.-Ecuador, 1862, Art. 1, *ibid.* 432; U. S.-Peru, 1868, Art. 1, 2 *ibid.* 1408; U. S.-Costa Rica, 1860, Art. 1, 1 *ibid.* 846; U. S.-Venezuela, 1866, Art. 1, 2 *ibid.* 1856; U. S.-Peru, 1868, Art. 1, *ibid.* 1411; U. S.-Mexico, 1868, Art. 1, 1 *ibid.* 1128; U. S.-France, 1880, Art. 1, *ibid.* 535; U. S.-Venezuela, 1885, Art. 2, 2 *ibid.* 1860; U. S.-Chile, 1892, Art. 1, 1 *ibid.* 185; France-Venezuela, 1902, Art. 1, Declercq, 22 Recueil des Traités de la France (1901-1904) 68; U. S.-Venezuela, 1908, Protocol, Art. 1, 2 Malloy, *op. cit.* 1870; U. S.-Great Britain, 1910, Treaty Series No. 573; U. S.-Mexico, 1923, Art. 1, *ibid.* No. 678; U. S.-Great Britain, 1927, *ibid.* No. 756 (exchange of notes); U. S.-Panama, 1926, Art. 1, *ibid.* No. 842.

The following treaties did not admit contract claims as such: U. S.-Mexico, 1868, Art. 1 (Umpire Thornton's subsequent interpretation based on expediency, which changed the course of decisions), 1 Malloy, *op. cit.* 1128; U. S.-Great Britain, 1871, Art. XII, *ibid.* 700, 705; U. S.-Spain, 1871, par. 5, 2 *ibid.* 1661, 1662; U. S.-Haiti, 1919, Protocol, Art. III (4 classes of fiscal claims were excepted in this treaty), Treaty Series No. 643. See also 2 Hyde, *op. cit.* 306.

of a new rule of international law an explicit reference to the new rule would be required.

Secondly, cases such as the *Illinois Central Railroad Co.* case state quite clearly that it is not necessary that an allegation of a breach of international law entailing state responsibility be the basis of a claim in order that the tribunal may assume jurisdiction over it;⁴⁵ and this, it was said, was so even though the instrument said that decisions were to be given according to the "principles of international law, justice and equity." This clearly shows that the parties to the treaty did not regard a breach of contract by a state *per se* as a breach of international law, although the tribunal was given jurisdiction in such cases.

Thirdly, unless the contrary is stated in the governing instrument as in the *Illinois Central Railroad* case, the merits of the case are decided by the application of the relevant municipal law. In the *Frear* case,⁴⁶ for example, the tribunal decided a claim alleging a breach of contract to pay for potatoes delivered by the application of French law relating to performance and discharge of contracts, as if it were dealing with a case presented to a French court.

International Decisions

In the decisions of international tribunals there are a few bare statements that appear to support the view that a breach of contract with an alien by a state is a breach of international law.⁴⁷ There is little or no evidence, though, that any breach of such a contract by a state has *per se* been treated as a breach of international law in any case.⁴⁸ On the other hand, there is evidence that such breaches *per se* have not been regarded as breaches of international law.

The leading case is the *Martini* case (Italy *v.* Venezuela).⁴⁹ A concessionary contract for the construction and operation of a railroad between the Venezuelan Government and an Italian company was terminated by the former as a result of a Venezuelan court decision. Italy claimed, *inter alia*, on behalf of the company that a counter-claim by the company before the Venezuelan court to the effect that the Venezuelan Government had broken the contract by granting a monopoly to another individual had been wrongfully rejected. The tribunal held against Italy on this count, but what is of importance is the tribunal's approach to the contention. The judgment shows that

⁴⁵ See also the case of the *Hermon*, 4 Moore 3425.

⁴⁶ *Ibid.* 3488. The tribunal was set up by the U. S.-French Claims Convention of 1880.

⁴⁷ See Nielsen's reference to this view in his dissenting opinion in the *International Fisheries Co. case* (U.S.A. *v.* Mexico), U. S.-Mexico Claims Commission Opinions 1930-1931, pp. 207, 241, and Commissioner Findlay in the *Venezuelan Bond cases*, 4 Moore 3616, 3649.

⁴⁸ The *Aboilard* case, 12 Rev. Gén. de Droit Int. Public, Documents 12 (1905), and *Hemmings case*, Nielsen's Report 617 (1926), 15 A.J.I.L. 292 (1921), *seem* to support this view, but even they can probably be explained.

⁴⁹ 25 A.J.I.L. 554 (1931).

(a) the tribunal did not assert that the Italian company's counter-claim was an allegation of a breach of international law;

(b) it did not treat it as one either. It did not examine the merits of the counter-claim as a court of appeal from the Venezuelan court as it would have done if it regarded a breach of contract by a state as a breach of international law.⁵⁰ Rather it looked for certain other defects in the judgment of the Venezuelan court. The success of the counter-claim had depended largely on the interpretation of the contract, and on this the tribunal said:

As the respondent has emphasized, there exists in several countries a well established jurisprudence by which the rights of a grantee under a contract of concession are interpreted restrictively. If the Court of Caracas, in adopting a restrictive interpretation of the Martini contract on the basis of the Venezuelan law, reached the conclusion that the Feo contract was not contrary to the contract of concession, that conclusion cannot be characterized as erroneous or unjust by an international tribunal.⁵¹

If the tribunal had been acting as a court of appeal, it would have examined the judgment of the Venezuelan court in order to find out whether that court's notion of the proper rule of interpretation coincided with the arbitral tribunal's opinion of it and whether that court had applied it in the way in which the arbitral tribunal would have applied it. Instead, the tribunal contented itself with finding out whether the rule of interpretation chosen was a *possible* one and whether it had been applied in a *possible* way;

(c) the tribunal does not seem to have even considered the question of applying international legal principles to determine whether the alleged breach was a breach of international law and whether the Venezuelan court had chosen those principles and applied them correctly in deciding the issue.⁵² Instead it seems to have accepted the choice of rules for determining the issue of breach made by the Venezuelan court *ipso facto*.

These factors lead to the conclusion that the tribunal in this case did not regard a breach of contract *per se* as a breach of international law. There seems to be one obstacle, however, to this view of this case. The *compromis*, according to the tribunal,⁵³ restricted its competence to defects in the action before the Venezuelan court. Can it be argued that it was because of this limitation of jurisdiction that the tribunal did not examine the question whether there had been a breach of contract by Venezuela on the basis that a breach of contract by a state is a breach of international

⁵⁰ This was the first conclusion stated above, p. 881, which must follow, if a breach of contract were a breach of international law.

⁵¹ 25 A.J.I.L. 554 (1931).

⁵² This was the second conclusion stated above, p. 881, which followed if a breach of contract were a breach of international law.

⁵³ "The Arbitral Tribunal will now examine the question whether 'in the action brought against Martini & Co., before the Federal Court of Cassation . . . there was a denial of justice or manifest injustice.'" 25 A.J.I.L. 564, at 565 (1931).

law and not because it did not regard a breach of contract by a state as a breach of international law? In discussing its competence the tribunal said that a "denial of justice" to which its jurisdiction was limited occurred, *inter alia*, when a judicial decision, which was final and without appeal and was incompatible with the treaty obligations *or other international obligations*⁵⁴ of the state, was given. Now, if acts of a state which constitute a breach of contract are breaches of international law, they are contrary to the international obligations of that state. If the courts of the state declare that those acts are not a breach of contract and consequently are not a breach of international law, when in fact they are, the judgment of the court is itself incompatible with the international obligations of that state. Therefore, in determining whether such a judgment is incompatible with the international obligations of that state and constitutes for that reason a denial of justice within the definition of that term, the tribunal must have had the competence to inquire into the question whether the acts themselves were a breach of contract and consequently a breach of international law. Hence, if the tribunal had taken that view of a breach of contract, it would have examined the acts alleged to have been a breach of contract in its own right in order to determine whether there was a breach of international law. But it did not. The only conclusion seems to be that it did not regard a breach of contract as *per se* a breach of international law.

There is much other evidence in favor of the view that a breach of contract is not *per se* a breach of international law in the attitude of international tribunals. In the *Illinois Central Railroad Co.* case, the main issue was whether the convention gave the tribunal jurisdiction over contract claims. The tribunal held that it was not necessary that either government should be responsible according to international law for a claim in order that the tribunal might have jurisdiction over it.⁵⁵ The Mexican argument was that only breaches of international law were within the tribunal's jurisdiction, and that, since breaches of contract were not *per se* breaches of international law, they were outside the tribunal's jurisdiction. While the tribunal denied that part of the contention which asserted that only breaches of international law were within the tribunal's jurisdiction, it seems to have assumed that the second part of the argument, namely, that a breach of contract was not *per se* a breach of international law was correct.

Again in the *International Fisheries Co.* case (U. S. v. Mexico),⁵⁶ where the cancellation of a fisheries contract by the Mexican Government on the ground that the claimant had failed to perform the contract was in issue, the tribunal said that the cancellation could have been contested in the Mexican courts, and therefore "was not an arbitrary act . . . which in itself might be considered as a violation of some rule or principle

⁵⁴ Italics added.

⁵⁵ U. S.-Mexican Claims Commission Opinions 1926-1927, p. 17.

⁵⁶ U. S.-Mexico Claims Commission Opinions 1930-1931, p. 207.

of international law. . . ."⁵⁷ It is clear that the tribunal took the view that a breach of contract *per se* is not a breach of international law, but that something more, making it an "arbitrary act," was necessary to make it one.

There are several other decisions which in effect regarded a breach of contract as a breach of international law when it was accompanied by some further element. These cases support the view that a breach of contract is not *per se* a breach of international law.

In the *General Company of the Orinoco* case (France v. Venezuela)⁵⁸ the breach of concessions for the exploitation of all vegetable and mineral products in and the extensive development of the territories of the Upper Orinoco and Amazonas during a period of thirty-five years and for the exclusive exploitation of sarrapia for a period of twenty-five years in a described area was put in issue. The company's property was seized, burned or sequestered and what remained was sold at a nominal figure. Also a Venezuelan Federal Court decree had condemned the company to pay damages for non-fulfillment of its contract. Here there were other circumstances than the mere breach of contract which made the breach a violation of international law so that the arbitrator could decide the case on that basis.

A concession to run tramways for a period of fifty years was rescinded arbitrarily by the state and thus caused a violation of international law in the case of *Pieri Dominique and Pieri Dominique & Co.* (France v. Venezuela).⁵⁹

In the *Oliva* case (Italy v. Venezuela),⁶⁰ fulfillment of a concession for the construction of a Pantheon was made impossible by expulsion of the claimant. This was a further element converting the breach of contract into a violation of international law, since the alien had no local remedies available to him.

Several other cases supporting the above view may be mentioned in passing, such as the *Kunhardt* case (U.S.A. v. Venezuela),⁶¹ the *Punchard, McTaggart, Lowther & Co. case* (Great Britain v. Colombia),⁶² the *Cedroni* case (Italy v. Guatemala),⁶³ the *Delagoa Bay and East African Railway Co. case* (Great Britain v. Portugal),⁶⁴ the *Cheek* case (U.S.A. v. Siam),⁶⁵ and the *May* case (U.S.A. v. Guatemala).⁶⁶ Insofar as they took into account a further element in determining that there was a violation of international law, they cannot be said to support the view that a breach of a contract with an alien by a state is *per se* a breach of international law.

Against these are ranged three decisions⁶⁷ which appear to support or

⁵⁷ *Ibid.* at 218.

⁵⁸ Ralston's Report of the French-Venezuelan Mixed Claims Commission, 1906, p. 244.

⁵⁹ *Ibid.* 185.

⁶⁰ Ralston's Report 771 (1904).

⁶¹ *Ibid.* 63.

⁶² La Fontaine, *Pasicrisie Internationale* 544 (1902).

⁶³ *Ibid.* 606.

⁶⁴ *Ibid.* 397.

⁶⁵ 1897 U. S. Foreign Relations 461.

⁶⁶ 1900 U. S. Foreign Relations 659.

⁶⁷ The important cases on which considerable reliance has been placed by the authorities, such as *Eagleton*, *op. cit.* at 167, are the *International Fisheries case*, note 56

have been interpreted to support the contrary view that breach of contract by a state is in itself a breach of international law. But all these on examination reveal the contrary, or are distinguishable. In the *Rudloff* case (U. S. v. Venezuela),⁶⁸ where a contract for the construction of a building in the market place had been declared null and void by the Municipal Council of the Federal District, the objection was raised by the defendant state that the case was still pending before a Venezuelan court of appeal, that there had been no denial of justice, and that, consequently, there was nothing on which the tribunal could pronounce. In deciding the case against the defendant government, Commissioner Bainbridge let fall words which may appear to support the view that a breach of contract *per se* is a breach of international law.⁶⁹ It is clear, though, that that was really not his view. In the first place, in his own judgment he regarded the issue as whether a claim based on a private law breach of contract was cognizable while it was still pending in the municipal courts, under a *compromis* which stated that "all claims . . . not settled by diplomatic agreement or arbitration" were justiciable. It was not a question of what constituted a breach of international law, a notion which was irrelevant for the purposes of jurisdiction.⁷⁰ Secondly, he stated explicitly that states ordinarily have a right to intervene on behalf of their nationals in the case of contracts only where there was a "denial of justice,"⁷¹ and proceeded to explain that the *compromis* gave the tribunal exceptional jurisdiction. Finally, the Umpire who settled the difference of opinion which occurred between the two Commissioners in this arbitration regarded the matter as entirely one of interpreting the treaty for the purpose of determining the tribunal's jurisdiction in a case where a contract claim was pending before a municipal court, irrespective of the question of breach of international law.⁷²

In *Beales, Nobles and Garrison* (U. S. v. Venezuela),⁷³ the claimant was suing for non-fulfillment of a contract for the establishment of a steamship service between New York and La Guayra, involving obligations relating to immigration and commerce which had been made with the dictator of Venezuela. The question at issue was whether the latter had power to contract and whether the contract had been validly concluded. The Commission was confronted with the preliminary question whether it had jurisdiction. In the course of his judgment Commissioner Findlay said:

It would be difficult, if not impossible, to assign a good reason why, on principles of abstract right and justice, an injury to a citizen arising out of a refusal of a foreign power to keep its contractual engagements, did not impose an obligation (sic) upon the government

above (Commissioner Nielsen's dissenting opinion), and the Venezuelan Bond cases, 4 Moore 3616 (Commissioner Findlay's opinion).

⁶⁸ Morris, Report of U. S. and Venezuelan Claims Commission 415.

⁶⁹ *Ibid.* at 423.

⁷⁰ *Ibid.* at 423, 426.

⁷¹ *Ibid.* at 426.

⁷² *Ibid.* at 431 and especially at 432.

⁷³ 4 Moore 3548.

of his allegiance to seek redress from the offending country, quite as binding as its recognised duty to interfere in cases involving wrongs to persons and property.⁷⁴

It is emphasized that the learned Commissioner says "injury . . . *arising out of*"⁷⁵ a refusal of a foreign power to keep its contractual engagements." He subsequently indicates that the additional factor of failing to afford redress is the vital element which constitutes the international wrong and not the breach of contract by itself.⁷⁶ It is in the light of this that the passage cited above should be interpreted. Moreover, it is clear that his conclusion whether there was a cognizable claim or not was reached by an interpretation of the *compromis*, to which the question whether there had been a breach of international law was irrelevant. Thus any statement on the latter point may be regarded as *obiter*.⁷⁷ In any case, the analogy between wrongs to persons and property and contractual claims which Commissioner Findlay makes in this passage is not entirely satisfactory on the present issue, as will be submitted later.⁷⁸

The *Venezuelan Bond* cases (*U. S. v. Venezuela*)⁷⁹ were based on a refusal to pay monies due under certain bonds issued by the old Republic of Colombia and forming part of the Colombian public debt for which Venezuela became responsible. Commissioner Findlay said:

A claim is none the less a claim because it originates in contract instead of in tort. The refusal to pay an honest claim is no less a wrong because it happens to arise from an obligation to pay money instead of originating in violence offered to person or property.⁸⁰

There was in this case a refusal both to adjudicate and to compensate. The statement of Commissioner Findlay must, therefore, be taken to include this material fact within the notion of a breach of international law arising from a breach of contract.⁸¹ In other words, it is not the breach of contract *per se* that is characterized as a breach of international law

⁷⁴ *Ibid.* 3555. It would seem that Commissioner Findlay was more concerned with the question whether the state of the injured national has an obligation to intervene—a different aspect of state responsibility. In stating that there is such an obligation, as opposed to a right or power to intervene, the learned Commissioner is unorthodox, to say the least.

⁷⁵ Italics added.

⁷⁶ "Conceding now . . . that good faith as between nations binds the state as a personality to fulfil the terms of its private contracts, *or pay damages for their non-fulfilment* . . ." (Italics added). *Ibid.* 3555.

⁷⁷ "But, however this question may stand on principle it cannot be doubted that, if the present claim was valid in other respects, it would be the duty of the commission, under the convention between the U. S. and Venezuela, to make an allowance of damages sufficient to compensate for the wrong, notwithstanding that it originated in a breach of private contract between a citizen of one state and the government of another." 4 Moore 3555.

⁷⁸ Analogy is not a panacea in the law. The relevance and success of its use depends, among other things, on the similarity of purpose between the relevant fields of law. The relevance of this analogy is discussed below at p. 899.

⁷⁹ 4 Moore 3616.

⁸⁰ *Ibid.* 3649. Eagleton places much reliance on this passage, *op. cit.* 167.

⁸¹ As the reference to "a refusal to pay an honest claim" indicates.

but the breach of contract accompanied by the refusal to adjudicate and to compensate. Also, this case was regarded as concerning the interpretation of a treaty conferring jurisdiction on the tribunal by both Commissioners Findlay and Little.⁸² In the light of this fact, Commissioner Findlay's statement refers not to the distinction between that which is internationally wrong and that which is not, but is rather concerned with the question whether claims based on certain kinds of "wrong" can be distinguished from claims based on other kinds of wrong for the purposes of the treaty. "Wrong" was not being used in a technical sense to denote an internationally illegal act entailing state responsibility. Hence the question whether a breach of contract by a state was *per se* an internationally illegal act was not within the purview of this statement. Moreover, the fact that this case concerned public bonds is an important source of distinction, for different rules may apply to them.⁸³ Yet, since the statement of Commissioner Findlay seems to refer to contracts with aliens in general, they have been treated on that basis.

From this survey it is clear that none of the existing authorities convincingly support the thesis that a breach of contract is *per se* a breach of international law; those that seem to do so can be distinguished or explained. On the other hand there seems to be some very definite and clear evidence in support of the contrary view, which is proposed as the correct view of the law.

Functional Factors Supporting the Better View

There are functional reasons why the view supported by authority is justified. That view is that a breach of contract by a contracting state is not *per se* a breach of international law. There must be some other factor, such as the refusal of means to secure redress in a municipal court, to give rise to such a breach of international law. This does not mean that contractual relations between state and alien are outside the purview of international law. Claims arising out of such contracts can certainly be claims alleging a breach of international law, provided they contain the necessary additional features.

When an alien enters into a contract with a state, he is engaging in a business transaction. It is reasonable to expect that an ordinary business man will acquaint himself with the existing laws of the state with which he contracts concerning the transaction into which he is entering. He freely consents to enter into the transaction. He equally freely consents to the application of the existing laws to that transaction. There is free choice in respect of both, but the two are inextricably linked; the free

⁸² Commissioner Findlay: "The great question that confronts us on the threshold of this case is: Whether by the use of the terms under which this commission has been created it was the intention of the United States to demand and Venezuela to assent to a submission of a portion of her public debt to the decision of this body as one of the claims agreed to be referred within the clear intent and purview of the treaty?" 4 Moore 3643; also Commissioner Little, *ibid.* 3626.

⁸³ See note 1 above.

choice of one involves the free choice of the other. There will be provisions of the law which provide both for determining the validity of a claim that the contract has been broken and for its adjustment. He accepts those provisions on redress as well. In business there is an important risk that the transaction will not be fulfilled, although this risk will be attended by remedial rights as provided by the legal system. A businessman can be expected to accept this risk together with whatever rights of adjustment there may be. Therefore, where he alleges a breach of contract he cannot expect that provisions different from these be applied to his claim.⁸⁴ International law can only protect him against abuses of the process of adjustment and its deprivation or absence.

Moreover, it is not clear that international law does, in general, have substantive provisions relating to the form and effect of contracts between states and individuals *as such*.⁸⁵ Hence, it is not clear how a breach of contract can *per se* be a breach of international law. It may be added that if international law governed a contract between a state and an alien, it could only govern the obligations of the state and not the obligations of the alien, for international law does not operate on the individual directly in this way. It would clearly be inequitable to subject the state to the regime of international law in the performance of its obligations under a contract, while leaving the obligations of the alien to the domain of municipal law, where the two sets of obligations are mutually inter-dependant in that one would not have come into existence without the other. The nature of contractual relations is such that the parties expect to be governed by the same law. It is with the questions whether means of redress are afforded in the state and if so, how these means are effectuated by the relevant organs of the state, that international law normally concerns itself. The alien is entitled to redress according to the municipal law existing at the time he entered into the contract and to a fair adjudication of claims relating to the contract. It is with these legitimate expectations that international law ought to deal. The substantive rights and obligations connected with the contract, including those of redress, should be left entirely to the municipal law for definition; it is the preservation of the substantive right of redress and the procedural methods by which it is given effect that should be within the competence of international law.

⁸⁴ Such as any that international law may provide.

⁸⁵ See the Serbian Loans case, P.C.I.J., Ser. A, No. 20 (1929), at p. 41. Those cases in which tribunals decided cases by reference to "principles of international law, equity and justice" in virtue of the *compromis* (see above, at p. 888), probably did so by the use of what may be called general principles derived by analogy; see Cheng, *General Principles of Law as Applied by International Courts and Tribunals passim*, especially at 148. However, it has been contended that general principles of law may govern a contract between a state and an alien; see Meron, *loc. cit.* note 3 above, at 276. In that case it may be argued that, where international law is the law governing the contract, a breach of contract is a breach of international law as well. No cases have arisen, however, in which this solution has been offered. The idea raises numerous difficulties such as, *inter alia*, what law governs the choice of "international law" as the governing law.

In this way it is possible to reconcile the interests of contracting states and aliens.

Attempts have been made to assimilate breaches of contract to torts committed against aliens.⁸⁶ But, apart from the question whether what international law may have to say on injuries to property or person is different from what it pronounces on contracts, the analogy may be questioned. There is more justification for making such injury *per se* subject to international law than there is in the case of contract breaches. In the case of a contract the alien has a choice of accepting the transaction, the existing laws applicable to it, and the risk of non-performance subject to the existing remedial rights provided, irrespective of the fact of his entering the territory of a foreign state or the fact of his property being on that territory. In the case of injury to person and property there is no such act of choice immediately relative to the laws and risk of injury, which is additional to the act of entering the foreign state or introducing property into that state. This difference is important. There is more justification in not expecting the alien to accept the risk of injury to his person or property subject to adjudication according to the existing local law *only* by his mere choice to enter or keep his property in the territory of the foreign state, as the case may be. That choice is not as significant for this purpose as the choice of entering into a transaction which is so closely connected with law and the risks of business in human experience. Hence it is more plausible in the case of torts that international law should concern itself with the actual injury, as opposed to restricting itself to the existence and procedure of redress for an alleged infringement of rights existing under municipal law.

Ordinarily, then, a breach of contract becomes a breach of international law not *per se* but when other conditions are also present. States become liable for violations of international law arising out of breaches of contract under the law of state responsibility for the treatment of alien. It is submitted that international law specifies what requirements should be present in order to enable a state to discharge its duty of treating an alien according to international standards in relation to contractual rights, and responsibility is incurred when these requirements are not met. Thus, ordinarily, it is not as a breach of contract *qua* breach of contract that contractual claims will be actionable at international law but as a delict committed in the treatment of aliens.

IV

It has been shown that the general proposition that a breach of a contract with an alien by a state is not *per se* a breach of international law is true. It remains to examine what factors would or would not make a breach of contract a breach of international law at the time of the breach.

⁸⁶ Commissioner Findlay in the Venezuelan Bond cases, p. 896 above.

*The Obligation to Resort to the Local Courts before Refusing
to Perform,*

The argument has sometimes been presented that a state commits a breach of international law if it does not first have recourse to the courts before declaring the contract terminated or refusing to perform it. This lays an undue burden on the state as a party to a contract. States would be in a worse situation than private individuals who are parties to contracts. Ordinarily, when an individual believes that his obligations under a contract are not what the other party contends they are or when he believes that he has a right to consider the contract discharged for some reason or other, he may cease to perform in the expectation of being sued by the other party in the courts, if the latter were not satisfied. Thus, he assumes the rôle of defendant which is a more advantageous position. There is no reason to subject a state party to a contract with an alien to the heavier burden of continuing to fulfill its contract and of assuming the rôle of plaintiff. In the *International Fisheries Co.* case (U.S.A. v. Mexico),⁸⁷ it was held that the state's failure to resort to the courts before canceling a fisheries contract on account of an alleged breach by the claimant company of its obligations to erect factories and establish shops did not make the non-fulfillment of the contract a breach of international law. The contract, however, contained a clause in which express provision was made for cancellation by the state party in case of certain failures by the claimant, among which were included the alleged breaches. It may be argued that this case does not support the general proposition that a state is not under an obligation to resort to the courts before canceling or refusing to perform its contract, because it has two limitations: first, it concerns cancellation for alleged breach as opposed to other methods of refusal to perform such as mere non-performance and, second, the contract contained a provision for cancellation on the alleged grounds. But these distinctions are not material.

Taking the second point first, the fact that the contract does or does not contain a clause permitting cancellation for breach by the other party is not really material. It is only if there were a duty to submit to a court before cancellation that the agreement of the parties would be necessary to exempt from such a duty. As has been submitted, there is no reason for imposing such an exceptional duty on a state party and putting it in a worse position than a private individual. This, indeed, was the reasoning on which the majority of the Commission based its decision in the *International Fisheries Co.* case.⁸⁸ Therefore, the clause concerning cancellation was not a material factor in the decision. Moreover, there are no cases which have been decided on the basis that there is an international legal duty for a state to submit to a court before cancellation. On the contrary, the Umpire's decision in the *Turnbull* case (U.S.A. v. Venezuela)⁸⁹ discounted such a duty. The contract in question, which was for

⁸⁷ U. S.-Mexico Claims Commission Opinions 1980-1981, p. 207.

⁸⁸ *Ibid.* at 219.

⁸⁹ Morris, *op. cit.* 451 at 500.

the development of the national resources of a certain territory, contained a clause which required that "questions and controversies that arise for reason of this contract"⁹⁰ should be decided by the competent tribunals of the state. In those circumstances, it was held that there was no claim on which the tribunal could pronounce in the absence of such a decision. However, an argument was raised by the claimant that the defendant state was under an obligation not to cancel the contract without prior reference to a court, and since it was in breach of this obligation, there was good ground for recovery. Commissioner Bainbridge, who dissented, accepted this argument on the principle of natural justice, "*nemo debet esse iudex in propria sua causa*."⁹¹ The Umpire, however, adverted to the issue but did not draw the same conclusions, saying merely that the cancellation was nothing more "than a communication on the part of the government that it thought the contract was ended to which the other party could agree or not agree as it thought fit, and if it did not think this fit, the contract would subsist until its annulment was pronounced by the proper tribunal."⁹² It would seem that the Umpire did not accept the argument that the state was under an obligation to resort to the courts before declaring a cancellation. The implied view that the principle "*nemo debet esse iudex in propria sua causa*" could not be applied to a cancellation so as to give rise to an obligation to resort to the courts before cancellation was correct. As long as the courts are intended to be the final arbiters, the above principle is not infringed and there is no logical or other necessity for recognizing an obligation to resort to the courts before declaring a cancellation.

The *El Triunfo* case (U.S.A. v. Salvador)⁹³ does not seem materially to affect this proposition. It is true that the arbitral tribunal insisted that "by the rule of natural justice obtaining universally throughout the world wherever a legal system exists, the obligation of parties to a contract to appeal for judicial relief is reciprocal,"⁹⁴ and found the Republic of El Salvador in breach of this obligation in declaring by decree a contract for the establishment of steam navigation in the port of El Triunfo canceled for failure to perform by the other party without prior resort to the courts. But apart from the criticism which has been made above of the application of this principle of natural justice, the tribunal's pronouncement on this aspect of the case was unnecessary, since the tribunal had already found that an appeal to the courts by the claimant company would have been in vain,⁹⁵ in short, that there was no redress available in the local courts. Hence, according to the tribunal's finding, there was a breach of international law by the state for the latter reason and any statement relative to the duty to resort to the courts must be regarded as *obiter*.

⁹⁰ *Ibid.* at 462, 505.

⁹¹ *Ibid.* at 472.

⁹² *Ibid.* at 505.

⁹³ 1902 U. S. Foreign Relations 859.

⁹⁴ *Ibid.* at 871.

⁹⁵ *Ibid.* at 870. On the facts of the case the correctness of this conclusion is open to doubt, but this is not in issue for our present purpose.

To rest the absence of a duty to resort to the courts before cancellation on the express agreement of the parties to the contract creates other difficulties. For, if there were such a duty at international law, how can it be waived by agreement between the state and the alien without the consent of the alien's national state when the duty, being international, is owed to that state? This is another cogent reason for not attaching to such a clause the effect of exempting from the duty to resort to the courts and for, therefore, not postulating the existence of such a duty.

A provision in the contract expressly requiring resort to the court before cancellation for breach is declared may appear to give rise to difficulty. There is no authority on this point. It is submitted that, since the clause is part of the contract, its nonobservance would merely result in a breach of contract. The express obligation is nothing more than a private law contractual one. It does not assume any greater significance for international law than any other express contractual obligation. Its breach may give rise to a breach of international law but only as a result of the presence of other necessary factors such as the absence of available remedies.

As for the first point of distinction mentioned above in connection with the *International Fisheries Co.* case, whether the breach of contract by the state derives from a mere failure to perform or a cancellation, it does not affect the chances of the other party of testing the legality of the act before the relevant tribunals. There is no essential difference between the categories of acts in this respect. Nor is there any intrinsic charm in a mere failure to perform as opposed to cancellation that would warrant an imposition of an obligation to submit to adjudication before a refusal to perform in the case of a mere failure to perform, an obligation to continue fulfilling the contract and assume the difficult rôle of plaintiff. There is no international duty to resort to the courts in either case.

The Tortious Character of the Breach

It has been said that a breach of contract is regarded as internationally illegal conduct, if it constitutes a tort as well.⁹⁰ The conclusion is based on the assumption that a wrong to person or property of an alien is an international wrong in itself. Granting this assumption, the conclusion is warranted, if it means that the act which consists of a wrong to person or property and at the same time is a breach of contract is an international wrong. But if it means that for this reason the allegation that the act constitutes a breach of contract is an allegation that it constitutes an international wrong, it is questionable. The distinction is important, for it will affect the nature and basis of recovery. In the former case recovery will be for a breach of an international rule governing the treatment of persons or property, and will be limited to injury to person or property. If the latter meaning were admitted, the injured party would be recovering for a breach of an international legal obligation stemming from the contract which may be wider both in its extent and in respect of the consequences that flow from its breach.

⁹⁰ 1 Hyde, *op. cit.* at 549, note 1.

No international decision goes so far as to hold that an injury to property or person which happens to give rise to a breach of contract converts the contractual obligation into an international one and the breach of it into a breach of an international obligation. The decisions that have been relied on for this proposition⁹⁷ have all been decided under the special terms of the *compromis*, which gave the tribunal jurisdiction over the claims in question. The holding in the *Moses* case,⁹⁸ in which certain custom house receipts, which had been secured for the purpose of payment for arms furnished, were diverted, was that this, being a tortious act, could form the basis of an award, irrespective of whether the Commission had jurisdiction over contract claims. This was not to say that the non-payment of the contract debt was to be identified with the diversion of the revenues for the purpose of the tribunal's jurisdiction. It was only with the diversion of the revenues in which a property right had arisen that the tribunal had power to deal. Hence, even for the purpose of jurisdiction, the two notions of breach of contract and of tort are kept separate. It is the better view that a breach of contract does not become internationally illegal conduct because a tort is involved in its commission as well.

Confiscation

In a dissenting opinion in the *International Fisheries Co.* case Commissioner Nielsen said:

In the ultimate determination of responsibility under international law I think an international tribunal in a case grounded on a complaint of a breach of contract can properly give effect to principles of law with respect to confiscation. . . . If a Government agrees to pay money for commodities and fails to make payment, it seems to me that an international tribunal may properly say that the purchase price of the commodities has been confiscated, or that the commodities have been confiscated, or that property rights in a contract have been destroyed or confiscated. Claim is based in the instant case on allegations with respect to the confiscation of valuable contractual rights growing out of an arbitrary cancellation of a concession.⁹⁹

The first point to be noticed is that Commissioner Nielsen's opinion was a dissenting one, and considerably less value attaches to it than would

⁹⁷ Walter's case (U.S.A. v. Venezuela) (1885), 4 Moore 3567; Moses case (U.S.A. v. Mexico) (1868), *ibid.* 3465.

⁹⁸ *Ibid.*

⁹⁹ U. S.-Mexico Claims Commission Opinions 1930-1931, at 241. See also Nielsen in the Cook case (U. S. v. Mexico), 4 Int. Arb. Awards 213 at 214, in the Dickson Car Wheel Co. case (U. S. v. Mexico), *ibid.* 669 at 686, and in the American Bottle Co. case (U. S. v. Mexico), *ibid.* 435 at 438; and see statements in the following cases decided under the American-Turkish Claims Settlement of 1923, which required that the Commission proceed to a "summary examination of the claims": the Ina M. Hoffman and Duleie H. Steinhardt case, American-Turkish Claims Settlement 286 at 287; Socony Vacuum Oil Co. Inc. case, *ibid.* at 374, Singer Sewing Machine Co. case, *ibid.* at 491; Malamatinis case, *ibid.* at 605. No attempt is made to distinguish all these statements individually but they can all be distinguished on the basis of the terms of the *compromis* or as dissents, or the statements in them are acceptable as applied to breach by legislation which was the issue in the case (see p. 908 below for this).

have, if he had not dissented. It is clear that the majority of the tribunal¹⁰⁰ and Commissioner Nielsen differed on the question whether there had been a breach of international law in the instant case, although they were in agreement on whether a breach of international law was required for the purpose in hand. This difference of opinion on whether there had been a breach of international law was clearly the result of a disagreement on what constituted a breach of international law in the case of contract claims. Thus the fact that the dissent was on this particular point deprives his opinion of authority on that point.

Apart from this comment on the value of the opinion, the general validity of this view may be questioned. In the case of an ordinary breach of contract, the dispute relates in some form or other to the existence of contractual rights and the corresponding obligations under a prevailing system of legal relationships. Where confiscation is in issue, however, the existence of the rights in the property concerned is a prerequisite for the operation of the rules relating to expropriation.¹⁰¹ The dispute is only as to whether the property has been taken in circumstances, in a manner and with the accompanying factors required by international law. There is thus an essential difference between the two causes of complaint.

Furthermore, in the former case a contracting party may be expected to assume the risk of non-performance subject to adjudication under the existing regime of legal relationships. The same reasoning does not apply to the taking away of property as happens in connection with confiscation.

These general differences between the two situations warrant a separation of the legal rules governing them. An exception may, however, be made in the case of a particular class of acts amounting to a breach of contract. It has certain features which make it different from an ordinary contract and more akin to an act of confiscation. When contractual rights are taken away by legislation it may be called confiscation. This exception will be discussed in greater detail below.¹⁰² It may be conceded here that Commissioner Nielsen's view is valid in relation to this category.

International Law Chosen to Govern the Contract

It has recently been suggested by Mann that contracts between states and aliens can be governed by international law, if such law is chosen to be the proper law of the contract:

It is possible, however, for contracts between parties only one of whom is an international person to be subject to public international law. . . .

(a) According to the theory referred to, a contract could be "internationalized" in the sense that it would be subject to public international law *stricto sensu*, that, therefore, its existence and fate would be immune from any encroachment by a system of municipal law in exactly the same manner as in the case of treaty between two inter-

¹⁰⁰ See p. 893 above for majority opinion.

¹⁰¹ The Peter D. Vroom case (U. S.-Mexico) 1841, 1 Lapradelle-Politis, *Recueil des Arbitrages Internationaux* 461.

¹⁰² See p. 908 below.

national persons; but that, on the other hand, it would be caught by such rules of *jus cogens* as are embodied in public international law.¹⁰³

Some support for this view was sought from the arbitral award between *Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi*, where Lord Asquith of Bishopstone referred to a "modern law of nature" as governing the contract between a state and an alien company.¹⁰⁴ Jessup seems to have been thinking on the same lines.¹⁰⁵

This view is not without its theoretical difficulties and has been opposed by Martin Wolff,¹⁰⁶ Fawcett¹⁰⁷ and Friedmann.¹⁰⁸ Their argument against that view is that the "internationalizing" of a contract would not in practice be carried out because public international law has allegedly not yet succeeded in developing, or sufficiently developing, the necessary legal rules.

A cardinal difficulty would seem to be that of mutuality. If the contract whose proper law is international law is governed by the international legal system, it follows that both parties have a right to invoke international law to settle any grievances arising out of the contract. Not only would a breach of contract by the state party to the contract be a breach of international law, but a breach of contract by the alien party to the contract would also amount to a breach of international law. From this it would follow that the totality of the contractual relations has its existence in international law and that the alien is given international personality by a mere choice of law. It could then be argued that, where the state party to the contract violates the contract, it has broken international law vis-à-vis the alien personally and not necessarily vis-à-vis the alien's national state by maltreating one of its nationals. This is a revision of the present law of state responsibility. Moreover, it would also follow that the alien who violates a contract of this kind may be sued at international law for the breach, which is a considerable advance on the present position. It would be illogical to say that the alien's national state must be sued as a representative of the alien when it has done no wrong. This would place an unfair burden on states whose nationals enter into contracts with foreign states. Also it is not sound legal theory. This is so, although in the converse case it may be proper for the alien to be represented in international proceedings when the alien is plaintiff. Clearly this difficulty, arising from the reciprocal nature of the contractual complex, can be overcome if it be conceded that the alien has international personality either for these purposes or in general, but it is questionable whether such a concession can be made in the present state of international law.

¹⁰³ "The Proper Law of Contracts Concluded by International Persons," 35 Brit. Yr. Bk. Int. Law 84, 43 (1959).

¹⁰⁴ 1 Int. and Comp. Law Q. 247, 251 (1952).

¹⁰⁵ A Modern Law of Nations 139 (1948).

¹⁰⁶ Private International Law 417 (1950), and "Some Observations on the Autonomy of Contracting Parties in the Conflict of Laws," 35 Grotius Society Transactions 143, 150-152 (1950).

¹⁰⁷ "Legal Aspects of State Trading," 25 Brit. Yr. Bk. Int. Law 44, note 3 (1948).

¹⁰⁸ Law in a Changing Society 472 (1959), and 50 A.J.I.L. 483, 484 (1956).

On the other hand, it is possible to say that, although a contract between a state and an alien may refer to international law as its proper law, it is not thereby raised to a position in the international legal system as such. It still remains a complex of relations belonging to a municipal level, although it may be necessary to import international legal principles to interpret the contract and give it effect. In other words, such a reference would introduce specific rules without altering the position of the contract in the municipal sphere. Lord Asquith's approach in the case cited above did not go further than this, it is submitted. The learned arbitrator was right in seeing the reference as an invocation of specific principles, while he did not commit himself to the view that the contract had its existence in the international legal system as such.

However desirable and useful it may be that aliens and states should make contracts which have their existence in the international, as opposed to the municipal sphere, it is submitted that the present state of international law and the state of the authorities do not permit such "internationalization." A mere choice of law cannot, therefore, convert a breach of such a contract by a state into a breach of international law vis-à-vis the alien's state.

V

So far four situations which do not affect the nature of a breach of contract by a state have been discussed. It remains to consider those factors which would positively give rise to a violation of international law simultaneously with a breach of contract.

The Absence of Remedies

In the *International Fisheries Co.* case the fact that the claimants "had the right to appeal to the Mexican courts for justice, as the government of Mexico can, as a general rule, be sued in its own Federal Tribunals . . ." ¹⁰⁹ was held to be sufficient to prevent the breach of contract by administrative declaration from being internationally illegal. In this holding is implicit the notion that, where a state cannot be sued in the courts of the land, a situation arises in which there is a violation of international law. This is an example of the absence of legal remedies giving rise to a violation of international law and is the most obvious case.

Equally clear is the proposition that the absolute prevention of the alien from appearing in court, whether as a result of some particular or general treatment, in relation to a class of cases to which his case belongs or in relation to cases in general, is a denial of free access to the courts and amounts to an absence of legal remedies. In the *Ambatielos* case (*Greece v. U.K.*) it was said that the modern concept of

free access to the courts represents a reaction against the practice of obstructing and hindering the appearance of foreigners in Court, a

¹⁰⁹ U. S.-Mexico Claims Commission Opinions 1930-1931, p. 219.

practice which existed in former times and in former countries and which constituted an unjust discrimination against foreigners.¹¹⁰

The principle was there stated as being based on discrimination between aliens and nationals. But it is arguable that the principle should extend further to cover such cases as, for example, those where a certain class of contract cases or contract cases in general are not presentable against the state, irrespective of discrimination against aliens. That is to say, access must be allowed in any contract case without exception in which an alien claims against the state or the principle will be infringed.

Apart from this absolute prevention from suing the state in its courts, there is no authority on what would constitute a denial of access in those cases where conditions, taxes or other such restrictions are imposed on the presentation of cases before state courts, *except* that where there is discrimination between aliens and nationals to the detriment of aliens there will certainly be a denial of free access. The *Ambatielos* case went thus far in dealing with the question.¹¹¹ But on the question whether there is an international minimum standard in this department there is no authority. The answer is that there should be such a standard.

A further problem is raised by the nature of the courts set up to deal with the case. The existence of a special jurisdiction for dealing with a particular case is not of itself a sufficient defect to cause an absence of remedies. Thus, for example, the fact that there exists a special court of claims for dealing with cases against the state would not amount to a denial of free access to the courts. In the *Croft* case (Great Britain v. Portugal), which concerned a decision by a special court on the cancellation of patent rights, it was held that there was no denial of justice *per se*, if the decision involved an actual judicial activity by that special court, "since its [the court's] practice depended solely on the free and independent righteous convictions of the individuals legally entrusted with it and not on obedience to superior orders."¹¹² The international legality of special courts depends on their independence. By the same token legally instituted ordinary courts will not be of avail as a means of adjudication, if the judiciary is not independent. Thus where the courts are packed with corrupt judges, albeit in accordance with the municipal law, there would be a denial of justice or an absence of remedies.¹¹³

Finally, an illegally constituted court would give rise to an absence of means of adjudication. In the *Idler* case (U.S.A. v. Venezuela)¹¹⁴ it was held that a judgment in connection with a breach of contract claim, given in favor of the state and without the consent of the claimant by a court to which two *ad hoc* judges had been appointed "in violation of the express provision" of the law, was internationally illegal. It is a logical

¹¹⁰ Commission of Arbitration, *Ambatielos* Case, Greece v. U.K., Award March 6th 1956 at p. 20 (H.M. Stationery Office). ¹¹¹ *Ibid.*

¹¹² 50 Brit. & For. State Papers (1859-1860) 1288 at 1290.

¹¹³ For an analogous situation exempting the alien from exhausting local remedies where there has been violation of an international obligation, see *The Robert E. Brown* case (U. S. v. Great Britain), 19 A.J.I.L. 193 (1925).

¹¹⁴ 4 Moore 3491.

inference from this that, where such a court has been illegally constituted, there is an absence of judicial remedies at the time the alleged breach of contract by the state occurs, and there will be a breach of international law simultaneous with the breach of contract.

Legislation Causing a Breach of Contract

The question whether legislation has any special relevance to the problem under discussion has not been expressly discussed in any international decisions. When a state interferes or attempts to interfere with its existing contractual obligation and the existing contractual rights of an alien by resort to its lawmaking powers, it may be argued that this form of breach of contract ought to have a special status at international law. The following reasons are submitted for this thesis: First, the state is resorting to its power of changing an existing system of rights and obligations in using legislation to disrupt a contract to which it is a party. It is distinctly a different power from that of cancellation or simple non-performance under the prevailing system of rights and obligations. Secondly, it is acting in its capacity of legislator and not in its capacity of party to the contract in acting thus. It is a level of functioning which is different from that of parties to a contract. Thirdly, the effect of legislation is to take away rights and obligations, including existing rights of redress irrespective of the question whether they exist under the system of law prevailing at the time or not. In the case of an ordinary breach, the non-performance is based on the theory that under the existing law there is no obligation to perform for some reason or other. But in the case of legislation, this aspect is completely overshadowed by the fact that the act purports to change the existing system of rights and obligations, whatever it may be. Fourthly, an alien does not expect his contractual rights to be taken away by legislative action in the ordinary course of business. Legislative action is not in the same category as ordinary refusal to perform, subject to adjudication, as far as expected risk is concerned.

The reasoning that applies to an ordinary breach of contract is of no avail in reference to this instance of a breach of contract. Hence, should not this case be regarded as an attempt to deliberately take away¹¹⁵ the existing rights of an alien? The rights under the contract should be regarded as property¹¹⁶ and the case as one of confiscation of property. The rules of international law relating to the confiscation of property should, therefore, be applied to it.¹¹⁷ Breach of contract by legislative

¹¹⁵ Whether the obligation of the state and the corresponding right of the alien are changed in whole or part or a different obligation and right substituted for the old one, in any of these cases the existing right is taken away.

¹¹⁶ It is clear that this amounts to a rejection of the theory that contracts can *never* be regarded as property for the purposes of the international rules relating to confiscation (*cf.* Friedman, *Expropriation in International Law* 158 (1955)), at any rate as far as breach of contract by legislation is concerned.

¹¹⁷ For rules of international law relating to confiscation of property, see 1 Lauterpacht, *Oppenheim's International Law* 351 and note 1 (8th ed., 1954).

act will *ipso facto* be a breach of international law, if the legislative act is not accompanied by the factors required by international law for the taking of property. A legislative act purporting to change contractual rights would *prima facie* be a breach of international law, unless the presence of the other required factors can be shown.¹¹⁸

Support for this view is found in the *Shufeldt Claim* (U.S.A. v. Guatemala),¹¹⁹ where a legislative decree of the Assembly of Guatemala by which a contract-concession was declared annulled, was treated as an act of taking away property rights as a result of which the government "ought to make compensation for the injury inflicted and cannot invoke any municipal law to justify their refusal to do so."¹²⁰ In the *George W. Hopkins* case (U.S.A. v. Mexico), legislative decrees nullifying certain money orders issued by a previous government were held to be measures which could not operate "to destroy an existing right vested in a foreign citizen."¹²¹ The question was regarded not as one of breach of contract as such but rather as a question relating to the taking of property. In the *George W. Cook* case (U.S.A. v. Mexico), where a payments law purporting to regulate obligations under certain money orders was in issue, Commissioner Nielsen regarded the case purely as one in which "property rights under a contract had been impaired or destroyed."¹²² Now the two latter cases were decided under a *compromis* which, according to a decision made on it, did not require a breach of international law for the purposes of jurisdiction.¹²³ Moreover, in the latter of the two above-mentioned cases, the rest of the tribunal preferred to base its decision on these wide powers.¹²⁴ Nevertheless, the approach cited above in both cases is the right one in general. Further, in the *Panevezys-Saldutiskis Railway* case (Lithuania v. Estonia) the Bolshevik law, which resulted, *inter alia*, in the destruction of the concession granted to a Lithuanian railway company in Estonia, was implicitly regarded as an illegal seizure of property giving rise to an international cause of action.¹²⁵

In the *Serbian Loans* case (France v. Serbia)¹²⁶ Serbian laws affecting the substance of the Serbian Government's obligations to bondholders appear to have been treated as acts interfering with property rights, not as a pure breach of contract. So also in the *Case of Certain Norwegian Loans* (France v. Norway), where a Norwegian law suspending the operation of certain gold clauses in state loan contracts was in issue, Judge Lauterpacht took a similar view. In dealing with the question whether there was a dispute relating to international law before the court, he said:

¹¹⁸ This would not affect the rule relating to exhaustion of local remedies, which would in this case be a procedural requirement, prior to the presentation of claims before an international tribunal: see Judge Lauterpacht's approach in the *Case of Certain Norwegian Loans*, [1957] I.C.J. Rep. at 39.

¹¹⁹ 2 Int. Arb. Awards 1083.

¹²⁰ *Ibid.* 1095.

¹²¹ 4 Int. Arb. Awards 41 at 46.

¹²² *Ibid.* 213 at 215.

¹²³ *Illinois Central Railroad Co. case*, note 34 above.

¹²⁴ 4 Int. Arb. Awards at 217.

¹²⁵ P.C.I.J., Ser. A/B, No. 76.

¹²⁶ P.C.I.J., Ser. A, No. 20, at 41.

"it is that very legislation, in so far as it affects French bondholders, which may be the cause of the violation of international law of which France complains."¹²⁷ There can be no doubt that the learned judge took the view that the legislation amounted to a taking away of property which, insofar as it did not manifest those factors required by international law, was illegal. These last two cases, it must be mentioned, relate to public loans which are outside the purview of this paper. Nevertheless, the principles were stated broadly and are applicable to contracts as well.¹²⁸

In several cases the notion has been suggested that a cancellation consisting of an "arbitrary act" is a breach of international law.¹²⁹ What is meant by an "arbitrary act" has, however, not been explained. It would appear that this term refers to cancellation by legislation or cancellation in the absence of legal remedies. Insofar as the term contemplates legislative cancellation, the notion that an "arbitrary act" of cancellation involves a breach of international law is in accord with the view expressed here.

A novel idea was mooted by Judge Badawi in a separate opinion in the *Case Concerning Certain Norwegian Loans*. He took the view that the legislation could only have been a violation of international law if the interpretation of the loan contracts contained in the legislation constituted "*un déni de justice*."¹³⁰ The question whether there had been a breach of international law was dependent neither on whether relief was available in the courts nor on the fact of legislation being the instrument of the breach. This view purports to give the state party to a contract the right to decide, through legislation at any rate, what the contract means in the case in hand, and there is no reason why this should not be extended to disputes on other issues founded in contract as well, provided it is not a decision which amounts to a "denial of justice." The term "denial of justice" as used here means something different from "wrong according to the law of the contract." It appears to imply that, although the interpretation may be wrong according to the governing law, yet, if it is not so wrong as to be unjust, it will not be internationally illegal. Hence, this view seems to give states parties to contracts a certain latitude to affect contractual rights of aliens with impunity. This view is not advocated.

Treaties

The general proposition that, where a state performs an act which is prohibited by a treaty to which it is a party, it will be responsible for a

¹²⁷ [1957] I.C.J. Rep. at 36. See also Judge Basdevant, dissenting, *ibid.* at 48, and Judge Read, dissenting, *ibid.* at 86. The majority of Court upheld the objection to its jurisdiction based on a reservation to the declaration by one of the parties accepting the Court's jurisdiction under Art. 36 (2) of the Statute. It did not, therefore, consider the point discussed above.

¹²⁸ See also the British Government's argument in the *Anglo-Iranian Oil Co. case*—Pleadings, Oral Arguments and Documents, I.C.J., 1952, 83, at 93.

¹²⁹ *International Fisheries Co. case*, U. S.—Mexico Claims Commission Opinions 1930-1931 at p. 218; see p. 893 above.

¹³⁰ [1957] I.C.J. Rep. at 83.

breach of international law to the other party or parties to the treaty requires no substantiation. In accordance with the same principle, an act which constitutes a breach of contract would be a breach of international law, if it is an act which that state is under an obligation not to commit by virtue of a treaty to which it and the national state of the alien are parties. Thus, where state A and state B have an agreement that state A shall enter into contracts for the purchase of oil with the nationals of state B and take delivery under these contracts, a refusal by state A to take delivery under the terms of the contracts would be a breach of the treaty and a breach of international law.¹⁸¹ Needless to say, much will depend on the interpretation of the treaty as to what are the extent and nature of the international obligations in relation to the contracts. Thus a treaty which merely specifies that certain contracts should be entered into may well leave outside the purview of international law the substantive law governing them, their terms and the settlement of disputes between the contracting parties in connection with their fulfillment as such. In that case, the customary international law elaborated above will apply to the breaches of these contracts. On the other hand, where the treaty specifically enjoins the performance of certain contracts, its terms may be such that the substantive law intended to govern them is international law. In that case it follows that an actual breach of contract would also be a breach of international law. A third case may be postulated where the treaty does not contain a specific reference to contracts but prohibits acts which could interfere with contracts, among other things. In such a case, it is clear that the treaty purports to lay emphasis on the interference with contractual rights in a particular way. Hence, interference with them in that way is both a breach of contract and a breach of international law, and the logical consequences would follow. For instance, in the *Martini Co.* case, a treaty of 1861 between Venezuela and Italy contained an undertaking that neither party would "grant, in their respective states, any monopoly, exemption or privilege, to the detriment of the commerce, the flag or the citizens of the other state." The granting of a monopoly to one Feo for the shipping of oxen from certain Venezuelan ports was claimed to be breach of a concession for the working of a railroad and coal mines held by the Martini Co., while at the same time being a breach of the treaty. As has already been said in the discussion of the case,¹⁸² the jurisdiction of the tribunal was confined to examining whether there had been "a denial of justice or a manifest injustice in the judgment of the Court of Caracas." These terms were interpreted to mean that the tribunal had jurisdiction to examine whether a decision of the court of Caracas on any issue was incompatible with the treaty obligations

¹⁸¹ This does not mean that local remedies need not be exhausted. But the reference to state courts will serve a preliminary procedural function; see Fawcett, "The Exhaustion of Local Remedies: Substance or Procedure?", 31 Brit. Yr. Bk. Int. Law 452 (1954). The state courts will be the first in the hierarchy of courts and the international tribunal the last. The proceedings in the international court will be by way of quasi-appeal on the merits.

¹⁸² Above at pp. 891 ff.

owed by Venezuela to Italy.¹³³ The tribunal's attitude was an admission that the question whether there was a breach of the treaty of 1861 by the granting of the monopoly was a question for the tribunal to decide on the merits as a court of quasi-appeal from the court of Caracas. Thus the question whether there had been a breach of contract in this way was also one for the tribunal to decide on the merits as a court of quasi-appeal from the court of Caracas, insofar as it concerned the treaty. It is clear that the tribunal regarded the breaking of the contract in this way as a breach of international law *per se*.¹³⁴

VI

CONCLUSION

This study shows that a breach by a state of a contract with an alien is not a breach of international law *per se*. There are special circumstances which bring about a violation of international law simultaneous with a breach of contract. Reasons have been given above in justification of this position at each stage of the discussion. To sum up, it may be said that the first rule is that only a non-provision of sufficient means of adjudication by a state party to a contract for the purpose of deciding an allegation by the other party that the contract has been broken will cause a violation of international law at the time of the breach. An alien's contractual rights are adequately protected, if provision is made by international law for preventing the absence of adequate remedies, where an infringement of those contractual rights takes place. There are two other circumstances in which international law is directly infringed in the case of a breach of contract by a state. The first is where express protection is granted to the contractual rights as such by international instruments. This circumstance needs no explanation. The violation of international

¹³³ "The Arbitral Tribunal hence is only competent to judge whether, by its decision in the Martini Case, the Federal Court of Cassation of Caracas has rendered Venezuela liable according to the treaty of 1861. It is a question for the Arbitral Tribunal to judge the attitude of the Court of Caracas by reference to the treaty." 25 A.J.I.L. 564 (1931). This competence was held to exist as opposed to the general competence to examine the question whether the treaty had been infringed *dehors* its relation to the contract. The language of the tribunal seems to indicate that it is the decision that would have rendered Venezuela liable, while in fact the decision could only have continued the liability but could not have destroyed it by pronouncing the original act not a breach of contract and so not a breach of treaty. It is in this sense that the tribunal's pronouncements must be understood, notwithstanding the actual words used.

¹³⁴ The tribunal decided the point regarding the treaty in the defendant state's favor on the grounds that (1) the claimant had not raised it in the proceeding before the Caracas court; and (2) the treaty did not give the claimant a right on which he could rely at international law without his state's actually claiming it before such proceedings. Both grounds relate to the question whether local remedies had been exhausted in relation to the breach of treaty and not as to whether there had, in fact, been a breach of international law by the granting of the monopoly which caused the breach of contract, which is the aspect of the case that concerns us here. Both the above points relate to the procedural methods to be followed in obtaining redress for a breach of international law. The correctness of these points is not in issue.

law is dependent on the express agreement of the states concerned, *i.e.*, the state party to the contract and the national state of the alien. The next circumstance in which a breach of contract is accompanied by a violation of international law is where the state party to the contract attempts to change the contractual rights and obligations outside the existing system of legal rules governing the contractual relationship, *i.e.*, by legislation. The law of confiscation applies in this instance. It is the special nature of the power resorted to in this case that justifies this rule.

Only these circumstances and no others bring about a breach of international law simultaneous with a breach of contract by a state. Other factors, such as the failure of the state to resort to its courts before canceling the contract or refusing to perform it, or such as the tortious nature of the breach do not make the breach of contract a breach of international law. Nor is a breach of contract by a state ordinarily to be treated as a confiscation of property causing a breach of international law. The law of confiscation operates with this effect only in the case of a legislative breach of contract by a state.

THE UNITED STATES ANTIDUMPING ACT

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Enacted in 1921, the United States law on dumping in international trade¹ was regarded at the time as a "model of draftsmanship."² Present-day technicians are content with its provisions, though they do not echo this encomium. But the reader who approaches the nine closely written pages of the law's text for the first time is likely to find the experience rather terrifying. These nine pages can be roughly summarized as follows. The Act comes into operation when a foreign producer sells to United States importers at a price less than that which he charges purchasers in his own country, with resultant injury to United States industry. When this is the case, a dumping duty is assessed on the imports, measured by the price differential which has been found.

It will be seen that there are two elements which must be present to justify action in a dumping case: (1) price discrimination and (2) injury.

Price discrimination typically involves a lower price to the United States than the price charged in the foreign producer's home market. But if the foreign producer is principally an exporter with few or no home market sales, price discrimination is found if there is a lower price to the United States than the foreign producer's third country price, *i.e.*, the price charged in the foreign producer's other export sales (not including sales to the United States). Finally, if the foreign producer sells only to the United States, price discrimination will be found if the price to the United States is lower than the foreign producer's cost.

By way of example, let us say that bicycles are sold in a producer's home market for \$15. They are exported to the United States for \$12. This is price discrimination. Or a foreign producer may sell no bicycles in his home market but may sell in export to various third countries, not including the United States, for \$15. If he then sells to the United States for \$12, this is price discrimination. Of a foreign producer may manufacture bicycles only for export to the United States; if his cost (including overhead and profit) is \$15 but his sale price is \$12, this is price discrimination.

Injury within the meaning of the Antidumping Act is found if an industry in the United States is hurt, or is likely to be hurt, or is prevented from being established, by imports which involve price discrimination.

* The opinions here expressed are the personal views of the author and do not necessarily represent the views of the Treasury Department.

¹ Antidumping Act, 1921, 46 Stat. 201 *et seq.*, 19 U. S. C. 160 *et seq.*

² Viner, Dumping, A Problem in International Trade 262 (1923).

PROCEDURE

The usual procedure in a dumping case is for a domestic (United States) producer to write the Commissioner of Customs in Washington and claim that a particular product is being dumped with resultant injury to him. If the Commissioner is satisfied that the domestic producer has reason to believe³ there is price discrimination, he will initiate an investigation.⁴ Information will be requested of the foreign producers. This will be checked against information available to Customs field officers in the United States as well as against the information submitted by the domestic industry. Visits are often made by Customs officers overseas to the foreign producers' plants. Representatives of both the foreign producers and the domestic industry are given full opportunity to present their views and arguments. If, on the basis of the Commissioner of Customs' report in the matter, decision is made by the Secretary of the Treasury or by his delegate, the Assistant Secretary, that there is price discrimination, jurisdiction over the case is transferred from the Treasury Department to the United States Tariff Commission, which will consider arguments presented and will decide whether there is injury. A positive injury determination will be followed by a dumping finding signed by the Secretary or Assistant Secretary of the Treasury. Dumping duties will thereupon be assessed on all imports as to which price discrimination is found. A negative injury determination, however, means that the case will be closed with the same effect as if there had been no price discrimination, *i.e.*, no dumping duties are assessed.

It should be noted that, while any case is pending under the United States Antidumping Act, appraisement may be withheld if there is "reason to believe or suspect" sales of imported merchandise at less than home price (or, if applicable, third country price or cost).⁵ The result of withholding is to postpone the fixing of any and all duties to be paid, so that if a dumping finding is thereafter made, the special dumping duties may be added to ordinary import duties as to all unappraised imports. The withholding does not, as some have mistakenly believed, deny entry to merchandise. It does, however, allow retroactive assessment of dumping duties as to unappraised imports. On the other hand, imports which enter at a price equal to or higher than home price may be currently appraised notwithstanding pendency of a withholding order.⁶

³ The availability to United States industry of information as to foreign producers' prices will vary in individual cases. The Commissioner of Customs has no set rules as to how much detail he will expect from the domestic producer in order to be satisfied that he has a serious and not a frivolous request for processing of a case.

⁴ The procedure followed by the Customs officers (Customs is a Bureau which operates under the Secretary of the Treasury) is outlined in the Customs Regulations relating to the Antidumping Act, especially in 19 C.F.R. 14.6, 14.8.

⁵ Antidumping Act, 46 Stat. 201(b), 19 U.S.C. 160(b).

⁶ Regulations, 19 C.F.R. 14.9(b).

COMPARISON WITH GATT PROVISION

The United States law is in substantial accord with the provisions of the General Agreement on Tariffs and Trade (GATT).⁷ The United States law defines price discrimination in terms of import sales at less than "fair value." GATT defines price discrimination as sales below "normal value." The GATT "normal value" is the comparable price in the ordinary course of trade in the home market or, if there is no such price, the highest to a third country or, if no such price, the cost of production plus a reasonable addition for selling cost and profit. This is in accord with what was the United States interpretation of fair value up to 1955.⁸ At this point, the United States regulations were amended (the United States statute itself gives no definition of "fair value" and accordingly the term is defined in published regulations) so as to provide that fair value will be based on home market price in the country of exportation as long as the volume of home market sales is sufficient to form an adequate basis for comparison.⁹ Otherwise (in accordance with a 1960 amendment to the regulations) fair value is based on third country price.¹⁰ However, in lieu of the GATT standard of highest third country price, the United States standard, where there are variations in the prices to various third countries, is the preponderant price or a weighted average.¹¹ The United States provision for calculation of cost in the event there are no sales other than to the United States is in general similar to the GATT provision except that, whereas GATT refers to "cost of production . . . plus a reasonable addition for selling cost and profit," the United States provision is defined in terms of "constructed value" which includes, in addition to cost of materials and of processing, an allowance for overhead, not less than ten percent, and for profit, not less than eight percent.

EXAMPLES OF APPLICATION OF LAW

The description given up to this point will, it is hoped, indicate that the essential elements in dumping under the law are simple enough. Herewith are some examples of its application to specific situations.

First, a case involving no price discrimination: A United States producer of macaroni products complained that a Canadian competitor was

⁷ General Agreement on Tariffs and Trade, Art. VI, Secs. 1, 2. The text of Art. VI can be found in *Antidumping and Countervailing Duties*, General Agreement on Tariffs and Trade, Geneva, July, 1958, p. 163.

⁸ 19 C.F.R. 14.7, footnote 15, which defined "fair value" to mean "foreign market value." See note 20 below.

⁹ Treasury Decision (T.D.) 53773.

¹⁰ T. D. 55118.

¹¹ United States adherence to GATT was subject to the proviso that where its law differed from Art. VI of GATT, its law could prevail. The amendments to the U. S. regulations relative to fair value were adopted subsequent to United States adherence to GATT. Accordingly, they could be challenged if they imposed stricter standards than those theretofore in effect. But the fact is that, in determining when and how third country price is to be used as a basis for price comparison, they have imposed what have been considered more liberal standards than those set forth in GATT Art. VI.

dumping. Inquiry showed that the Canadian producer had a substantial market for his product in Canada, and that the price he charged the American importer who purchased from him was in fact higher than the price paid by purchasers from him in Canada. This was price discrimination, it is true, but, as has been indicated, price discrimination comes within the purview of the Antidumping Act only if the price of the import is the lower of the two prices which are compared. In this case, therefore, the complaint was dismissed. The Canadian home price in this case constituted what is called under the Antidumping Act the "fair value." The decision was, therefore, that the imported macaroni was not sold at "less than its fair value."¹²

Second, a case involving price discrimination but no injury: Rayon staple fiber from France was sold to United States importers at a price below the French home price. This constituted price discrimination or, to use the technical wording, sales at less than "fair value." The first of the two elements necessary to bring a case within the purview of the Antidumping Act was therefore present. But further inquiry into the facts showed that, during the period under consideration, domestic (*i.e.*, United States) producers of rayon staple fiber, "as a result of aggressive pricing practices of that industry, had lowered their prices to such levels that the importer did not generally meet the lower average domestic prices and, as a consequence thereof, his sales in the United States of the imported fiber declined sharply compared to sales of the like domestic fiber. The importer gained no customers during this period and there is no evidence that he sold at a price lower than that charged by the domestic producers for the same fiber." Therefore it was determined that there was no injury. Since there was no injury, the fact that there had been price discrimination was irrelevant. To justify action under the Antidumping Act, that is, to justify imposition of dumping duties, there must be *both* price discrimination and injury.¹³

Third, consideration of the situation where there is injury but no price discrimination: In the first of these examples, the Canadian macaroni products case, it may be that the United States producer who filed the complaint was injured by sales of the Canadian imports, priced lower than the complainant's own domestic product. It is conceivable such low-price Canadian imports could put him and every other United States producer of macaroni products out of business. This would obviously qualify as injury within the meaning of the Antidumping Act. Nonetheless, since the injury could not be shown to have been accompanied by price discrimination, *i.e.*, sales at less than fair value, there could be no assessment of dumping duties and, once the no-dumping decision was made, no remedy whatsoever could be available to United States industry under

¹² Antidumping Act, Sec. 201(a), 19 U.S.C. 160(a). This case is reported in 27 Fed. Reg. 7867 (1962).

¹³ The French rayon staple fiber case was reported in the Federal Register as follows: Determination of sales at less than fair value, 26 Fed. Reg. 1671 (1961); Determination of no injury, *ibid.* 4428.

the Antidumping Act. For its protection United States industry would have to seek relief on other grounds.

Fourth, a case involving both price discrimination and injury: Bicycles were imported from Czechoslovakia. It was established that there was price discrimination and consideration was accordingly given to the question whether the lower-priced sales to the United States resulted in injury. A finding was made that, due to the pricing of the Czechoslovakian imports, "the importer has sold, and continues to sell, bicycles in the United States at prices below the prices at which domestic producers are able to produce comparable models." It was also found that "the sales of the Czechoslovakian bicycles have been, and are likely to continue to be, in sufficient volume to displace a significant part of the United States market for low-price bicycles." Finally it was found that "the importation of Czechoslovakian bicycles purchased at prices below fair value is continuing and there is indication of an intent on the part of the exporting organization to continue its practice of selling the bicycles at less than fair value." The conclusion was therefore reached that there was injury to United States industry. A dumping finding was published. The dumping duties in this case are estimated at something over a quarter of a million dollars.¹⁴

PRICE REVISION CASES

It will be noted that in the Czechoslovakian bicycle case one of the elements considered in determining that there was injury was the indication that the exporting organization in Czechoslovakia intended to continue selling its bicycles at less than fair value. Consideration may now be given to what can happen if it is found that price discrimination has been present but has been discontinued, and available indications are that it will not be resumed.

Cement was imported from Yugoslavia, and it became evident that this was a case which had involved price discrimination. However, no importations were being made at the time complaint was filed, and those which had already entered had been appraised. (Once an importation has been appraised, no dumping duties can be collected on it.) The Antidumping Act authorizes a finding of dumping not only where there are sales at less than fair value at the time the case is under consideration but also where there is a likelihood of such sales in the future. In this case, however, evidence was submitted designed to show that the foreign producer had no intention of selling to the United States in the future at less than fair value. Technically it would have been possible to have concluded that this could qualify as a case involving price discrimination and to have gone on to a consideration as to whether there was injury. But, practically, what would have been the use? Even with a dumping finding, no duties could be collected on the past imports and there was evidence

¹⁴ This case was reported in the Federal Register as follows: Determination of sales at less than fair value, 25 Fed. Reg. 6657 (1960); Determination of injury, *ibid.* 9782; Finding of dumping, *ibid.* 9945.

that there were going to be no future imports which could be made subject to dumping duties. From the standpoint of the foreign producer a dumping finding would be ineffective. From the standpoint of the United States industry, further inquiry into the injury aspect could take away his protection instead of enhancing it, because if there was a determination of no injury, conceivably that could justify resumption of sales involving discriminatory pricing. From the standpoint of the taxpayer, additional processing of the case, if essentially meaningless, would involve useless expenditure of the revenue. Under these circumstances the logical solution is to close out the case then and there, with no further action to be taken under the Antidumping Act. That is what was in fact done.¹⁵

In this type of case, where there has been price discrimination but the practice is discontinued, a determination of no dumping is justified with reference to Section 14.7(b)(8) of the regulations under the Antidumping Act, which provides that a determination of sales at less than fair value is not to be made if, despite the presence of price discrimination, the quantity involved in the sales, or the differential between the prices compared (typically between the foreign producer's home market price and his price to the United States), is "not more than insignificant." Ordinarily in this type of case the foreign producer consults with the United States Customs officer to determine what revisions must be made in his pricing so that the price discrimination is ended and future importations can be made without the danger that they will come within the purview of the Antidumping Act. For this reason, these cases are ordinarily described as "price revision cases."

FURTHER COMPLICATIONS

The examples just given—Canadian macaroni products, French rayon staple fiber, Czech bicycles and Yugoslav cement—are instances in which the application of the Antidumping Act is a reasonably simple matter. However, there can be complications.

The determination as to whether there is price discrimination involves, at least in the ordinary case, far less exercise of personal judgment than the determination as to whether there is injury. Indeed the statement has been made that this question is "purely a matter of arithmetic."¹⁶ In the earlier history of the law's administration this was in fact the case. One took the home market price of the foreign product, adjusted this to an ex factory basis; one took the price to the United States market of the same product and similarly adjusted it to ex factory basis, and then made the comparison. The adjustments consisted of those specifically set forth in the law—principally adjustment for differences in expense of containers and coverings respectively used in shipping to the two markets; for inland and overseas freight from the factory to the United States; for import

¹⁵ Yugoslav cement, 28 Fed. Reg. 41 (1963).

¹⁶ See Hearings before Committee on Ways and Means, House of Representatives. 85th Cong., 1st Sess., on H. R. 6006 (1957), p. 43.

duties or taxes included in the home market price but rebated and therefore excluded from the price to the United States market. In the earlier days—in this respect prior to October, 1954—the problem was further simplified by the fact that the same United States agency—Treasury Department—resolved both questions of price discrimination and of injury. In many instances it appeared likely from the outset that the case did not involve injury. If this was so, the Treasury Department would concentrate on the injury aspect, without bothering for the time being to investigate in any detail the pricing. If, as anticipated, the final decision was that there was no injury, that was entirely dispositive of the case; further inquiry into pricing was unnecessary.

In 1954, however, the function of determining whether there was injury in cases under the Antidumping Act was transferred from the Treasury Department to the United States Tariff Commission.¹⁷ The legislation putting this transfer into effect provided that the Commission not be given cases for its consideration unless Treasury had already determined that there was price discrimination. This being the case, the option of examining seriously into pricing problems only in cases where there appeared to be injury was no longer available to the Treasury Department. On receipt of a complaint, the Treasury had to inquire into the pricing situation, even though its officials were reasonably sure that an inquiry made at this point into the economics of the situation would show there was no injury. If there was price discrimination, Treasury would so determine, and thereupon refer the case to the Tariff Commission. It was at this point that the Treasury Department decided it should examine carefully into the question whether further refinement should be made of its standards for determining presence or absence of price discrimination. A number of possible formulas were considered.

After several trial balloons the regulation adopted in 1955¹⁸ effected a significant change in the method of calculation. Fair value was to be based on price in the exporter's home market, as long as his home sales amounted to a meaningful proportion of all his sales in markets other than the United States. (Therefore fair value had been based on home market price if there were any sales or any offers in the home market; there had been no need to show these represented a meaningful proportion.) If, however, the volume of home market sales was insufficient for a just comparison, then reference was to be had to a weighted average of home and third country sales. The provision for weighted average of home and third country sales when volume of home sales was insufficient for a just comparison was abandoned in 1960,¹⁹ at which time provision was made simply for reference in such event to third country sales.²⁰

¹⁷ Customs Simplification Act of 1954, P.L. 768, Title III, 42 Stat. 11, Sec. 201.

¹⁸ T. D. 58773, cited note 9 above.

¹⁹ T. D. 55118, cited note 10 above.

²⁰ As has been pointed out above (see note 8 above) "fair value" had from 1921 to 1955 been defined by regulation (the term is undefined in the law) to mean "foreign market value." "Fair value" is the standard used in determining whether there is price discrimination. "Foreign market value" is the standard applied in measuring

In the drafting of these regulations serious consideration was given to factors which heretofore had been deemed of little or no importance.

Home market price was, as heretofore, to be the usual basis for fair value. What if, during the three or four months covered by the inquiry, the home market price had varied? Suppose it has been \$20 a unit part of the time, \$18 part of the time. Should fair value be \$20 or \$18 or something in between? Under the previous regulations fair value would have been \$20. Under the new regulation it was decided to take an average of the two prices or, if one of them had been in effect for by far the greater part of the time under consideration, then to take that price, representing the preponderance of the sales.²¹

But other factors presented a more difficult problem. What if the home market price was, for small orders, \$100 a unit, but \$95 in quantities of 500 or more, and sales to the United States were in quantities of at least 500? The former regulation gave no guidance on this point. Decision was reached that fair value for the purposes of this case should be \$95, and sales to the United States at or above \$95 would involve no price discrimination.²²

Provision was also made in the 1955 amendment to the regulations that reasonable allowances were to be made for other "circumstances of sale."²³ It has been this field—circumstances of sale, including quantity allowances—that has supplied the most fertile ground for controversy in connection with determinations as to price discrimination. Examples of circumstances of sale for which allowances *may* be made are given in this provision of the regulations: differences in credit terms, guarantees, warranties, technical assistance, servicing, advertising and other selling costs, commissions. Allowances have in fact been made for such circumstances in many instances.²⁴

dumping duties. Sec. 205 of the Antidumping Act (19 U. S. C. 164) had during this period defined "foreign market value" in terms of the home price or, if there was none, the third country price, which was "freely offered . . . to all purchasers." This was construed to mean the *highest* among varying home prices or (if applicable) third country prices at any given time. The 1955 amendment to the regulation (note 18 above) for the first time established a different standard for calculating fair value from that set forth in the law for calculating foreign market value. The 1958 amendment to the Antidumping Act (P.L. 85-630, 72 Stat. 584) in general brought the definition of foreign market value into conformity with the 1955 regulation definition of fair value. Removal of a further inconsistency between the two was accomplished by the 1960 amendment to the regulations (notes 10 and 19 above). See discussion in Report of Secretary of Treasury Humphrey on the Operation and Effectiveness of the Antidumping Act. Feb. 1, 1957, printed in Hearings before Committee on Ways and Means (1957), referred to in note 16 above, pp. 18, 19.

²¹ This is set forth in Sec. 14.7(b)(7) of the regulations.

²² This is implicit from example 4, footnote 15 to Sec. 14.7(a) of the regulations. It may be noted that the example will need to be revised if the 1964 proposed amendments to the regulations, referred to at the conclusion of this article, are adopted.

²³ T.D. 53773, cited note 9 above, Sec. 14.7(b)(2).

²⁴ See for example, German rayon staple fiber, 26 Fed. Reg. 3387 (1961); Belgian cement, *ibid.* 1971; Japanese radio tubes, *ibid.* 6276; Canadian nepheline syenite, 25

Admittedly, this was an experiment in administration of the law which, in an effort to reach a result completely fair to all parties directly involved—the United States industry complainant, the United States importer, the foreign producer—established standards considerably more sophisticated than any applied by other countries in the administration of their dumping laws.

Without doubt the experiment involved some disadvantages. One of the primary objectives in administration of the law has been speed and certainty.²⁵ The more refined the examination into circumstances of sale, the longer the processing time, and the more doubtful in advance the end result. Inquiry into price discrimination was, it turned out, no longer merely “a problem in arithmetic.” In addition, unless more specific guidelines were given, foreign producers would be increasingly tempted to make unjustified claims to cover up actual price differentials.

Experience with the 1955 regulation in due course showed there was in fact a tendency on the part of the foreign producers to claim too much in the way of circumstances of sale, and the conclusion was reached that a revision in this particular part of the regulations was desirable, to make more clear in advance what would and what would not be allowed.

There were no particular difficulties in connection with differences in credit terms, guarantees, warranties, technical assistance or servicing. These factors could usually be easily and quickly identified and measured in dollars and cents. An example in point is the case involving German typewriters.²⁶ Here a guaranty was made in respect of all typewriters sold to purchasers in Germany. No such undertaking was given by the German producer to the United States importers. The average cost of meeting the obligation incurred by the guaranty, calculated on a per unit basis, was accordingly ascertained and was deducted from the German home price in making the price comparison with the price to the United States.

The real problems, however, came in connection with advertising, selling costs, and quantity allowances. In connection with advertising, it soon became evident that foreign producers were making claims that their entire budget for encouraging home market sales of their product in preference to that of their home market competitors should be reduced to a per unit cost and deducted from home market price in the computation of fair value. In connection with selling expenses they were claiming deduction for salesmen's salaries, for rent of office space the salesmen occupied or for depreciation on buildings or portions of buildings devoted to their use, and for any other portions of their general expenses—salaries, maintenance, overhead, and so forth—which could be considered part of the sales, as distinguished from the production effort. The resultant

ibid. 10442 (1960); German typewriters, 26 *ibid.* 1418 (1961); Japanese clinical thermometers, 25 *ibid.* 8384 (1960).

²⁵ See Sec. 5, Customs Simplification Act of 1956, P.L. 927, 70 Stat. 943; Report of Secretary of the Treasury Humphrey, Feb. 1, 1957 (printed in Hearings before Committee on Ways and Means on H. R. 6006, referred to in note 16 above, p. 10).

²⁶ 26 Fed. Reg. 1418 (1961).

home market price calculations were claimed by them to be reduced to a point where initial apparent disparities again and again would, if the claims were allowed, completely disappear. Given sufficient imagination, lawyers and accountants can produce surprising results!

Logical as these claims might seem at first glance, it was doubtful that they were allowed by other countries in the administration of their laws, and, as inquiry proceeded, the claims appeared more and more expensible to cover any possible indication of price disparity.

A similar situation became apparent in regard to quantity differentials. Sales to the United States were often in shipload lots, whereas home market sales were often confined to relatively small quantities in a protected market. That unit costs can under certain circumstances be lower for large quantity sales than for sales in smaller lots is known to every businessman; but the foreign producers pressed their claims for allowances on this account to what were considered unreasonable limits.

It was these considerations which gave rise to the revisions in the regulations under the Antidumping Act published on July 5, 1960.²⁷ In these regulations it was stated that "reasonable allowances generally will be made" for "assumption by a seller of a purchaser's advertising or other costs," but "except in those instances where it is clearly established that differences in circumstances of sale bear a reasonably direct relationship to the sales which are under consideration, allowances will generally not be made for . . . advertising and other selling costs of a seller unless such costs are attributable to a later sale of merchandise by a purchaser" nor, unless the relationship to the sales is clearly established, will allowance be made for "differences in research and development costs, production costs." Also, "in determining the amount of the reasonable allowances for any differences in circumstances of sale" the reviewing officer "will be guided primarily by the effect of such differences upon the market value of the merchandise."²⁸ As to allowances for differences in quantities, provision was made that

consideration will be given, among other things, to the practice of the industry in the country of export with respect to affording in the home market (or third country markets, where sales to third countries are the basis for comparison) discounts for quantity sales which are freely available to those who purchase in the ordinary course of trade.²⁹

FURTHER CONSIDERATION OF INJURY

What has been said up to now has dealt for the most part only with price discrimination. If one turns at this point to the question of injury,

²⁷ T.D. 55118, cited note 10 above.

²⁸ Regulations, 19 C.F.R. 14.7(b)(2).

²⁹ Regulations, 19 C.F.R. 14.7(b)(1). Among examples of allowances which were made because of circumstances of sale in cases involving importations prior to the July 5, 1960, amendment to the regulations, but which were denied as to importations received thereafter, are cases involving Portuguese cement, 26 Fed. Reg. 6605 (1961), and Japanese clinical thermometers, 25 *ibid.* 8384 (1960).

the approach must be cautious. Determinations as to injury are made by the United States Tariff Commission.⁸⁰ The Tariff Commission, unlike American courts of law, is not bound by its own precedents. Even if it were, one must recognize that it is seldom that two cases are found which are truly alike. The elements may be similar, but often enough there can be subtle differences, apprehended only after careful study of the entire record, which justify an injury decision in one and a no-injury decision in the other case. In addition, what is here given is a recitation of various elements found in 8 injury and 31 no-injury decisions. Most cases have more than one element present, so that the decisions can very well depend upon a combination of elements rather than any single one at any time here mentioned.

Certain descriptive words and phrases have been used by the Tariff Commission in explaining or commenting on some of its decisions. It has found no injury in some cases which represented merely "technical dumping,"⁸¹ or where the sales were "inculpable"⁸² or "not anti-competitive."⁸³ It has stated that injury under the law must be "material,"⁸⁴ that "imports of articles purchased from abroad at less than fair value are not *ipsa facto* injurious when brought into the United States,"⁸⁵ nor do they involve "even a presumption" of injury.⁸⁶ Sales at less than fair value are not "malum per se," and it is "only when they have an anticompetitive effect . . . that such sales may be equated with the concept of 'unfair competition.'"⁸⁷ Further, the "injury must be caused by the 'dumping' of the product, not merely by the imports per se."⁸⁸

A good deal of attention has been given to the extent to which the motivation of the foreign producer is a factor to be considered. There have been no-injury decisions where one of the facts pointed out in the opinion was that the foreign producer did not realize he was selling at less than fair value. In one case, the Treasury Department's method of calculating price differential was apparently not what the foreign producer had anticipated, "with the result that the allowable deductions

⁸⁰ As indicated in the footnotes, all Tariff Commission decisions have been published in the Federal Register except for a few in the time before the 1958 amendment to the law made this mandatory. In these exceptional cases publication was by press release.

⁸¹ French rayon staple fiber, 24 Fed. Reg. 10092 (1959); Belgian rayon staple fiber, 26 *ibid.* 4477 (1961); French rayon staple fiber (1961) (note 13 above); Canadian cement, 24 *ibid.* 10267 (1960); Cuban rayon staple fiber, 26 *ibid.* 4478 (1961); German rayon staple fiber, *ibid.* 6537.

⁸² French rayon staple fiber (1961) (note 13 above); Belgian rayon staple fiber (note 31 above); Cuban rayon staple fiber (*ibid.*); German rayon staple fiber (*ibid.*).

⁸³ French titanium dioxide, 28 Fed. Reg. 10467 (1963).

⁸⁴ French titanium dioxide (note 33 above).

⁸⁵ Cuban rayon staple fiber (note 31 above); German rayon staple fiber (*ibid.*); French titanium dioxide (note 33 above). ⁸⁶ French titanium dioxide (*ibid.*).

⁸⁷ French titanium dioxide (*ibid.*). The sales in the Australian chromic acid injury decision, 29 Fed. Reg. 2919 (1964) were described as "anticompetitive."

⁸⁸ Canadian vital wheat gluten, 29 Fed. Reg. 5921 (1964). By "dumping" the Commission is understood to have meant sales at less than fair value.

were considerably less than the foreign producer had thought to be allowable.”³⁹ In two cases involving the same importer the price to the United States turned out to be less than fair value (home consumption price) because the anticipated volume of sales to the United States did not materialize, and the allowed quantity discount became inapplicable. The lowered volume of imports was attributed to a lowering of the United States producers’ prices to a level which “the importer did not generally meet.”⁴⁰ In another case, while the foreign producer may very well have realized he was selling at less than fair value, the facts appeared to the Commission such as to warrant leniency. A Canadian company was constructing a plant in the United States. In the meantime it sold cement imported from Canada to the United States, at or above fair value, using water transportation. “Largely because of circumstances over which the importing concern had no control, it was obliged to enter some of the imported cement by rail rather than by water. The rail freight was much higher than the water rate.” The shipments made by rail were less than fair value, because the foreign producer absorbed the extra charge. The decision was no injury.⁴¹ In another case involving a Canadian company, the producer had a “historic policy” to “disregard the rate of exchange between the United States and Canadian dollar.” In other words if, for example, the foreign producer’s Canadian home price was \$10 (Canadian), then his price to the United States would be \$10 (U. S.). This policy had been “established when the two currencies were virtually at par and continued during a period of some 13 years when the U. S. dollar was at a substantial premium. When the value of the Canadian dollar became higher than the value of the U. S. dollar, the sale price of nepheline syenite for export to the United States in U. S. dollars became lower than its home market price in Canada expressed in U. S. dollars.” Here also the decision was no injury.⁴² A further no-injury decision was based in part on the Commission’s conclusion that the foreign producer “was clearly not selling at less than fair value in order to market his product to American customers.”⁴³ In three of the cases above referred to, and in several others, one of the factors noted in no-injury decisions was *absence* of predatory intent or motivation.⁴⁴ However, none of the posi-

³⁹ French rayon staple fiber (1959) (note 31 above). Similarly, in a no-injury decision involving Canadian vital wheat gluten (note 38 above), the Tariff Commission noted that “if the Canadian producer had been fully aware of the exact calculations used by Treasury in determining sales at less than fair value, he might well have avoided such sales.”

⁴⁰ Belgian rayon staple fiber (note 31 above); French rayon staple fiber (1961) (note 13 above). For a fuller quotation of the Commission’s language, see description of the French rayon staple fiber case given in the example cited in the text above of a case involving price discrimination but no injury.

⁴¹ Canadian cement (note 31 above).

⁴² Canadian nepheline syenite, 25 Fed. Reg. 8394 (1960).

⁴³ Canadian vital wheat gluten (note 38 above).

⁴⁴ East German potash, Tariff Commission press release dated Feb. 25, 1955; Finnish tissue paper, 23 Fed. Reg. 8891 (1958); Norwegian tissue paper, *ibid.* 8892; French rayon staple fiber, 24 *ibid.* 10092(1959); Canadian cement (note 31 above); Canadian

tive determinations of injury made by the Commission refer to *presence* of predatory intent. The Czech bicycle injury decision alone among these specifically mentions intent—here the intent to continue sales at less than fair value.⁴⁵

The impact of dumped imports on United States industry is, of course, an important factor to be considered. Injury decisions have been rendered where the result of the sales at less than fair value has been to make the United States producers lower their price⁴⁶ or to maintain prices already lowered by previous injurious sales at less than fair value.⁴⁷ Similarly, injury has been found in cases where United States producers lost sales to the imports which entered at less than fair value⁴⁸ or where such imports were rapidly growing, absorbing 14, then 30, then 47 percent of the United States market under consideration.⁴⁹ On the other hand, no injury was found where such imports furnished "insignificant competition" or were not a "disruptive factor,"⁵⁰ had no effect upon prices in the United States market⁵¹ or "did not take a single customer away from" the domestic industry,⁵² or where the foreign producers gained no new customers⁵³ or lost customers.⁵⁴ Injury was found where the imports which entered at less than fair value increased;⁵⁵ no injury was found where such imports decreased.⁵⁶ Likelihood of injury from sales at less than fair value was found in a case where the domestic industry was operating at only 70 percent of capacity.⁵⁷ On the other hand, among the reasons given for some no-injury decisions has been a record showing ex-

nepheline syenite (1960) (note 42 above); Canadian nepheline syenite (second case), 26 Fed. Reg. 956 (1961); Dominican cement, 27 *ibid.* 3872 (1962); Australian cast iron soil pipe, 29 *ibid.* 5253 (1964) (concurring opinion of two Commissioners). See reference to "predatory motives" in Viner, *op. cit.* note 2 above, p. 147.

⁴⁵ Czech bicycles (note 14 above).

⁴⁶ Australian chromic acid (note 37 above) ("triggered a price war"); Canadian steel reinforcing bars, 29 Fed. Reg. 2839 (1964) (depressed price levels from 9 to 24 percent).

⁴⁷ Swedish cement, 26 Fed. Reg. 3002 (1961); Belgian cement, *ibid.* 5102.

⁴⁸ Swedish cement (note 47 above); Belgian cement (*ibid.*); Portuguese cement, 26 Fed. Reg. 10010 (1961).

⁴⁹ Australian chromic acid (note 37 above).

⁵⁰ Canadian peat moss, 29 Fed. Reg. 4843 (1964); Australian cast iron soil pipe (note 30 above); Japanese titanium dioxide, 29 Fed. Reg. 5479 (1964).

⁵¹ Japanese titanium dioxide (note 50 above).

⁵² Canadian nepheline syenite (1961) (note 44 above).

⁵³ French rayon staple fiber (1961) (note 13 above); Belgian rayon staple fiber (note 31 above); German rayon staple fiber (*ibid.*).

⁵⁴ Czech sheet glass, 27 Fed. Reg. 11568 (1962).

⁵⁵ Swedish cement (note 47 above); Australian chromic acid (note 37 above). However, the fact that the quantity of imports which entered at less than fair value was "substantial and growing" did not justify a positive determination where the other factors in the picture did not add up to what the Commission considered injury in the Canadian vital wheat gluten case (note 38 above).

⁵⁶ French rayon staple fiber (1961) (note 13 above); Belgian rayon staple fiber (note 31 above); Cuban rayon staple fiber (*ibid.*); German rayon staple fiber (*ibid.*).

⁵⁷ Dominican cement (second case), 28 Fed. Reg. 4047 (1963).

pansion of the United States industry in question.⁵⁸ No-injury decisions have been rendered in the three cases in which United States industry indicated its opinion or preference that a positive determination should not be made.⁵⁹ The Commission recognizes, of course, that low-price imports may have "disturbed" portions of the United States industry, but not be actionable if they have been at or above fair value. Accordingly, injury was not found in some cases where the major factor in low price imports was a country which was selling *not* below fair value; the sales by other countries which *were* below fair value were not "significant."⁶⁰

One of the most controversial subjects to have been considered by the Tariff Commission is the scope to be given to the term "an industry in the United States." The Tariff Commission has in some instances held that a portion of the United States, rather than the entire country, could constitute the geographic segment or "competitive area" within which companies could qualify as "an industry" within the meaning of the Antidumping Act. The areas thus defined have consisted, in some cases, of one or two States; in others, of parts of one or more States.⁶¹ However, in most cases the Commission appears to be considering the entire United States industry. Examples in point are the European steel wire rod cases. Here the Commission reasoned that, though

domestic producers of such articles as wire rods can generally supply nearby users at lower costs than can more distant domestic producers . . . virtually all such domestic producers, in greater or lesser degree, regularly penetrate one another's "natural" markets. Moreover,

⁵⁸ Canadian nepheline syenite (1961) (note 44 above); French titanium dioxide (note 33 above); Japanese titanium dioxide (note 50 above).

⁵⁹ South African hardboard, Treasury Department press release, Dec. 27, 1957; Canadian hardboard, *ibid.*; French rayon staple fiber (1959) (note 31 above). The decision in the last-named case includes the following:

"The domestic industry, in its written statement, discounted any basis for a finding that the industry is being or is likely to be injured in the circumstances of this case. The domestic producers further stated that for the industry to urge a finding of injury in this case would be only vindictive and that the Antidumping Act was intended to be preventive rather than punitive. The Commission agrees."

It may be noted that in the South African hardboard case the foreign producer was a subsidiary of the major American producer. The regulations under the Antidumping Act do not limit institution of a dumping inquiry to cases where there has been complaint by American industry (19 C.F.R. 14.6).

⁶⁰ Four European steel wire rod cases: Luxembourg steel wire rods, 28 Fed. Reg. 6476 (1963); Belgian steel wire rods, *ibid.* 6476; German steel wire rods, *ibid.* 6006; French steel wire rods, *ibid.* 7368 (1963). See also Japanese titanium dioxide, note 50 above.

⁶¹ United Kingdom cast iron soil pipe, Treasury Department press release, Oct. 27, 1955 (California); Swedish cement (note 47 above) (North Atlantic seaboard of 3 states); Belgian cement (*ibid.*) (East Coast of Florida); Dominican cement (1962) (note 44 above) (Puerto Rico and Metropolitan New York City); Dominican cement (1963) (note 57 above) (Metropolitan New York City); Australian chromic acid (note 37 above) (West Coast, accounting for 10 percent of domestic consumption); Canadian steel reinforcing bars (note 46 above) (Oregon and Washington, accounting for 5 percent of domestic consumption).

both the buyers and the sellers in each of such markets take vigilant note of the happenings in each of the other of such markets.

Accordingly, in these cases, the Commission found "no merit in the 'regional industry' concept."⁶²

In these same cases the question also arose as to whether, in considering what was the steel wire rod industry, the portion of rods used by manufacturers in their own integrated mills could be excluded. It was found that

some 70 to 75 percent of the total production of such rods is in fact used in captive mills [belonging to the integrated companies], with the result that only 25 to 30 percent of the domestic production is sold to "arms-length" customers. Moreover, the determination of the quantity of rods to be produced and the proportion thereof to be used in captive mills, as well as the pricing policies relating to market sales, are almost fully within the managerial discretion of the domestic producers.

Consequently the Commission denied the contention that the "industry" should be considered limited to the sales to arms-length customers.⁶³

In still another case involving scope of "industry," the Commission considered imports of sheet glass cut to *jalousie louvre* sizes, unedged. The importer did not offer the glass for sale in this condition but proceeded himself to edge it so that his disposable product was edged *jalousie louveres*. The Commission considered whether there was injury (1) to domestic producers of unedged glass; (2) to domestic edgers of domestic unedged glass; (3) to domestic edgers of imported unedged glass. The Commission noted that the domestic producers of unedged *jalousie louveres* "met no direct competition and only limited indirect competition from the imported Czechoslovakian glass," and it found no injury, either, to edgers of domestically produced glass or edgers of glass imported from elsewhere.⁶⁴

A fundamental factor in the Tariff Commission's determinations has been a comparison of the price of the import with the price of the similar United States product. As has been pointed out, the price comparison made by the Treasury Department in determining whether there are sales at less than fair value is ordinarily on an ex factory basis. In other words, this comparison is between what (1) a purchaser for consumption in the foreign market and (2) a United States importer would himself have to pay, in either case if he took delivery at the foreign producer's factory, and had to pay any additional charges, such as transportation—also, in the case of the importer, duties—instead of these charges being assumed by the foreign producer. In the case of an injury determination, however, it stands to reason that the important price comparison is typically between (1) the price of a given domestic product in a given United States commercial center and (2) the price to the importer of the competing foreign product delivered and duty-paid in the same commercial center.⁶⁵ No-

⁶² Four European steel wire rods cases (note 60 above).

⁶³ *Ibid.*

⁶⁴ Czech sheet glass (note 54 above).

⁶⁵ "The price spread between the [less than fair value] imports from France and domestic TiO₂ is not governed by the 'margin of difference' determined by the Treasury

injury decisions have been made where the import is priced higher than the competitive domestic product, though sold at less than fair value.⁶⁶ And in a number of instances no-injury decisions have been made where the import, though sold at less than fair value, merely meets the domestic competition.⁶⁷ Such decisions have at times been justified on the ground there was "no evidence that the price cutting practice of the exporter . . . was made other than in good faith to meet the prices of comparable goods sold by domestic competitors."⁶⁸ In a series of cases referred to above,⁶⁹ no-injury decisions were made where the less than fair value imports, instead of meeting domestic competition, met the competition of imports from another country not sold at less than fair value. In these cases it should be noted that although low price imports had "disturbed the integrated [U.S.] producers," the less than fair value imports had "not been a significant factor in the situation." Here the question of who initiated the low price imports—the foreign producers selling at fair value or the foreign producers selling at less than fair value—was held to be immaterial.⁷⁰ As might be expected, the fact that less than fair value imports underprice the domestic competition has been cited as an important element in injury decisions.⁷¹ In two cases it has been indicated that a further element to be considered in such instances is whether the less than fair value sales have been "systematic."⁷² In another case, however, it

for French TiO₂." French titanium dioxide (note 38 above). See also Australian chromic acid (note 37 above), where the foreign product undersold every domestic product on a "delivered price basis." It is true that the "margin of difference" is stated to be one of the ten different factors which the Commission "took into account" in making its no-injury decisions in the European steel wire rod cases (note 60 above), but it seems reasonable to suppose that this margin at most would ordinarily be of secondary importance.

⁶⁶ German pencil sharpeners, Treasury Department press release, Aug. 29, 1955; Finnish tissue paper (note 44 above); Norwegian tissue paper (*ibid.*); Czech sheet glass (note 54 above); Canadian vital wheat gluten (note 38 above).

⁶⁷ South African hardboard (note 59 above); Canadian hardboard (*ibid.*); Finnish tissue paper (note 44 above); Norwegian tissue paper (*ibid.*); French rayon staple fiber (1961) (note 13 above); Belgian rayon staple fiber (note 31 above); German rayon staple fiber (*ibid.*); Cuban rayon staple fiber (*ibid.*); Canadian technical vanillin, 28 Fed. Reg. 4048 (1963).

⁶⁸ German rayon staple fiber (note 31 above); Cuban rayon staple fiber (*ibid.*); *cf.* Robinson-Patman law, 38 Stat. 780, 49 Stat. 1526, 15 U.S.C. 13, which provides that a seller may rebut a prima facie case of price discrimination in domestic commerce by "showing that his lower price . . . was made in good faith to meet an equally low price of a competitor."

⁶⁹ Four European steel wire rod cases (note 60 above).

⁷⁰ Four European steel wire rod cases (note 60 above). Similarly, a no-injury decision was made in the Canadian vital wheat gluten case (note 38 above) where "the margin of difference was small and was not a significant factor in enabling the Canadian product to penetrate the domestic market."

⁷¹ Czech bicycles (note 14 above); Australian chromic acid (note 37 above); Canadian steel reinforcing bars (note 46 above) (the import prices "grossly lower" than the domestic competition).

⁷² French rayon staple fiber (1959) (note 31 above); Canadian nepheline syenite (1961) (note 42 above). Classical economists, on the other hand, are inclined to view dumping as harmful only when it is sporadic. See, for example, Haberler, *The*

was noted that a \$.23 ex dock (East Coast, U. S.) price for a less than fair value import, when the domestic product sold, delivered anywhere east of the Rockies, for \$.25,⁷³ need not require an injury determination. The Commission pointed out that the United States purchaser of the foreign product "risks uncertain and late deliveries. . . . In the absence of a price inducement, he would not generally purchase the imported product at all."⁷⁴

Volume of imports is also an important consideration. However, as indicated above, injury to domestic producers in a relatively small area in the United States has on occasion been construed to mean injury within the meaning of the Antidumping Act.⁷⁵ Applying this principle, injury was found in one case—United Kingdom cast iron soil pipe—where the record shows that imports were less than 1 percent of total domestic production.⁷⁶ On the other hand, no-injury decisions have been rendered where the imports were "small in number,"⁷⁷ where they "constituted about 3 percent of total imports . . . from all sources,"⁷⁸ or where the imports were "very small in actual quantity, as well as relative to domestic production."⁷⁹ This last-quoted phrase was used to describe the situation in two cases, in one of which imports were 1 percent of United States consumption,⁸⁰ in the other, 2 percent.⁸¹ In the cases just referred to, where there were no-injury decisions, the Commission did not limit the scope of the United States industry, as it did in the United Kingdom soil pipe case, to a small geographic segment of the United States.⁸² Injury has been found where the volume of imports was "in sufficient volume to displace a significant part of the United States market for low-price bicycles."⁸³ On the other hand, a factor in two no-injury decisions was scarcity of the product in the United States at the time.⁸⁴

In a number of cases the Commission has taken into consideration what the future is likely to bring, and has used this prognostication as an element

Theory of International Trade 314 (1936): "Dumping is harmful only when it occurs in spasms and each spasm lasts long enough to bring about a shifting of production in the importing country which must be reversed when the cheap imports cease." Viner, *op. cit.* note 2 above, p. 140, is to the same general effect: "The chief menace of dumping from the point of view of the importing country arises out of intermittent or short-run dumping."

⁷³ In view of rail or trucking charges against the import from U. S. dock to points of delivery within the United States, the 2-cent differential would, for inland sales, be reduced or could disappear.

⁷⁴ French titanium dioxide (note 33 above). The Japanese titanium dioxide case (note 50 above) involved similar facts. ⁷⁵ See note 61 above.

⁷⁶ United Kingdom cast iron soil pipe (note 61 above) (this was a 3-2 decision).

⁷⁷ German pencil sharpeners (note 66 above).

⁷⁸ Netherlands nicotine sulphate, Treasury Department press release, Aug. 29, 1955.

⁷⁹ Finnish tissue paper (note 44 above); Norwegian tissue paper (*ibid.*). Similarly, in the Australian cast iron soil pipe case (*ibid.*), where imports were "insignificant compared with the quantity of domestic consumption and entered the United States market only over a short period of time."

⁸⁰ Norwegian tissue paper (*ibid.*).

⁸¹ Finnish tissue paper (*ibid.*).

⁸² See notes 77 to 81 above.

⁸³ Czech bicycles (note 14 above).

⁸⁴ South African hardboard (note 59 above); Canadian vital wheat gluten (note 38 above).

in its decision. Where the imports appear injurious or potentially injurious and are continuing, injury decisions have been made.⁸⁵ And in its first of two decisions rendered solely on the ground of likelihood of injury⁸⁶ the Commission noted that the foreign producer under consideration had in the past sold at less than fair value, that its home market absorbed only one-half of the producer's potential production, that its sales to the United States, though below home price, were not below cost, and made "a positive contribution to net return," so that "the capacity and the incentive for making such [less than fair value] shipments remain."⁸⁷ On the other hand, where the less than fair value imports, though they may have been potentially injurious, are discontinued, no-injury decisions have on frequent occasions been rendered.⁸⁸ In at least some of these cases the Commission has noted that, having been discontinued, the less than fair value imports are not likely to be resumed.⁸⁹ Also, in certain of these cases the Commission has given favorable attention to the co-operative attitude of the foreign producers in their endeavor to avoid future sales at less than fair value.⁹⁰ In a more recent case, despite evidence that sales at less than fair value would be resumed if there was a negative injury determination, the Commission made a negative determination on the ground that there was no "clear and imminent likelihood that injury will

⁸⁵ Czech bicycles (note 14 above); Swedish cement (note 47 above); Belgian cement (*ibid.*).

⁸⁶ The Tariff Commission's mission, as set forth in Sec. 201(a) of the Antidumping Act is "to determine . . . whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States." "Such merchandise" refers to "a class or kind of foreign merchandise" which the Treasury "determines . . . is being, or is likely to be, sold in the United States or elsewhere at less than its fair value." The Tariff Commission has passed on no cases so far involving the claim that an industry in the United States "is prevented from being established."

⁸⁷ Dominican cement (1963) (note 57 above). In the first (1962) Dominican cement case (note 44 above), the Commission had found ground to believe "that continued effort is being made on behalf of the parties concerned to avoid future sales at less than fair value." In a later similar decision involving Canadian steel reinforcing bars (note 46 above), the Commission noted the potentially injurious imports were expected to increase if there was a negative decision. As in the 1963 Dominican cement case, the Commission found both the "capacity and incentive" for continuing sales at less than fair value.

⁸⁸ Canadian cement (note 31 above); French rayon staple fiber (1959) (*ibid.*); French rayon staple fiber (1961) (note 13 above); Belgian rayon staple fiber (note 31 above); Canadian nepheline syenite (1960) (note 42 above); Canadian nepheline syenite (1961) (note 44 above); Canadian peat moss (note 50 above). These cases came to the Tariff Commission instead of being closed out by the Treasury Department without reference to the Commission on a "price revision" basis because the quantities involved or differences in price had been considered "more than insignificant" within the meaning of Sec. 14.7(b)(8) of the regulations.

⁸⁹ Canadian cement (note 31 above); Canadian nepheline syenite (1961) (note 44 above); French rayon staple fiber (1961) (note 13 above); Belgian rayon staple fiber (note 31 above); Dominican cement (1962) (note 44 above); Canadian vital wheat gluten (note 38 above).

⁹⁰ French rayon staple fiber (1959) (note 31 above); French rayon staple fiber (1961) (*ibid.*); Belgian rayon staple fiber (*ibid.*); Canadian nepheline syenite (1961) (note 44 above); Dominican cement (1962) (*ibid.*).

be inflicted."⁹¹ A concurring opinion of two Commissioners in this case noted "the very limited potential for expansion of shipments" by the foreign producer. Finally, in determining that there was no injury where despite past sales at less than fair value none are expected in the future, the Commission has on occasion noted the absence of any significant inventory of goods purchased at less than fair value, not remaining unsold.⁹²

Since the Tariff Commission must operate under an extremely tight time schedule of three months⁹³ it will not consider any new evidence as to the type of sales at less than fair value which may be received by the Treasury Department after a case has been referred over to it.⁹⁴

STATISTICS

Below are some statistics on the operation of the Antidumping Act. In considering their meaning one should bear in mind that the price revision cases⁹⁵ listed in the 1955-1964⁹⁶ summaries in effect represent determinations which gave the complainant what he asked for—an end to sales involving price discrimination—even though they did not involve findings of dumping.

Lifetime record: 1921-June 30, 1964

1. Findings of dumping	73
2. No dumping	551
(a) because there were no sales less than fair value	282
(b) because there was no injury	146
(c) old files unavailable to indicate reason	123
	<hr/>
Total no dumping	551

Record January 1, 1955, to April 1, 1964

1. Findings of dumping	8
2. No dumping	295
(a) because there was no price discrimination	202
(b) because there was price revision ⁹⁷ which ended previous price discrimination	62
(c) because there was no injury	31
	<hr/>
Total no dumping	295

⁹¹ Australian cast iron soil pipe (note 44 above).

⁹² French rayon staple fiber (1961 (note 13 above); Belgian rayon staple fiber (note 31 above); Dominican cement (1962) (note 44 above); German rayon staple fiber (note 31 above).

⁹³ Antidumping Act, Sec. 201(a), 19 U.S.C. 160(a), provides that the "Commission shall determine within three months" after being advised by the Treasury Department of a determination of sales at less than fair value "whether an industry in the United States is being or is likely to be injured. . . ."

⁹⁴ Canadian nepheline syenite (1960) (note 42 above). It may be noted that the Commission's rules of procedure are set forth in 19 C.F.R. 208.

⁹⁵ See discussion on price revision cases in the text above in connection with Yugoslav cement.

⁹⁶ This time period is used since the split of authority between the Treasury and the Tariff Commission became effective Oct. 1, 1954, and no Tariff Commission decisions were made until 1955.

⁹⁷ See discussion on price revision cases above. Included in this group were cases in which shipments ceased.

RECORD YEAR BY YEAR, JANUARY 1, 1955, THROUGH JUNE 30, 1964

Year	Finding of dumping	No dumping		
		No price discrimination	Price revision	No injury
1955	1	40	5	5
1956	0	19	1	2
1957	0	21	4	2
1958	0	20	5	2
1959	0	23	13	1
1960	1	19	7	2
1961	3	25	5	5
1962	0	9	12	2
1963	1	19	4	6
1964 (first 6 months)	2	7	6	4
Total	8	202	62	31

1964 PROPOSED AMENDMENT TO THE REGULATIONS

In line with a procedure adopted ten years ago, the Treasury Department last winter held a hearing at which all interested persons were invited to submit suggestions as to how the regulations might be amended. More than a hundred persons appeared. Twenty-five presented views; of these approximately one-half represented domestic producers and the other one-half espoused the cause of the importers or exporters.

Following this meeting a series of amendments was drafted in the Treasury Department and published for comment.⁹⁸ The changes proposed are designed primarily to make more information available to interested parties; to set forth in some detail the opportunities afforded persons to appear before Treasury officials responsible for decisions; in many cases to eliminate retroactivity in the assessment of dumping duties; to allow termination of proceedings when circumstances have changed and there is no reason to continue them; to allow reimbursement of dumping duties by the exporter to the importer under certain circumstances and to impose certain restrictions on making allowances for quantity discounts.

These changes are based in large part on the comments received both orally and in writing in connection with the hearing above referred to. In addition, the proposed amendments reflect the views of experts engaged by the Treasury Department to act as consultants in regard to this matter. Finally they are based in part on suggestions emanating from within the Treasury Department.

It has been the uniform experience of all who have been engaged in the administration of the Antidumping Act that neither side in the continuing struggle of ideologies relating to dumping can be expected to welcome publicly any development which does not lead to extremes. On the

⁹⁸ 29 Fed. Reg. 5474 (1964).

one hand, those whose sympathies are on the side of domestic importers or consumers of imports have believed the law should be enforced to the minimum. On the other hand, those whose sympathies are on the side of domestic production industry have believed enforcement should be to the maximum. Nonetheless, analysis of the basic problems has disclosed a surprisingly large area in which there is room for improvement which it is believed will be welcomed at least tacitly by all concerned therein. This is the area toward which the major part of the proposed revisions is directed.

THE COMPLEXITY OF SABBATINO

BY RICHARD A. FALK

Of the Board of Editors

Banco Nacional de Cuba v. Sabbatino is a seminal decision, interpreting significantly the rôle of a domestic court in an international law case.¹ At the same time, it avoids reaching definitive results. Very little is settled once and for all by the Supreme Court. This realization prompts caution. *Sabbatino* will not yield an authoritative interpretation, except, perhaps, as a consequence of subsequent Supreme Court decisions. A commentator must be content, therefore, with the less dramatic claims of provisional and partial analysis. Those that claim more are misleading us. The complexity of *Sabbatino* is almost certain to poison hordes of over-clarifiers who are descending upon this major judicial decision as vultures upon a freshly dead carcass.

By an 8 to 1 majority, the Supreme Court of the United States concluded in *Sabbatino* that the act of state doctrine prevents a domestic court from questioning the validity of a Cuban expropriation of sugar located within Cuban territory at the time of the taking. Thereby the Supreme Court upset the rulings of two Federal courts that had decided that this expropriation was not entitled to respect in an American court.² As well, the Supreme Court disappointed the expectations of many lawyers and their clients who had hoped and even predicted that the highest court in the land would strike down Castro's program of expropriation with a ringing denunciation of its confiscatory and discriminatory features.

The several main lines of probable attack upon the *Sabbatino* decision are easy to foresee and can be briefly depicted. The Supreme Court refrained from condemning a political enemy of the United States for violating what many observers regard as clearly established rules of customary international law governing the taking of property owned by aliens. Furthermore, a domestic court refused to apply substantive rules of international law in a case coming before it. What is worse, this judicial refusal was based primarily upon a servile acceptance of executive paramountcy. The decision allegedly compromises the status of rules of customary international law protecting foreign investment and this, it can be said, undermines the effort to build a stable world economy. On a less sophisticated level, the decision is held to exhibit a solicitude toward Cuban interests at a time when the United States is using every form of coercion

¹ 376 U. S. 398 (1964) (hereinafter referred to as *Sabbatino* and cited by page reference alone); 58 A.J.I.L. 778 (1964).

² The lower court opinions are reported in 198 F. Supp. 375 (S.D.N.Y., 1961), digested in 55 A.J.I.L. 741 (1961); and in 307 F. 2d 845 (2d Cir., 1962), 56 A.J.I.L. 1085 (1962).

short of violence to make life miserable for Castro. It seems especially odd to some observers that the Executive Branch of our Government should have intervened to urge the Supreme Court to decide in favor of the Cuban Government, which had initiated the litigation through the complaint of its agent, Banco Nacional de Cuba.

It seems important to meet this vexed reaction with an explanation of why the Supreme Court was probably right in most respects to decide as it did. But it is also important not to get overly sidetracked by these polemics. *Sabbatino's* permanent significance has nothing to do with Castro and rather little to do with the legal protection of foreign investment.

Sabbatino offers an interpretation of the proper rôle for a domestic court to play in an international law case.³ This interpretation is subject to just criticism as being too responsive to the Federal character of the American political system and somewhat too little influenced by the decentralized (horizontal) character of international society. The balancing of this dual perspective indicates my special interest in the case. It guides the discussion of three main facets of *Sabbatino* in the pages that follow: first, the character of the reaffirmation of the act of state doctrine; second, the nature of Federal authority exercised by courts in the field of international law; and, third, the treatment accorded by domestic courts to a foreign sovereign with whom the United States maintains no diplomatic relations.

I. ACT OF STATE DOCTRINE

Of course, interest in *Sabbatino* centers upon its endorsement of the act of state doctrine. Apparently a major cause of consternation is that the Supreme Court has been understood as saying that, even if the foreign governmental act is alleged to violate international law, a domestic court is helpless, at least until it has been formally released by receipt of a *Bernstein* letter, to do anything about it. Critics resent both this helplessness and the dependance of courts upon executive authorization. In both respects, I would contend, *Sabbatino* takes a constructive step beyond its precedents, even if one accepts, as I do not, the orientation of those critics who want to enlist domestic courts in the struggle to make national views on the protection of foreign investment prevail in contemporary international law.⁴

³ Falk, *The Role of Domestic Courts in the International Legal Order* (1964).

⁴ Even if it is agreed that the requirement of a stable international economy includes the protection of private capital abroad, it is doubtful whether either domestic courts or customary international law have much to contribute at this stage of international history. Given the attitude of the new states toward their imperial past and given the ideological outlook of the socialist states, it is futile to try to impose substantive standards that pre-dated their appearance on the international scene as independent actors. To protect contemporary foreign investment it is necessary to start over and to base protection on rules which receive the active assent of all major groups of nations in the world. If this assent cannot be achieved, then the implications of its absence must be accepted.

A review of the pre-*Sabbatino* precedents is not necessary. Mr. Justice Harlan has done this persuasively in Section IV of his opinion.⁵ The *Underhill* decision is appropriately emphasized, and its formulation of the act of state principle is quoted to emphasize the breadth of the doctrine that courts of one state "will not sit in judgment on the acts of the government of another done within its own territory."⁶ There is no hint in *Underhill* or elsewhere in the act of state cases at the Supreme Court level that this principle of deference might admit of exception. An examination of the subsequent act of state cases fails to manifest any "retreat from *Underhill*. . . . On the contrary in . . . *Oetjen* and *Ricaud*, the doctrine as announced in *Underhill* was reaffirmed in unequivocal terms."⁷

The one apparent exception "to the unqualified teachings of *Underhill*, *Oetjen*, and *Ricaud*" was a product of executive intervention in the second *Bernstein* case.⁸ At maximum, *Bernstein* stands for the proposition that the operation of the act of state doctrine can be suspended by a court if it has received an explicit executive mandate to this effect.⁹ But, as Justice Harlan points out, "whatever ambiguity may be thought to exist in the two letters from State Department officials on which the Court of Appeals relied . . . is now removed by the position which the Executive has taken in this Court on the act of state claim."¹⁰ In other words, even if it were reasonable—as it most certainly was not—for the Court of Appeals to construe Executive action as equivalent to a *Bernstein* letter,¹¹ this construction was not at all tenable after the Executive Branch entered the *Sabbatino* controversy with an argument in favor of applying the act of state doctrine.¹²

In passing, *Sabbatino* mentions that "[T]his Court has never had occasion to pass upon the so-called *Bernstein* exception, nor need it do so

⁵ Pp. 416-420.

⁶ *Underhill v. Hernandez*, 168 U. S. 250, 252 (1897); quoted by Justice Harlan at p. 416.

⁷ Pp. 416-417.

⁸ Pp. 418-419; *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F. 2d 71 (2d Cir., 1949), digested in 44 A.J.I.L. 182 (1950); 210 F. 2d 375 (2d Cir., 1954), digested in 48 A.J.I.L. 499 (1954).

⁹ It is "at maximum" because, according to the rationale of *Sabbatino*, it was unnecessary to apply the act of state doctrine to the *Bernstein* facts even without an Executive dispensation; a consensus condemned the racist basis of Nazi confiscations and the government whose acts were being appraised was no longer in existence. Therefore, Judge Learned Hand was not necessarily correct in deciding the first *Bernstein* case as he did, that is, as if a domestic court had no choice but to validate German acts of state so long as judicial review had not been authorized by Executive mandate. See *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F. 2d 246 (2d Cir.), digested in 42 A.J.I.L. 217 (1948); 332 U. S. 772 (1947).

¹⁰ P. 420.

¹¹ *E.g.*, see persuasive argument to this effect developed by Lillich, "A Pyrrhic Victory at Foley Square: The Second Circuit and *Sabbatino*," 8 Villanova Law Rev. 155 (1963).

¹² See Brief for the United States as Amicus Curiae, filed in the Supreme Court on Sept. 10, 1963, in the case of *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398 (1964) (reprinted in 2 International Legal Materials 1009 (1963)).

now."¹³ It need not precisely because the Executive has made no attempt to relieve a court from the normal obligation to apply the act of state doctrine. However, the Supreme Court clearly went out of its way to deprecate the teaching of *Bernstein*:

It is highly questionable whether the examination of validity by the judiciary should depend on an educated guess by the Executive. . . . We do not pass on the *Bernstein* exception, but even if it were deemed valid, its suggested extension¹⁴ is unwarranted.¹⁵

Certainly this undermining of the authority of *Bernstein* falls far short of a reversal, but it does disclose a judicial mood that appears favorable to a reconsideration, if not to a repudiation, of the *Bernstein* exception, given the opportunity. This gratuitous questioning of *Bernstein* in a setting where it was not really relevant to the outcome does function to warn the Executive to ponder the consequences of writing such a letter and invite a litigant to challenge its relevance should it ever be written.¹⁶

Therefore, it does seem reasonable to conclude that the *Bernstein* exception to the act of state doctrine has been cast in some disrepute by *Sabbatino*. To the extent that this is correct, it is beneficial. The rôle of domestic courts is made more independent of executive will. The treatment of an act of a foreign government is made to rest upon judicially-created principles of deference and assertion instead of upon the Executive's *ad hoc* advice. The outright repudiation of the executive prerogative implicit in *Bernstein*, something that must await a direct test, would contribute to the goal of judicial independence for domestic courts in international law cases.

There are two reasons to highlight the willingness of the *Sabbatino* court to reproach the *Bernstein* precedent. First, because it runs counter to the general rationale of judicial abstention that is developed by the *Sabbatino* majority in support of the act of state doctrine. And, second, because the repudiation of *Bernstein* might be used as the opening wedge in an overdue attack upon the authority and validity of the principles enunciated in the *Pink* decision.¹⁷ In *Pink*, the Supreme Court made some critical pronouncements about the duty of domestic courts to decide litigation before them so as to promote the foreign policy of the Executive. This duty took precedence over the parallel duty to apply domestic and international law to the controversy. This duty must be eliminated if domestic courts are

¹³ P. 420.

¹⁴ Refers to suggestion that act of state doctrine is only applicable to violations of international law if the Executive expressly requests the courts to refrain from passing on the question of validity. See Association of the Bar of the City of New York, Committee on International Law, *A Reconsideration of the Act of State Doctrine in United States Courts* (1959).

¹⁵ P. 436; see also note 9 above.

¹⁶ *E.g.*, Brief for the United States as Amicus Curiae, pp. 37-38: ". . . a 'Bernstein letter' invoking the exception and waiving the act of state doctrine seems to have been issued only once, in the *Bernstein* case itself, so in practice the exception is an exceedingly narrow one. The circumstances leading to the State Department's letter in the *Bernstein* case were of course most unusual."

¹⁷ *United States v. Pink*, 315 U. S. 203 (1942); 36 A.J.I.L. 309 (1942).

to regain their proper rôle in international law cases, and this means that the thinking in *Pink*, if not *Pink* itself, must be rejected.

But if the *Bernstein* letter cannot suspend the operation of the act of state doctrine, then it might appear that courts would never be able to inquire into the legality of a contested act of a foreign government. If an absolute act of state doctrine is affirmed, then, regardless of whether the rationale stresses accommodating diverse systems of public order in international society or internal constitutional requirements, an occasion for judicial scrutiny never arises. Therefore, it is important to investigate whether *Sabbatino* offers any new exceptions to substitute for the *Bernstein* exception, should it ever be fully eliminated. Because *Sabbatino* does offer grounds for exception, it can justly be hailed as a progressive decision from the point of view of the application of international law in domestic courts.

Sabbatino definitely does not formulate an absolute act of state doctrine. Courts are urged to pursue a flexible approach determining in each context whether the policies served by the act of state doctrine would, on balance, be served by its application to the facts of the particular controversy.

Act of State Doctrine: Its Scope

The *Sabbatino* decision enumerates no less than four occasions on which the act of state doctrine might not apply. First of all, the doctrine would not shield from judicial scrutiny a foreign governmental act alleged to be in violation of a rule contained in an international agreement or treaty binding upon the parties to the dispute. The act of state doctrine applies only to the review of foreign governmental acts that are said to be in violation of rules of customary international law. This distinction between customary and conventional international law properly reflects the greater definiteness and mutuality of treaty obligations as compared to customary norms.¹⁸

However, according to *Sabbatino*, there are, aside from the *Bernstein* precedent, three kinds of facts that might justify a court's willingness to review a contested act of state by reference to rules of customary international law: first, where a consensus exists in support of the standard supplied by the rule of customary international law; second, where the case before the court has an unimportant bearing upon the conduct of foreign relations; and, third, where the foreign government whose act is being challenged is no longer in existence. These three broad grounds for exception to the doctrine's scope are offered as illustrative of the kinds of considerations that might make it inappropriate to apply the act of state doctrine, and do not purport to be the only such grounds. *Sabbatino* is in the mainstream of policy-oriented jurisprudence by virtue of Justice Harlan's pointed insistence that the scope of the act of state doctrine must

¹⁸ Rules of customary norms arise in an uncertain manner, there is no way to reform or repudiate their content, and there is a tendency not to regard their validity as dependent upon changes in the character of international society, however fundamental.

be determined from case to case by reference to "the balance of relevant considerations."¹⁹

The scope of *Sabbatino's* version of the act of state doctrine is partly disclosed by the narrowness of the substantive holding:

Therefore, rather than laying down or reaffirming an inflexible and all-encompassing rule in this case, we decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign, extant and recognized by this country at the time of suit, in the absence of treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.²⁰

Crucial Section VI of the majority opinion in *Sabbatino* begins with this key sentence:

If the act of state doctrine is a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.²¹

This statement summarizes the findings in Section V of the opinion that international law does not require domestic courts to apply the act of state doctrine, nor does the Constitution make its application mandatory. Nevertheless, the act of state doctrine does have "'Constitutional' underpinnings," which apparently means that it is an expression of the idea of separation of powers in the context of foreign affairs.²² The Executive Branch has been given exclusive responsibility for the conduct of foreign affairs. The judiciary must not allow its adjudications to interfere with the proper discharge of this responsibility. Hence, the act of state doctrine is a jural device enabling the courts to refrain from reaching decisions that might in some way interfere with executive policy in matters of foreign affairs. The *Bernstein* exception conforms to this concept because it allows courts to suspend the act of state doctrine only when it becomes executive policy to encourage an adjudication on the merits of the complaint about foreign governmental action.

The most intriguing aspect of *Sabbatino's* treatment of the act of state doctrine is its stress upon the relevance of consensus among nations to the application of the doctrine:

It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more

¹⁹ P. 428.

²⁰ *Ibid.* Cf. also the sentence on pp. 436-437 articulating the holding in narrow terms: "However offensive to the public policy of this country and its constituent states an expropriation of this kind may be, we conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application." (Emphasis supplied.)

²¹ Pp. 427-428.

²² P. 423; for an excellent interpretation of this aspect of the *Sabbatino* decision see Henkin, "The Foreign Affairs Power of the Federal Courts: *Sabbatino*," 64 Columbia Law Rev. 805 (1964).

appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact.²³

If consensus exists with respect to customary norms, then a court is not forbidden from considering an argument that the challenged acts of the foreign government violate international law. Without such consensus, the Court reasons, decisions made in the name of international law will probably be perceived as an assertion of national policy rather than as an authoritative decision of law.²⁴ In fact, a satisfactory explanation of the validity of rules of customary international law would seem finally to rest upon a continuing consensus in support of them.²⁵ *Sabbatino* glimpses, although it stops short of an explicit statement to this effect, a connection between the reality of a legal obligation and its support by an active consensus of nations. Justice White, in his dissent, seems confused about the significance of consensus, or its absence, to the existence of binding international legal obligations.²⁶ His is the traditional view of legal obligation—the customary rule either exists or does not exist. The existence of the rule is crucial, consensus irrelevant. How does one tell whether the rule exists? According to Justice White, one looks back at practice for evidence of a sense of obligation sustained over time. Justice White never informs us how a customary rule, once established, is repudiated. How does a social system that lacks a legislature change its rules to reflect shifts in the values of its actors? Recourse to consensus as a factor relevant to the existence of customary obligations provides a method by which to accommodate pressure for change in a social system as decentralized as is international society. Such a method is essential for the maintenance of minimum international stability in a revolutionary period in international relations.²⁷

Sabbatino makes it very clear that a domestic court that confronts a set of facts for which the rules are supported by a consensus is not bound to apply the act of state doctrine, nor, it should be added, is it instructed not to apply the doctrine. *Sabbatino* prescribes only that the presence or absence of a consensus (with respect to the customary norm in issue) is a factor that a domestic court should take into account in the course of achieving the end product of judicial inquiry—what Justice Harlan so aptly calls a “balance of relevant considerations.” Thus the most that can be said is that a future court might mention the existence of a consensus to justify its decision not to apply the act of state doctrine. If such a decision stems from such reasoning, it could constitute a refusal to apply the doctrine on the basis of an independent judicial inquiry without the receipt of any prior executive mandate in the form of a *Bernstein* letter. The act of state doctrine does not necessarily apply, then, to governmental

²³ P. 428.

²⁴ Pp. 434–435.

²⁵ This point has been developed in greater detail elsewhere. Falk, “The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking,” 50 Va. Law Rev. 231, 243–248 (1964).

²⁶ Pp. 455–456.

²⁷ See Hoffmann, “International Systems and International Law,” in *The International System* 205 (Knorr & Verba eds., 1961).

acts performed with respect to a subject matter about which there is no significant controversy among nations as to the status and character of governing standards of international law.

In the presence of diversity, the act of state doctrine performs a valuable function in international society. It allocates jurisdictional competence on the basis of a reciprocal pattern of deference by which national actors are given mutual assurance that their activity will receive universal respect if carried on within jurisdictional limits (simplified in the *Sabbatino* discussion to refer to the control of tangible property located within territory). Such deference accords with the facts of decentralization and ideological cleavage that exist in international society today.²⁸

Sabbatino also intimates that a domestic court might properly be more ready to suspend the act of state doctrine if the dispute did not bear significantly on the conduct of foreign relations: "The less important the implications of an issue are for our foreign relations the weaker the justification for exclusivity in political branches."²⁹ Evidently this, too, is a judicially determined rule that can be invoked and applied without awaiting prior executive intervention. This self-assertion by the courts advances the cause of judicial autonomy, although it does so at the expense of internal deference, that is, deference by the judiciary to the wishes of the Executive. It is desirable to end this subordination of the law-applying function of courts to the diplomatic functions of the Executive.³⁰ Such subordination is inconsistent with the growth of habits of respect for international law, as internal deference reinforces the idea that nothing takes precedence over sovereign discretion in the field of foreign relations. Is it not a central objective of international law to promote the acceptance of law as a source of limitation upon sovereign discretion? And are not domestic courts suitable arenas within which to give evidence of this acceptance? The rule of law in world affairs—a favorite rhetorical phrase in the speeches of our diplomats—is an idle pretense unless implemented. Just as the Connally Reservation dilutes our plea for the adjudication of disputes between nations, so uncritical deference by domestic courts to the political branches undercuts our more general commitment to work for the growth of law in world affairs.

Sabbatino also suggests that if the foreign government no longer exists, as was the case when *Bernstein* was decided,³¹ then a domestic court might more reasonably refuse to apply the act of state doctrine. This seems sensible. The argument for reciprocal deference is reduced, if not re-

²⁸ See very good discussion in Lissitzyn, "International Law in a Divided World," Int. Conciliation, No. 542 (1963), p. 1.

²⁹ P. 428; such a conclusion takes account of most of the considerations mentioned by Justice White in his complaint that the majority is too rigid and deferential in its delimitation of the separation of powers. Pp. 461-472.

³⁰ For a clear statement of the opposite position see Cardozo, "Judicial Deference to State Department Suggestions: Recognition of Prerogatives or Abdication to Usurper?", 48 Cornell Law Q. 461 (1963).

³¹ And so, presumably, either *Bernstein* court might have taken this factor into account as part of a decision to refuse application of the act of state doctrine.

versed, by the replacement or disappearance of a government in a foreign country, especially since non-existence often is coupled with a repudiation of the government whose act is now being challenged before a domestic court. It is quite probable that either the acting government has disappeared altogether or it has been replaced by one with a radically different political orientation. In such a situation, it might turn out to be more of an affront to the present government to apply as law the acts of its predecessor than to refuse to do so.³² *Sabbatino* properly deems this factor relevant to the availability of act of state and hints, at least, that such a consideration might have liberated the *Bernstein* court without the permission of the Executive.

These grounds for refusing deference to a foreign governmental act are not made to appear exclusive or determinative in the *Sabbatino* opinion. They are enumerated as considerations that a domestic court should properly take into account when the application of the act of state doctrine is challenged by a litigant. It is important to realize this. A domestic court shall regard the presence of one or more of these three circumstances—consensus, unimportant bearing on foreign relations, non-existence of the acting government—as entering into “the balance of relevant considerations.” Other matters could presumably also enter the balance. Therefore, there are no rigid guidelines laid down as to when a court should refrain from applying the act of state doctrine. What is plain, however, is that the Supreme Court took pains to develop a non-absolute version of the act of state doctrine and to suggest that a decision not to apply the doctrine could be achieved by judicial inquiry unaided by executive guidance. I regard this as very crucial for an understanding of *Sabbatino*: the *rationale* of act of state, as we shall see, rests heavily on judicial deference to executive prerogatives in the area of foreign affairs, but the specific *application* of the doctrine depends upon an independent process of judicial decision-making. Such a distinction makes it possible to reconcile functional deference with the achievement of judicial independence. Justice Harlan’s opinion maintains a subtle balance between judicial self-restraint and judicial self-assertion.

In view of this conception of act of state, why does the balance of relevant considerations lead the Supreme Court to insist upon application of the doctrine to the *Sabbatino* facts? Several reasons are outlined in the majority opinion.

First, no consensus exists to support the relevant rules of international law. Second, the dispute is deeply embedded in foreign relations. And, third, the government whose act is challenged remained fully in existence at the time of the suit. The opinion also considers such other possible grounds for the non-application of the act of state doctrine as the hostile state of Cuban-American relations and the appearance of the Cuban Government in the litigation as a plaintiff taking advantage of its own act of

³² This would be especially so if the forum state and the new government were both strongly opposed to giving effect, if at all possible, to the acts of the predecessor government.



state. Justice Harlan's opinion concludes that neither of these latter two circumstances is an appropriate basis upon which to upset the balance of relevant considerations. Hence, the *Sabbatino* facts are within the proper scope of the act of state doctrine. Note that the first three reasons for making an exception to the act of state doctrine are regarded as good reasons, but their relevance is rejected because they do not apply to the *Sabbatino* facts. In contrast, the last two reasons are viewed as bad reasons for making an exception to the doctrine, although the *Sabbatino* facts exhibit their relevance.

Of course, the most controversial aspect of *Sabbatino* involves the determination that no consensus exists to support those rules of international law that condemn a confiscatory and discriminatory taking. The objections to this conclusion exist on three levels, each of which is mentioned in Justice White's dissent. On the first level, the facts of dissensus are disputed; evidence can be collected to show widespread support for some measures of compensation as a mandatory part of expropriation valid under international law. On the second level, the identification of relevant rules is contested. The *Sabbatino* majority is rather vague about just what are the customary rules that lack a supporting consensus. In contrast, Justice White is very specific about contending that a discriminatory and retaliatory taking of foreign-owned property is prohibited by rules that are supported by a consensus of nations reflected both in their practice and doctrinal pronouncements. It makes a great deal of difference whether one is denying a consensus for the rule that "prompt, adequate, and effective compensation" must accompany a valid expropriation rather than for the rules that prohibit discrimination against the nationals of one country or forbid a confiscatory expropriation in which no compensation at all is offered. The *Sabbatino* majority does not seem sensitive to the importance of identifying rather specifically the customary norms that are in issue. Judge Waterman, in the Circuit Court of Appeals, was very careful to state his holding in terms far narrower than those used by Judge Dimock to void Castro's expropriation in the District Court.³³ It might be argued that *Sabbatino* should have affirmed the decision of the Circuit Court, substituting its rationale for exceptions to act of state deference for Judge Waterman's strained and misguided conclusion that the Executive had written, in effect, a *Bernstein* letter.

Finally, on the third level, the argument is made that even if there is no consensus to support the rules, nevertheless such a taking should be struck down because it violates customary international law as established by authoritative and unrepudiated precedents. The pros and cons of this dispute are difficult to assess. I would incline to agree with the *Sabbatino* majority that the protection of foreign investment is a subject about which there is such salient conflict that it is not one in which domestic courts are capable of positing authoritative standards. Let it be clear that the explicit holding makes reference to the capacity of domestic courts and not

³³ *Banco Nacional de Cuba v. Sabbatino*, 307 F. 2d 845, 864 (1962); 56 A.J.I.L. 1085 (1962).

to the status of the customary norms. All that *Sabbatino* says is that a domestic court is not an appropriate forum to apply a rule of customary international law unless that rule is supported by a consensus at least wide enough to embrace the parties to the dispute. Such judicial self-restraint may not be appropriate if the forum is an international tribunal entrusted with competence by both sides, but for a domestic court the situation is different. The appearance of impartiality is as important to the formulation of authoritative law as is the actuality of impartiality. The consequence is that a domestic court, however manfully it struggles to achieve impartiality, will not be able to render an authoritative judgment when the adjudication requires it to decide whether the forum state or the foreign state is correct about its contentions as to the content of customary international law. The act of state doctrine, in the absence of a firm agreement on the rules of decision, acknowledges this incapacity of domestic courts.

If a domestic court were to pass upon the over-all validity of the Cuban expropriation, it could reach one of two unsatisfactory results. Either it could hold the expropriation illegal and render a decision that would be perceived as nothing more than an expression of national interest, or it could find the expropriation legal and gravely compromise the diplomatic posture of the United States. *Sabbatino's* dual concern for judicial independence and for executive-judicial harmony made this an unacceptable dilemma.

Justice White's dissent rejects this entire line of analysis. He argues that a consensus exists to support relevant norms of customary international law, but that even if it does not, a domestic court is always capable and obliged to apply international law. The unacceptability to one's ideological adversaries of a decision is not, the dissent contends, a relevant reason for restraint.⁸⁴ If the rule exists, then international law is promoted by applying it to settle a legal controversy. On the issue of judicial interference with executive policy, Justice White has this to say:

I would not disregard a declaration by the Secretary of State or the President that an adjudication in the courts of the validity of a foreign expropriation would impede relations between the United States and the foreign government or the settlement of the controversy through diplomatic channels. But I reject the presumption that these undesirable consequences would follow from adjudication in every case, regardless of circumstances. Certainly the presumption is inappropriate here.⁸⁵

This excerpt discloses much about Justice White's view of *Sabbatino*. In the first sentence, one wonders whether Justice White wants to distinguish a declaration by the Solicitor General, the Deputy Attorney Gen-

⁸⁴ This argument is most persuasive if the holding is fashioned in the narrow form adopted by Judge Waterman in the Circuit Court of Appeals. Cf. Justice White's emphasis on the fact that the Cuban decree "is alleged not only to be confiscatory but also retaliatory and discriminatory. . . ." P. 459.

⁸⁵ P. 462.

eral, and an Assistant Legal Adviser from that of the President or Secretary of State. Why? Surely these high officials speak for the Executive Branch with sufficient authority. In *Sabbatino* they did speak, although the dissent could maintain that since their declaration was based on a general doctrine of separation of powers, and as it proceeded "regardless of circumstance," its directive should not have received judicial acquiescence.

The second sentence in the excerpt from Justice White's dissent is either an echo of the majority opinion or a misunderstanding of it. Justice Harlan's opinion expresses as much dissatisfaction with an abstract and mechanical notion of act of state as does Justice White. In fact, the majority, as we have discussed, details an approach based on the "balance of relevant considerations." It emphasizes the absence of a consensus in support of customary norms of international law applicable to foreign investment in reaching its conclusion that internal deference (judiciary to Executive)⁸⁶ is appropriate here, especially so in view of the executive intervention to urge upon the Supreme Court the application of the act of state doctrine. In contrast, Justice White regards internal deference as inappropriate here. First of all, the Executive has already contended in formal diplomatic notes that Castro's expropriations violate international law. And furthermore, a decision on the merits by a domestic court, even in the unlikely event that it comes to the conclusion that the expropriation carried out by Cuban Law No. 851 is legal, is not going to cause the Executive "greater embarrassment" than does the *Sabbatino* rationale that there exist no "widely accepted principles to which to subject the act."⁸⁷ Except on the issue of embarrassment to the Executive, however, the alternative of deference or substantive judgment is not equivalent. For Justice White considers a judgment on the merits, while not endangering legitimate executive interests, to possess the great advantage of giving a litigant his day in court. Justice White puts the choice this way: "As to potential embarrassment, the difference is semantic, but as to determining the issue on its merits and as to upholding a regime of law, the difference is vast."⁸⁸

The dissent analyzes the situation without revealing any awareness of the distinctive character of international law as a legal order. Most specifically, Mr. Justice White does not appear sensitive to the constraints placed upon domestic courts by their dependence upon the horizontal mechanisms of international law. Without adequate central legal institutions of interpretation and enforcement, the area of consensus and common interests sharply restricts the domain of effective international law. The *Sabbatino* decision is partly significant because it seems to appreciate this limiting condition, although it undermines this appreciation to some extent by relying so heavily upon an argument favoring judicial deference to executive action, instead of trying to justify United States deference to Cuban action.

⁸⁶ External deference: forum-state-to-foreign-state.

⁸⁷ P. 465.

⁸⁸ Pp. 465-466.

Sabbatino's Rationale

Prior discussion has indicated that the *Sabbatino* decision, despite its many virtues, rests upon two unfortunate characteristics. First, it over-generalizes the customary norms at stake to be apparently coterminous with the entire law of foreign investment and, thereby, forfeits the opportunity to suspend the operation of the act of state doctrine by narrowing the norms at issue to those prohibiting discriminatory and confiscatory taking. Second, it rests the argument for the act of state doctrine principally upon separation of powers (internal deference) rather than upon conflict of laws (external deference). Although these criticisms have been made in passing already, it is important now to examine the case for and against separation of powers as the principal basis of decision.

Justice White rejects the relevance of the separation of powers analysis to the *Sabbatino* situation. Instead, he emphasizes that the act of state doctrine is best understood and used as a doctrine in the conflict of law that has arisen to affirm the territorial sovereignty of national actors.³⁹ His opinion argues that the act of state doctrine is an American equivalent to the rule "adopted in virtually all countries, that the *lex loci* is the law governing title to property."⁴⁰ The dissent connects up the deference implicit in the act of state doctrine with the need for comity and reciprocity in the international legal system:

Where a clear violation of international law is not demonstrated, I would agree that principles of comity underlying the act of state doctrine warrant recognition and enforcement of the foreign act.⁴¹

Such a statement is tantamount to saying that where authoritative standards are not available, then the logic of a horizontal legal system requires validating the separate legal claims of each unit within its spatial sphere of competence. This does seem to be the most persuasive rationale for the act of state doctrine.

Unfortunately, the majority opinion rests its case for the act of state doctrine almost entirely upon its internal aspect, that is, as an appropriate technique for the allocation of competence between the Executive and the judiciary when the subject matter of litigation touches upon foreign affairs. But, as the dissent demonstrates, this is a rather shaky justification for deference when adopted in the form of a general principle rather than as a possible outcome of a case-by-case analysis. Justice White points out that quite often a judicial appraisal of foreign governmental acts would not be inconsistent with the proper discharge of executive function in the field of foreign affairs.⁴² It is not very convincing to contend, Justice White suggests, that an appraisal of legality is, *in general*, likely to be embarrassing for the Executive. If international law is to be an important source of law, then its application should not be subordinated by domestic courts

³⁹ Pp. 444-450.

⁴⁰ P. 445.

⁴¹ P. 458.

⁴² Of course, the majority opinion leaves room for such an exception where a court deems it apt.

to hypothetical political considerations. For this reason, the emphasis upon the internal aspect of deference seems to be unnecessarily deprecatory of the rôle of domestic courts in the field of international law.

Justice White is arguing somewhat against an imaginary adversary. The majority concedes most of what he is purporting to argue against. As we have said, Justice Harlan does not regard deference as automatic or as dependent upon executive mandate. Justice White's complaint would be more apposite if it were restricted to the case at hand: why defer in *Sabbatino*? The majority, despite its language about a balance of relevant considerations, does not investigate very carefully the reasons why a court should defer to the Executive in the *Sabbatino* setting. A clearer, stronger case for deference could be made by reference to the dependence of international society upon patterns of mutual respect for territorial law. Such an argument is persuasive with regard to the *Sabbatino* facts unless the dispositive issue is narrowed beyond expropriation in general to the discriminatory and confiscatory quality of this particular expropriation.

II. FEDERAL AUTHORITY

Less celebrated, but not less significant, is the attempt of *Sabbatino* to clarify the basis and extent of Federal authority in the field of international law. The decision strongly affirms the unified control of the central Government, as expressed through the Supreme Court, over the interpretation and application of international law by domestic courts, whether they be State or Federal. Such an affirmation is very important to make in a federal system such as our own. Without it, there is an element of uncertainty and non-uniformity introduced into the process of giving domestic effect to international obligations that hampers the capacity of a state to participate effectively in international society.

Professor Henkin has written so well on this aspect of *Sabbatino* that it is only necessary here to state the conclusions reached by the decision in their bare outline.⁴³ *Sabbatino* confirms Federal authority to establish uniform standards binding on lower courts, whether State or Federal, with respect to the application of international law. This conclusion eliminates the suspicion that *Erie v. Tompkins* might to some extent require Federal courts to follow State law in international law cases.⁴⁴ *Sabbatino* also makes it plain that the application of international law by State courts is a Federal matter to which the supremacy principle applies. This is obviously a sensible result. The United States can best participate in the international legal system as a single political unit, not as an assemblage of fifty sub-units, each having its own sphere of competence. However, every rose bush has its thorns. The centralization of Federal control facilitates the use of domestic courts as vehicles for the pursuit

⁴³ Henkin, note 20 above.

⁴⁴ Pp. 425-427; *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938); see Jessup, "The Doctrine of *Erie Railroad v. Tompkins* Applied to International Law," 33 A.J.I.L. 740 (1939).

of national policy objectives. In that sense, courts are made more vulnerable to pressures for conformity to the national will than if each were subservient to the more local policies operative at the State level.

III. ACCESS TO DOMESTIC COURTS

Sabbatino holds that the severance of diplomatic relations does not affect the access of a foreign sovereign to a domestic court in the rôle of a plaintiff.⁴⁵ Thus the Supreme Court refuses to adopt the *Cibrario* precedent as guidance for the treatment of a government with which the United States has broken diplomatic relations. It will be remembered that *Cibrario* dealt with a claim of access to a New York State court put forward by the unrecognized Soviet government;⁴⁶ in a companion case, *Wulfsohn v. Russian Socialist Federated Soviet Republic*, the same court held that the Soviet government, although unrecognized, could nevertheless bar prosecution against itself by an appeal to the doctrine of sovereign immunity.⁴⁷

This conclusion seems sensible. A foreign government should be able to have recourse to a domestic court so as to obtain an adjudication of its legal rights. Maximum recourse is consistent with the wider international effort to encourage reliance upon third-party procedures to obtain the peaceful settlement of international disputes. It is also expressive of a policy of making the work of domestic courts in the international law field as independent as possible of the vagaries of foreign relations. An American court should adjudicate a legal controversy between litigants without reference to the state of Cuban-American relations or to the locus of the forum within the territory of the United States. Such an adjudication emphasizes the supra-national quality of the rules of international law and indicates that national courts are institutions within the international legal system rather than servants of the national political will.⁴⁸

Sabbatino, perhaps to avoid questioning old precedents, rests its conclusions too heavily upon the distinction between severance of diplomatic relations and non-recognition of a foreign government. Mr. Justice Harlan writes for the majority that

the refusal to recognize has a unique legal aspect. It signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control.

Furthermore: "Political recognition is exclusively a function of the Ex-

⁴⁵ Pp. 408-412, 437-438.

⁴⁶ *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255 (1923).

⁴⁷ *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372 (1923).

⁴⁸ This orientation also tends to reduce the relevance of the national locus of the forum to the outcome in a domestic court. Uniformity of judicial outcome is, of course, an ideal nowhere attained at present. Its closer approximation is an important aspect of the over-all commitment to the development of a universal system of legal order. And its explicit denial in the name of national values is a regressive acceptance of sovereign precedence in world affairs.

ective."⁴⁹ Such language makes the outcome depend upon a *doctrinal* rather than a *functional* allocation of competence between Executive and judiciary. The Executive is just as much in charge of severance as of non-recognition, and the two modes of response to disfavored foreign governments may be pursued for identical reasons. There is no reason to treat Mao's China differently from Castro's Cuba in United States domestic courts merely because one government is unrecognized whereas diplomatic relations with the other have been severed.

It would seem preferable to stress the executive competence to resolve judicial doubts about the facts of foreign governmental control. Thus, if a civil war is going on in a foreign country, the court might obtain guidance from the Executive as to which government is in control of what. If the factual existence of a foreign government is not in doubt, then there is no more justification to deny access to an unrecognized government than to a government with which we have broken diplomatic relations. The *Cibarrero* rule implies that it is a favor to gain access, implying that the availability of an international law solution should depend on a prior record of friendship and good behavior between the forum state and the plaintiff state. It is important to persuade all states, whether friend or foe, to develop good law habits in foreign relations. One way to dramatize this point is to make clear that access to our tribunals is quite compatible with otherwise hostile political relations.

Sabbatino decided that a judicial determination of reciprocity was an unwise condition precedent to access. It refused to extend the approach developed in *Hilton v. Guyot* to deal with the conclusiveness of foreign judgments to a situation in which the foreign government sought access as a plaintiff.⁵⁰ *Sabbatino* correctly pointed out that

Re-examination of judgments, in principle, reduces rather than enhances the possibility of injustice being done in a particular case; refusal to allow suit makes it impossible for a court to see that a particular dispute is fairly resolved.⁵¹

However, this assessment does not argue the complex case of how to balance the particular against the general claims of access to domestic courts. The opinion is quite correct to suggest how difficult it would be for a court to resolve the issue of reciprocity. The merits and difficulty of executive scrutiny are not considered. Perhaps they should be, as this might be an appropriate occasion for the reliance of the judiciary upon an executive conclusion in an international law case.

Sabbatino mentions that

The freezing of Cuban assets exemplifies the capacity of the political branches to assure, through a variety of techniques . . . that the na-

⁴⁹ P. 410; and see footnote 12, p. 411, which calls attention to the literature that has criticized the preclusion of even unrecognized governments from access to our domestic courts; as with Bernstein, here, too, there is evident, at least, a judicial willingness to reconsider. The indication of this willingness is a signal worth noting.

⁵⁰ *Hilton v. Guyot*, 159 U. S. 113 (1895).

⁵¹ P. 412.

tional interest is protected against a country which is thought to be improperly denying the rights of United States citizens.⁵²

Thus, even if the plaintiff government is permitted access and wins the controversy, the Executive is still in a position to deny the fruits of the litigation to the victor. This executive capacity indicates the difference between adjudication and diplomacy, and it is a risk that even the most inexperienced foreign government must realize when it goes to the trouble and expense of initiating litigation. Even if no money is collected, however, the favorable outcome is a valuable asset. It provides the foreign government with an impartial determination that its contention, which often extends beyond the adjudicated controversy, is correct. Such support may have immediate psychological value and it is almost certain to be taken into account if a general political settlement is reached in the future.

The prerogative of the Executive to freeze foreign assets illustrates the continuing dependence of international society upon the primitive sanction-remedy of self-help. The remedy is primitive because its application is self-determined by a party to the dispute, making its appropriateness hinge upon the over-all validity of the claim. It also is primitive because its coercive nature suggests the extent to which international society tolerates the use of coercion other than outright military violence in the course of settling an international dispute. Such an imperfect system of legal order is an almost inevitable consequence of the absence of compulsory procedures of peaceful settlement in international society. This absence, in turn, expresses the fact that national actors retain predominant control over the outcome of international disputes, and have yielded only marginal competencies to international institutions. As long as this is the case, there are bound to be sharp limits imposed upon the opportunities for developing universal procedures and standards to deal with disputes among nations. In recognition of these limits, ideas of reciprocity and mutuality emphasize the dependence of international society upon horizontal forms of international legal order.

IV. AFTERMATH

It is almost certain that *Sabbatino* will become a landmark decision in the field of international law. It will be hailed. It will be condemned. Of course, time must intervene before its over-all impact upon the development of international law can be accurately discerned and appraised. It is not too early, however, to praise *Sabbatino* for achieving the qualities of distinction that Dylan Thomas commended to the poet: "The best craftsmanship always leaves holes and gaps in the works of the poem so that something that is *not* in the poem can creep, crawl, flash or thunder in." ⁵³

⁵² P. 412.

⁵³ George J. Firmage (ed.), *A Garland for Dylan Thomas* 152 (1963).

EDITORIAL COMMENT

NEW PERSONALITIES TO CREATE NEW LAW

The search for a new international law has led the United Nations General Assembly to create a new body to prepare the way for its formulation.¹ In the guise of a "Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States," jurists representing states selected by the President of the General Assembly will take their places in August, 1964, at the first session in Mexico City. The task set for the Committee is preparation of a report for the purpose of the progressive development and the codification of the four principles designated by the 17th Assembly as of priority concern so as to secure their more effective application.² The report will be presented to the 18th General Assembly in November, 1964, and will be referred to the Sixth Committee for consideration and possible drafting of a resolution designed to affect the whole course of international law.

Through the process established by the General Assembly there is in the making a new source of international law, designed by its proponents to go beyond codification. This source, in the view of many of its proponents, is to facilitate development of completely new law. In this view the International Law Commission has proved its incompetence to move quickly and to develop law imaginatively. Its character as a group of scholars remote from political life favors performance of its function as codifier of existing principles, but this very lack of political experience among most of its members is thought to deprive it of the wisdom necessary to development. While some states do not share this attitude toward the International Law Commission, strong pressure from the states in developing areas for review and development has required acceptance of this new effort to adjust law to current conditions, lest it be thought that the long-established states are prepared to accept no change in contemporary law.

The character of the Special Committee is suggested by the men who compose it. Though the resolution creating the body recommends that jurists be designated by the states represented, the emphasis is upon selection of men of political acumen as well as legal training. This is made evident by the mode of selection. Jurists are not chosen as individuals. States are named as members of the Special Committee, and they in turn choose their representatives, subject only to the recommendation that they appoint jurists "in view of the general importance and the technical aspect of the item." The debates leading up to the resolution make clear beyond doubt that for most of the participants, emphasis is upon politics,

¹ See General Assembly Res. 1966 (XVIII), Dec. 16, 1963.

² See General Assembly Res. 1815 (XVII), Dec. 18, 1962.

not existing law.³ Foreign office lawyers were favored by many speakers, and professors were specifically downgraded by some as being remote from political reality.

With the resolution as his guide, and in lengthy consultation with the various political groupings within the United Nations, the President of the General Assembly chose the states to be members of the Special Committee. In language reminiscent of that of the Statute of the International Court of Justice, the resolution admonished selection of members "in consideration of the principle of equitable geographical representation and the necessity that the principal legal systems of the world should be represented." The President has selected in implementation of the resolution the following states as members: Afghanistan, Argentina, Australia, Cameroon, Canada, Czechoslovakia, Dahomey, France, Ghana, Guatemala, India, Italy, Japan, Lebanon, Madagascar, Mexico, The Netherlands, Nigeria, Poland, Rumania, Sweden, the U.S.S.R., the United Arab Republic, the United Kingdom, the United States of America, Venezuela and Yugoslavia.⁴

The Special Committee is much larger than had been anticipated by several of the states accepting the resolution, for these had expected the group to be a small working committee. Nevertheless, the President felt impelled by demands for seats from the African, Asian and Latin American states to make the committee large enough to include a representative group from each region. The result is the group of twenty-seven, including, in addition to the permanent members of the Security Council (exclusive of China), strong representation from the developing regions of the world.

The individuals appointed by the member states are largely the representatives or deputy representatives of these same states on the Sixth Committee, although there are some exceptions in the person of members of legal departments of foreign offices and a few law professors. As a result of the nominations, the selection process has established a Special Committee composed of individuals with the precise qualifications desired by most of those who supported it, namely, a combination of legal knowledge permitting manipulation of legal techniques and political acumen tied through employment relations to foreign offices. Since many of its members are their states' representatives on the Sixth Committee, the Special Committee becomes, in effect, a cross section of the Sixth Committee differing from its parent only in two features: it is about one quarter the size, and its members will be able to spend full time on the problems before the committee during its sessions. This latter point is important for several of the small states since, during New York sessions of the General Assembly, the Sixth Committee delegates often bear heavy delegation responsibilities and sit on several committees concurrently.

The first year's agenda⁵ for the Special Committee continues the four

³ See J. N. Hazard, "The Sixth Committee and New Law," 57 A.J.I.L. 604-613 (1963).

⁴ See U.N. Doc. A/5689, Feb. 17, 1964.

⁵ See U.N. Doc. A/AC.119/1, May 1, 1964.

items chosen by the 17th Assembly for a 1964 report, but more is in view for later years. Resolution 1966 (XVIII) placed on the agenda for discussion by the 19th Assembly three additional items. Judging by experience with the four items currently before the Special Committee, the three additional items will be made the subject of a general debate within the Sixth Committee at the 19th Assembly in which the delegates of all Member states of the United Nations will seek to orient the items in the political scene as each understands it. Subsequently, with a record setting forth in general terms the hopes and fears of Member states as to the direction in which law should move and the evils that must be avoided, the Sixth Committee will obtain from the General Assembly a resolution placing the three additional items on the agenda for report by the Special Committee. In this way the four original items will become seven, and presumably the process will be continued until the Special Committee will be asked to report on a considerable number of topics. Czechoslovakia proposed at the outset of the debate in the 17th Assembly that these be nineteen,⁶ and if history is to repeat itself, this proposal will be heard again, for the Eastern European countries are known for the tenacity with which they hold to basic themes, even though outvoted repeatedly.

The Secretariat of the United Nations, as requested by the resolution of the General Assembly, has been bringing together materials requested in aid of the Special Committee. Background documentation prepared for the 18th Assembly⁷ has been reissued in expanded form,⁸ and the comments of governments sought for the 18th Assembly and published at the time⁹ are being gathered anew. The practice of the United Nations, which is extensive, has also been requested from the Secretariat, although a small staff and the short time available has delayed completion of the materials. Background documentation takes the form of texts relating to the four priority items currently before the Special Committee. These are selected not only from treaties, multipartite conventions, and judicial decisions of international tribunals, but also declarations of states and even proposals of non-governmental bodies such as the International Law Association, the "Hudson Committee" on the International Law of the Future and the First World Conference on World Peace through the Rule of Law.

By virtue of the documentation, emphasis is upon precedent, at least to the extent that it must be examined as a starting point for development. The fact that the representatives on the Special Committee are jurists reinforces the concept of development from precedent rather than bold initiation of new formulae without reference to the past. The "break-through" technique of the natural scientist in which startling new discoveries come when old formulae and techniques are discarded is not easy

⁶ See U.N. Doc. A/C.6/L505, Oct. 26, 1962.

⁷ See U.N. Doc. A/C.6/L537, Oct. 30, 1963.

⁸ See U.N. Doc. A/C.6/L537, Rev. 1, March 23, 1964.

⁹ See U.N. Docs. A/5470, Aug. 7, 1963, and Add. 1, Sept. 6, 1963, and Add. 2, Sept. 25, 1963.

for men with legal training to adopt. This is so even when the innovators desire to start afresh in a world in which the epoch of colonialism has ended, and where the epoch not only of independence but of radical social and economic change has begun.

Perhaps such "break-throughs" are not necessary to satisfy most of the men pressing for change. Many of these hold philosophical views that permit them to see novelty in a legal system even though there persists in it a familiar pattern of legal norms. For them the social end pursued by the system, and not its terminology or techniques, creates its character. If this be the view held by proponents of innovation seated upon the Special Committee, agreement will not be difficult, for change will take place within established patterns and will not create unrecognizable norms. The new features will be in new attitudes relating especially to the respect to be accorded to Asian and African states. Such attitudes are already accepted by most of the long-established states, and it remains only to spell them out in such a manner that Asians and Africans are satisfied that they are now beyond challenge.

But the philosophically minded group is not the only one demanding innovation. Another group professes to discard legal norms established before the coming into effect of the United Nations Charter, unless there has been a chance to review these norms and to accept them anew. While such a position can be supported with some logic in a fast-changing social order, it presents obvious practical difficulties. The first is of time. To review the entire body of pre-1945 norms to determine their adequacy to modern conditions would require a conference of infinite duration. The conferences on the law of the sea have demonstrated the painstaking negotiations necessary to complete a convention. While such a conference or series of conferences was in contemplation or preparation, years would elapse during which no state could be sure of the acceptability of traditional rules.

The second objection to the discard of norms unless accepted on review lies in the problem of majorities. *Vox populi, vox Dei* is a favorite cry of the demagogue, but the function of the law has long been not only to respond to the demands of the majority but to protect the minority as well. This is true both on the domestic and the international scene. During a transitional period, while emotions still run strong, and when a near majority, if not an absolute majority, of states have not yet tried out in practice the norms of the past that can suit their needs, a quick vote based on principle alone could throw out the baby with the bath.

International social order, and hence peace, needs for its support recognition of a presumption that the old rules stand until specifically overruled by thoughtful action of an experienced community of states rather than a presumption that no norm enunciated prior to 1945 has force unless specifically reaffirmed subsequent to Charter ratification.

The new Special Committee can be, in the view of many jurists, a major factor in balancing the new with the old. This is true by virtue of its membership and its procedures. Its membership has been estab-

lished to represent both new and old states. Its personnel has been chosen to present men who can strike a balance between the seemingly endless deliberation of the scholars on the International Law Commission and the quick judgment of diplomats functioning within the resolution-oriented General Assembly. Yet, balancing issues creates problems. Proceedings cannot but become a contest between opposing views, and herein lies the difficulty.

Can the representatives on the Special Committee or, more accurately, the foreign offices they represent, accept the adversary process as a means of discovering a truth beneficial to all, or will they insist on making the Special Committee a forum for debate designed to achieve no solution but to strike a blow for one or another side? In short, will the Special Committee become a jousting field in the battle of books or a forum consecrated to the achievement of compromise and peace?

The very choice of the committee's title "Special Committee . . . on Friendly Relations and Co-operation" suggests that the majority of the Members of the United Nations want their Special Committee to resolve disputes rather than joust. Yet, the four items given priority by the resolution in development of law have histories replete with combats. Each item has been used to tease or even to lash a political opponent. Let us consider them in turn.

(1) States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations:

The Sixth Committee's rapporteur¹⁰ informs his readers that some representatives doubt that it is desirable or feasible to formulate a complete definition of the prohibition of the threat or use of force. Opponents of definition state that military force is now almost outmoded, and there has emerged economic and political force which is sometimes more dangerous to developing countries than military force. Some note that force, while still military, is now often exercised by irregular forces or armed bands operating from bases within other states that tolerate their presence. Some see the arms race as pressure. Some doubt that a line can be drawn today between international and national relations, since a revolting group can claim statehood and any threat against it could be considered "international." Some note the failure of the United Nations to define aggression after many years and see no hope of success with the Special Committee.

(2) States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered:

This principle has to run the gamut of states which refuse to accept international adjudication in resolution of disputes and prefer to rely upon diplomatic negotiation as the means of peaceful settlement. Small states

¹⁰ See U.N. Doc. A/5671, Dec. 13, 1963.

in the Sixth Committee have rejected diplomatic negotiations as inadequate to their needs when strong Powers press them. Peaceful settlement may assuredly be brought about by such measures, but it is the peace of the powerful, not the peace of the consensus which small Powers now hope to achieve.

Adjudication also meets opposition from some states which see the perils of diplomatic negotiations but which fear that the International Court of Justice is not sufficiently representative of their legal systems and is oriented toward the "have" rather than the "have not" nations. Some see it oriented in favor of capitalism and not socialism. The Special Committee will have to determine whether these complaints come from states which oppose adjudication because they want always to win in argument, or whether they come from men who are entirely prepared to risk loss so long as they can have confidence in the fair-mindedness and impartiality of their judges.

(3) States shall not intervene in matters within the domestic jurisdiction of any state, in accordance with the Charter:

Here is a principle which seemed so obvious at the time of Charter formulation that it needed no embellishment, but times have changed. Many now question the possibility of distinguishing domestic from international results of any policy. International peace seems to be threatened by rupture of domestic peace through intense racial and religious hatreds. Perhaps the current situation is as reported by the rapporteur, who noted that some states think it necessary to recognize that what constituted interference in domestic affairs is essentially a matter of degree, since states cannot be sealed off from one another or from the United Nations. If the matter is one of degree, experience suggests that rules of law can hardly be formulated to cover the situation. It is a matter of adjudication, and the issues noted in comment on principle number two are presented. Who can be accepted as adjudicator?

(4) States shall enjoy sovereign equality:

No principle could be simpler to state, but what difference there has been in interpretation! Some states have argued that their sovereignty precludes their binding themselves irrevocably to any course of action. No sovereign need perform his own agreement. Yet, in agreement, and the predictability that comes from agreement, lies the force of international law. *Pacta sunt servanda* cannot be put in jeopardy by subsequent unverified arguments that pressure was used to reach agreement or that times have changed. *Rebus sic stantibus* is a principle with some validity, but can there be unilateral determination? To state the question some years ago would have been to refute it, but not so today. Voices are being heard which want to leave open for almost daily decision by a foreign office what previously assumed obligations need be observed currently.

To recite the agenda items is to indicate the difficulties before the Special Committee members. The meetings can lead to no agreement if discussion is focused on some of the strongly held views that have been heard in the Sixth Committee. From the position of most of the long-established

states, discussion of principles cannot hope to produce agreement, if claims for recognition of the right to nullify treaties, the right to nationalize without compensation, and the right to intervene in "just wars" are presented for approval under the four items on the agenda.

With forewarning of the pitfalls before the Special Committee, what can the members do to maximize the value of the time they will be spending together over the years? Lawyers reared in the common law will probably wish that the committee make studies patterned upon those of the *Institut de Droit International*, of the International Law Association or of the Harvard Research in International Law. In these groups rapporteurs for each theme gather practice from many sources and then attempt to deduce principles to be presented for synthesis to the specialists gathered in committee. Critics of this procedure have argued that its merits were limited by the inadequacy of the study of practice because the sources tapped tended to be those of long-established states, especially those of Europe.

The Special Committee with its talented foreign office lawyers from all parts of the world is in a good position to gather evidence of practice from a much wider area. The Latin American tradition, which has been little known outside the Western Hemisphere, could be presented, together with the experience of Asian and African states in settling disputes over borders, in forming various types of unions for political, economic and social purposes and in establishing their international life. In short, the Special Committee could add to the analysis of United Nations practice, which the Secretariat is to prepare, a description of emerging techniques in newly developing areas so that they can be compared with those which found their place in the doctrinal tracts of the nineteenth and early twentieth centuries. With this documentation, it would be possible to determine what innovation is needed, and the specific political acumen which the Special Committee is intended to embody could be brought to bear upon development of the law.

Jurists of civil law background, including those of the Marxist-oriented socialist countries, may be tempted to turn their hand to immediate declaration of principles. Draft resolutions introduced by some of these states in the Sixth Committee in the past suggest that such an approach has wide appeal. Some proponents argue that it is hard for lawyers to think unless they are working on the precise text of a draft resolution, seeking to change a word, or alter a comma. While a technique of work based upon amendment of drafts had validity when the draftsmen were confident that they knew the practice of international law in the part of the world that came within their limited ken, it ceases to have validity today when a man who claims to know the practice throughout the world must be considered immodest. The African and Asian practice, and even the Latin American, require discovery and description to Europeans and North Americans, and to the jurists from the other developing areas not represented in the report.

The work of the Special Committee in preparing for the development of law may be retarded by another item placed on the agenda by General Assembly Resolution 1967 (XVIII), for by that resolution the Special

Committee was requested also to deliberate upon the feasibility and desirability of establishing a special international body for fact-finding or of entrusting to an existing organization fact-finding responsibilities. What this will involve has remained uncertain, but it obviously requires extensive consideration of existing procedures and the necessity for new ones. In some measure the Special Committee is given the task of creating that part of a court's function which has to do with the gathering of evidence. It is a difficult piece of work that is required, and because of the short span of time available to meetings of the Special Committee there will be a temptation to perform perfunctorily two functions which require careful analysis. If the Special Committee is to be useful as a source of new law, it must not be overburdened by having to explore whatever new idea is presented to the General Assembly, no matter how good the idea may seem to be.

The Special Committee has been created as a forum subject to strong influence from the states of the developing regions of the world. Sufficient time has passed for many of these to establish themselves firmly upon the international stage. They need no longer think only of aspirations. They are developing a practice. The Special Committee could be a place in which they have an opportunity to express their experience with other states in an environment removed from the tempestuous hurry and publicity of meetings in New York.

The developing states are represented in the Special Committee as they have not been in the past on other international bodies concerned with law. They have an opportunity to demonstrate the responsible statesmanship so many have already shown in maintaining peace and dissipating tensions on their own continents. The Special Committee presents an opportunity to rethink problems and to establish rules which can be utilized to eliminate the cause of tensions and of threats to the peace. There is now need for a law that will keep not only the colonial masters from intrigue in the new states. Perhaps this is the minor problem today, for the battles with the colonial Powers have, with a few glaring exceptions, been won. Now is the time to create an international law capable of protecting the peace from violation, not primarily from remote traditional sources of power but from youthful expansion-minded neighbors, tempted to flex muscles, to rectify frontiers, to subvert inconvenient governments, and to utilize force generally to influence the policies of others. The Special Committee could be a body supplementing regional groupings in preparing the way for development of old rules to meet the problems raised by inequality of power in newly developing regions. In doing so it would have the advantage of permitting the newly developing states to have a major say in creating the rules they need for their mutual protection.

JOHN N. HAZARD

THE QUASI-JUDICIAL RÔLE OF THE SECURITY COUNCIL AND THE GENERAL ASSEMBLY

The Charter of the United Nations says little about violations of the obligations it imposes. In fact, there are only two provisions which expressly refer to responsibility for action in the event of violation of the Charter obligations: one is Article 6, which provides that a Member "which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council"; the other is Article 14, which states that the General Assembly may recommend measures for the peaceful adjustment of any situation likely to impair the general welfare or friendly relations among nations, "including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations." While both of these provisions furnish a basis for the organs to pass upon alleged violations, neither directly provides that states may bring complaints of violations or that it shall be the duty of the organ to determine whether or not a violation has occurred. The emphasis in Article 14 is placed on recommended "adjustments" of situations impairing general welfare or friendly relations; Article 6 is directed to "persistent violations" which may be deemed to warrant the extreme sanction of expulsion. Of the many other Charter articles conferring functions on the two main political organs, none provides specifically for the responsibility of deciding whether a state has failed to live up to its obligations.

This cautious approach to the function of determining violations is not surprising. In part, it reflects the traditional view in favor of auto-interpretation by states of their international obligations and their reluctance to confer superior authority on collective organs. It will be recalled that a proposal which would have assigned to the International Court of Justice primary competence to decide questions of Charter interpretation was rejected in San Francisco. Nor was there a general disposition to confer on the Security Council the task of passing on complaints of non-observance of Charter precepts, even though the Council was required to deal with disputes and, in the circumstances of Chapter VII, was granted the authority to make binding decisions. It seems probable that the principal draftsmen believed that the primary task of the Council—to maintain or restore international peace and security—would not be served and, indeed, might possibly be impeded if the Council had to decide which side had been guilty of violating its legal obligations. Some recalled the past experience with apparently seamless webs of charges and counter-charges in international disputes, and it was understandable that they should have wanted the Council to be relatively unfettered in its authority to take whatever measures it considered likely to bring about peace and security without determining which side might have been responsible for violating its legal obligations.

The considerations which led the founding fathers to eschew a quasi-judicial rôle for the political organs are undoubtedly still persuasive to

many governments. This is evidenced, in some measure, by the fact that, even when complaints and charges of violations are made, the organs are usually reluctant to decide the issue of responsibility; they tend to adopt recommendations or decisions which avoid judgments on the charges made and seek to bring about a settlement or adjustment of the dispute without determining guilt or innocence of any party. Their objective is a resolution which will be acceptable and therefore likely to be implemented by the governments directly concerned; it will often not serve this end to decide whether the charges and counter-charges of illegality are well founded.

This approach made good sense at San Francisco and for the most part still does. Yet governments have repeatedly called upon the political organs to pass judgments on whether states have observed their obligations, and in several cases the organs have in fact done so, either explicitly or by clear implication. True, these cases are few in number, compared to the multitude of questions dealt with by the United Nations, but they are regarded as among the "leading" cases because of their legal implications and political repercussions. Examples which come to mind are the cases relating to Suez, Hungary, Korea, Congo, South Africa, and the Portuguese territories.¹

It may be said that none of these cases is a shining example of United Nations achievement; nearly all have left deep scars and a sense of frustration. Is this because they have been dealt with in terms of the Charter obligations (rather than through negotiation) or is it the other way around—that the legal prescriptions were invoked because the problems could not be settled merely through compromise and adjustment? There is, of course, no ready answer for all cases, but they suggest that the intractability of the problems tends to bring about a focusing on legal principles and a recourse to normative judgments by the political bodies. This is so, in spite of both the general predisposition to favor compromise and the recognized limits on United Nations authority. Certainly almost everyone would prefer settlements that did not place in issue the authority of the United Nations—an almost inevitable result of its judgments attributing "guilt" to a state. It is not surprising that these cases involve the burning issues of our day rather than the lesser disputes (such as boundary quarrels) which are usually considered as more suitable for legal adjudication. These lesser disputes can be side-stepped; the others cannot: they either involve violence with its threat of global conflagration or the insistent demands to eliminate colonialism and stigma of racial discrimination, both equally incendiary issues.

It would perhaps be stretching a point to conclude from this that when

¹ In all of these cases, resolutions were adopted at one stage or another which explicitly or by unmistakable implication declared state conduct to be contrary to the Charter. There was, of course, a much larger number of cases in which charges of illegality were extensively debated without the adoption by the organs of decisions confirming such charges. However, in some of these cases, the proceedings may be said to exhibit a broad consensus on the characterization of certain conduct as legally impermissible.

the chips are down, law becomes necessary. The cases do, however, indicate how difficult it can be to ignore the problem of legal responsibility when disputes are brought to the United Nations political organs and the Charter principles are invoked as a basis for decision. True, governments do not have to assert non-compliance with a Charter obligation as a basis of competence, since both the General Assembly and the Security Council have ample authority to consider disputes and situations on other grounds. Yet, in most cases affecting peace and security or questions of colonialism or acute matters of human rights, charges will be made by the complaining states that Charter obligations have been violated. The evident reason for this is that the behavior of a state cannot easily be challenged solely on grounds of "policy." For, unless it can be shown that a course of conduct involves a departure from legal obligations, the matter will normally be regarded as within the discretion of the state or, in Charter language, within its "sovereign" rights or domestic jurisdiction. The question of responsibility may be, of course, ultimately avoided if a settlement should be achieved, but when a solution is not obtained and the pressures continue, the issue of Charter compliance is likely to become the focus of the debate.

It can hardly be claimed that, in considering such charges of violations, the members of the organs observe judicial standards of impartiality. They will, of course, exhibit partisanship and interest in varying degree. Governments are expected to take positions in the political organs in accordance with their conceptions of national interest and it is apparent that these conceptions will embrace considerations based on ties of alliance, friendship or political bargaining. However, it is not sufficient for Member states to argue their case on grounds of national interest alone, since the organs contain varied and conflicting ideas of national interest. Whatever the actual motives for a state's position, its justification in the international forum must include grounds that will be acceptable to other states, a requirement which is not simply a matter of logic but the consequence of the political necessity of achieving the widest possible support. The decision that emerges, as shown by the cases mentioned above, will be supported (one might even say "necessarily" supported) by Member states having divergent interests and ideologies and their agreed evaluation of the specific facts in Charter terms will be accorded weight precisely because of their diverse and representative composition. It does not seem far-fetched to characterize such decisions in conventional legal terms as a contemporaneous construction by the parties of their treaty obligations expressed through formal decisions of a competent organ.

It may be asked whether such judgments can be considered authoritative unless it is shown that they have an effect on state conduct and are not merely verbal admonitions. To respond that they have moral weight and influence public opinion seems too vague and uncertain to carry conviction, especially in the face of a determined stand by the "target" governments. On the other hand, one can hardly disregard the evidence that resolutions of United Nations organs critical of state behavior as contrary to the peremptory principles of the Charter have played a rôle in both

domestic and external criticism of the government concerned. Thus, in regard to Suez and the Congo, it was apparent that, in the countries directly concerned, important political groups and personalities were influenced by the positions of United Nations organs in relation to the commitments of their governments and that their criticism had an impact on governmental policy. Nor can one overlook the consequences of a resolution on the officialdom of a government. Just as a superior official will rarely direct a subordinate to disobey a rule, officials in most governments would probably be reluctant (except under great pressure) to disregard an authoritative decision of a United Nations organ which asserts a legal requirement based on the Charter. Even if we recognize that these are points on which verifiable data are fragmentary, it is difficult to deny that influential groups within national states generally believe that the self-interest of their states not only extends to immediate gains and losses but also includes the factor of reciprocity and a long-term interest in order and stability. Rarely will responsible national officials lose sight of the possibility that a failure on their part to observe the rules can be used "against" them in the future and thereby weaken the basis for their own reliance on commonly accepted restraints.

This is, of course, far from saying that all United Nations decisions are given effect or are enforced; it is merely pointing out that judgments by United Nations organs asserting legal requirements possess a degree of authority that generates pressures—internal or external—in favor of compliance. Perhaps that is all that can be said, short of plunging into the details of each historical situation. One other point might be noted: the test of "effectiveness" is not only measured by compliance; for a government may flout a United Nations decision and then pay a price for it. This price may take various forms; for example, defections from political parties ideologically disposed to support of the recalcitrant state or a weakening of confidence in internal order which reduces the flow of investment to the non-complying country. It is not inconceivable that the governments affected will modify their position in future situations or that others in similar circumstances will profit by the example.

In evaluating the effectiveness of such United Nations adjudication there is another dimension which should be borne in mind. The United Nations political organs are more than places for debate and the adoption of resolutions addressed to the states. They are also centers of authority for a complex institutional system through which activities are undertaken that have an impact in a variety of ways on the policies and conduct of governments. These institutional activities are typically fact-finding procedures which range from investigations to continuing verification and supervisory operations, as in the Middle East or Kashmir. They may also extend considerably beyond fact-finding and, as we saw in the Congo, include an elaborate and costly apparatus necessary to eliminate unilateral military intervention and to develop viable administrative and economic machinery to fill a governmental vacuum. In almost all of these cases we find that the action of the Organization has been undertaken on the

basis of a normative judgment made by a political organ, a judgment which is generally considered to be an essential premise in the formulation of the general will of the Organization and in the justification of "corporate" measures taken in the name of the institution.

There is a further consequence of some significance. When an organ applies a Charter principle or any other rule of law to a particular set of facts, it is asserting, as a matter of logic, a new rule of a more specific character. This is a law-creative act, even though the members of the organ maintain (as they often do) that their decision is confined to the specific facts and they do not intend to establish a precedent. It may be that the "rule" of that case will not be followed in other situations and that its applicability will prove to be limited. But the contrary may also prove true, since, once a decision is rendered by an authoritative body, it has entered into the stream of decisions that will normally be looked to as a source of law. Considerations of equity and equal treatment will tend to favor its application in "equivalent" situations; moreover, the reasons which impelled its adoption in the one case are likely to have some influence in other cases.

The development of a body of case law in this way has its drawbacks. The facts that have been considered in each case have necessarily been limited and in large measure selected by chance; the outcome must inevitably have been influenced by the particular parties and the adversary character of the proceedings. Obviously this falls far short of the processes of conscious law-making (such as the elaboration of a treaty or a set of general rules) in which a wide range of situations and possible solutions are normally considered and the texts purposively designed to meet a variety of future circumstances.

But such general law-prescribing procedures have their own shortcomings; moreover they are not used sufficiently. Governments tend to be reluctant to assume precise commitments which may limit their action in future hypothetical cases; this reluctance is particularly strong in the kind of situations we have been discussing, namely, those involving restrictions on use of force or principles of human rights and justice. But the objection to such commitments for the future does not arise when an existing rule has been invoked in a particular case and the resulting decision can be viewed as one limited to the circumstances of that case. In addition, there is a factor of political urgency when a state brings up a complaint of illegal conduct, involving a danger to peace or an alleged violation of a strongly held principle, which cannot easily be postponed.

The "precedents" or case law thus generated have added significance in matters of peace and security because the body of principles is still so fragmentary and abstract. Such precedents contribute the specificity which is essential to convert the "soft" law of the Charter into the "hard" law needed for effective implementation. Greater precision through case law may also contribute to more rational treatment of particular problems. Broad concepts such as "intervention" are now used to describe a wide variety of situations which differ markedly in their facts and in their

bearing on policies and purposes; more specific concepts would facilitate inquiry into the particular facts and encourage consideration of policies that are relevant to achieving the major purposes of the Charter.

It may still be asked whether it would not be better to forget about applying norms and legal concepts in conflicts of interest between states because that only makes it more difficult to achieve the desired reconciliation and compromise. There is a good deal of substance to this point; clearly many situations can be more effectively dealt with through the adjustment of relations than through a quasi-adjudicative process. But the reconciling of interests may be accomplished in various ways, and it is doubtful that "compromise" is a sufficient working principle; it may at times be no more helpful than asking a man at a crossroads to adopt a middle solution by going off in between the two roads. In public affairs a rational settlement of conflicts of interest may require, or at least be aided by, a standard of general or community interest; and it is the essential function of legal norms to express that common interest. Whether or not they actually do so is a matter of empirical evaluation in any given case. I have taken it for granted that the principles of the Charter embody such community interests and I have suggested that the process of applying these principles in concrete cases is a reasonable, if faltering, way of determining new points of common interests and giving a measure of efficacy to recognized goals of international order and security.

OSCAR SCHACHTER

RECOGNITION DE FACTO—IN REVERSE GEAR

In a well-ordered world, nicely geared to democratic processes, it ought not to be hard to say who is the government of the country, who has the right to speak in its name, who can bind the state by his decision, in a word whose act constitutes an "act of state."

But unhappily not all countries follow democratic procedures in the selection of their representative officials; and we are only too familiar with *coups d'état* of all sorts, with colonels, majors, and even sergeants, who for one reason or another decide to overturn constitutionally elected governments and set themselves up as the head of the state. Have they a right to be recognized as such? The rule of law is well established that in their personal capacities they have no inherent right to be recognized, but that each of the other members of the international community will decide for itself when the new government appears to have the necessary stability to be taken as representative of the state and whether, expressly or impliedly, it offers assurances that it will live up to the international obligations of the state. In the meantime the new government can expect no more than *de facto* recognition, namely, that daily relations of a necessary character will be carried on with it, short of acknowledging its right to speak in the name of the state. Only when the second step has been taken and recognition *de jure* is given, may the new government claim all of the

rights of the state, while assuming at the same time the corresponding duties.

All this is obvious; but it raises the interesting question whether the existing rule should be continued that, once recognition *de jure* is given, the government thus recognized continues to represent the state and to act in its name, however far it may depart from the pledges it gave when *de jure* recognition was accorded to it. In a recent letter in answer to a private inquiry regarding the amenability of the Cuban Government to suits in United States courts, the Department of State wrote:

Although the United States has severed diplomatic relations with Cuba, it has not withdrawn recognition from the Castro government as the government of Cuba. Consequently, the Government of Cuba can sue or be sued in the United States courts on the same basis as any other government.¹

Acting on this basis, although at the same time accepting the "act of state" doctrine as a correct principle of international law, the Supreme Court of the United States, in the recent *Sabbatino* case,² found it necessary to apply the doctrine to the act of a government which had violated not only established rules of general international law but the more specific provisions of the Charter of the Organization of American States, a government which had been excluded from the inter-American regional system by reason of having identified itself as a Marxist-Leninist government. A case might, indeed, have been made by the Court, along the lines of the dissenting opinion of Justice White, for considering the particular act of state so flagrantly in violation of international law as to be superseded by the larger principle that international law is "part of the law of the land" and must be applied in appropriate cases. But be that as it may, and accepting the view of the Court that adequate compensation for acts of confiscation was not so absolute a rule as to be part of established international law, the fact remained that the Court recognized as an "act of state" the act of a government which, under the conditions, could not properly speak in the name of the state, having denied to its people the fundamental human rights on which its representative character might be based. Where there is no freedom of speech, no freedom of the press or of assembly, there is no standard by which the "will of the people" can be determined, if Jefferson's test is still to be taken as our national policy of recognition.

Assuming that it is the function of the Executive Department to determine the juridical character of a foreign government, would it not be possible for the Department of State to introduce a new rule and to apply the two steps of recognition in reverse gear? That is, reduce the status of a government from *de jure* to *de facto* when by its conduct it clearly no longer represents the will of a free people? Obviously there would be

¹ Cited in "United States Contemporary Practice Relating to International Law," 57 A.J.I.L. 409 (1963).

² 376 U. S. 398 (March 28, 1964); 58 A.J.I.L. 779 (1964).

occasions when it might be difficult to determine whether the conduct of a particular government would be such as to justify the proposed reduction. But if the reasons that justify breaking diplomatic relations with a government are always serious, the same reasons could be offered in justification for modifying its *de jure* status. The simple rule would be that a government, which was believed to meet certain conditions when recognized as *de jure*, in fact no longer meets them. Obviously the rule would be applied only in cases where the representative character of the government was involved.³

In the *Sabbatino* case the State Department, in its position as *amicus curiae*, made the case that diplomacy was the more effective remedy for expropriations in violation of international law. But to what effect is diplomacy available when the expropriating state has already rejected the established principles upon which diplomacy might negotiate, and the only alternative would be a resort to force which is forbidden by the provisions of the Charter of the United Nations? In the case of Cuba the defiance of juridical procedures would be absolute. Are we to expect that a government, which has deliberately violated international law by the expropriation of the property of aliens, under the circumstances described in the *Sabbatino* case before the Court of Appeals, would meekly respond to negotiations for redress or would submit its case to the adjudication of the International Court of Justice?

The proposed reduction of *de jure* recognition to *de facto* is in line with the modern development of international law. How long is the international community—how long in any case are the governments of the Western tradition—going to proclaim doctrines of fundamental human rights, and then stand aside and see one of their own number, after solemnly proclaiming them, violate them with impunity? The issue for the moment is not that of a threat to the peace, however real that may be when the political institutions of a particular American state come under the domination or control of the international Communist movement, as described in the resolution taken at Caracas in 1954. The issue is much simpler, namely, whether recognition of a government as *de jure* shall continue when by its denial of fundamental human rights it no longer represents the will of the people in whose name it pretends to speak.

C. G. FENWICK

³ In 1933, at Montevideo, a Convention on the Rights and Duties of States was adopted, including a rule that recognition of a state was "unconditional and irrevocable," but this would seem not to apply to governments; and in any case the broad reservation accompanying the signature of the United States would dispose of any legal obligation in the matter.

NOTES AND COMMENTS

ADMISSION OF STATES TO THE ORGANIZATION OF AMERICAN STATES

In September, 1962, the newly independent states of Trinidad-Tobago and Jamaica became Members of the United Nations. As of this writing, these states have not as yet applied for membership in the inter-American regional organization, the Organization of American States, possibly because of the Organization's known lack of admissions procedures.¹ These procedures, which have been under study for almost two years by the Committee on Juridical and Political Affairs of the Organization, pose a question for the inter-American system, the answer to which will have important ramifications for the future rôle of the Organization.

The operative articles of the Charter of the Organization for admission of new members are Articles 2 and 108. The texts read:

ARTICLE 2

All American States that ratify the present Charter are Members of the Organization.

ARTICLE 108

The present Charter shall remain open for signature by the American States and shall be ratified in accordance with their respective constitutional procedures. The original instrument, the Spanish, English, Portuguese and French texts of which are equally authentic, shall be deposited with the Pan American Union, which shall transmit certified copies thereof to the Governments for purposes of ratification. The instruments of ratification shall be deposited with the Pan American Union, which shall notify the signatory States of such deposit.

On their face, the provisions are deceptively simple.² The requirements to be filled would seem to be only three: that the applicant be a state; that it qualify as "American"; and that it ratify the Charter. Discussion at the Ninth International Conference of American States, during which the Charter was drafted in Bogotá, 1948, fails to indicate that the delegates placed any particular importance on even these qualifications. The only question which received attention at that time was whether an American state would become a member "of its own right" or whether it would have to ratify the Charter.³ Prior to the drafting of the Charter, it was under-

¹ They have applied for and been admitted to the Pan American Health Organization, one of the specialized organizations of the inter-American system.

² This view is stated in a recent study of the O.A.S. See Thomas and Thomas, *The Organization of American States* (Dallas, Southern Methodist University Press, 1963). The authors state: "Once the act of accession by ratification has been accomplished, admission is of right. The OAS has avoided the pitfall of the UN provision . . ." (p. 57).

³ Ninth International Conference of American States. *Actas y Documentos*, Vol. III, pp. 175 ff.

stood that, if the question arose, the former would be the practice for the Pan American Union,⁴ and the "Draft Organic Pact" presented to the Conference by the Governing Board of the Union sought to continue the rule.⁵ In revising the provision, the mood of the Conference was to avoid establishing rigid requirements while, at the same time, not giving membership a "compulsory" character. It was considered that membership should be a voluntary act on the part of the ratifying state.⁶

In spite of the fact that the text of the Charter lays down no specific conditions of membership, Article 2, as finally accepted, does imply the three conditions mentioned above. No Charter provision, however, indicated the competent organ to weigh those elements. Several interpretations have been advanced. One view holds that the Pan American Union, as the organ which receives the ratification for deposit is competent to make the determination,⁷ and in cases where a question might arise due to latent political problems or other reasons, the matter would be resolved by the Meeting of Consultation of the Ministers of Foreign Affairs which, under Article 39 of the Charter, is competent to "consider problems of an urgent nature and of common interest to the American States."⁸ The Committee on Juridical and Political Affairs of the O.A.S. has recommended that the Council of the O.A.S., by a two-thirds vote will determine whether the Charter can be opened for ratification to the applicant state.⁹ In making this recommendation, the Committee is relying on Article 51 of the Charter, under which the Council of the Organization is the organ "responsible for the proper discharge by the Pan American Union of the duties assigned to it."

On the surface, the problem does not appear unduly difficult; guidelines exist for making an objective juridical determination of all the necessary elements. A state, in terms of international law, is a self-governing territory with capacity to enter into relations with other states.¹⁰ Broad guidelines to qualify a state as "American" have also been set forth;¹¹

⁴ See Resolution on the Organization of the Pan American Union, Fifth International Conference of American States, Santiago, 1923; Convention on the Pan American Union, Sixth International Conference of American States, Havana, 1928 (not ratified).

⁵ See Art. 2. *Actas y Documentos*, *op. cit.*, Vol. III, p. 9.

⁶ This interpretation is ably summarized in Thomas and Thomas, *op. cit.* at p. 55: "It was not felt desirable to set forth an inherent requirement of membership—to extend membership automatically to a state if it did not desire to assume the obligations of membership. To avoid any such interpretation, a condition of accession was provided by ratification, and by this act the state voluntarily accepts the rights and duties of membership. An inherent right to become a member remains, this right being converted into membership by an exercise of will—ratification of the Charter."

⁷ See Thomas and Thomas, *op. cit.* 56, 57. See also Kelsen, *The Law of the United Nations* 58 (1950).

⁸ This view is explained in Thomas and Thomas, *op. cit.* 57.

⁹ Report of the Committee on Juridical and Political Affairs on the Admission of New Members of the O.A.S. OEA/Ser.G/IV. C-1-688 (Rev. 2 Corr.).

¹⁰ See Convention on Rights and Duties of States. Seventh International Conference of American States, Montevideo, 1933. Article 1.

¹¹ Treaty of Reciprocal Assistance, 1947. Art. 4 defines the area broadly as one

and some states even take the position that the term is self-defining.¹² Ratification "in accordance with their respective constitutional procedures" does not appear to be a question which will ordinarily arouse dispute.¹³

These implied conditions, while they raise questions of procedure, are not of a nature that would cause the present prolonged delay over the admission of the newly independent American states. Clearly, other problems are latent. Without considering at this time the political issues which could arise regarding the admission of some former colonies whose status might be in doubt,¹⁴ a substantial question has arisen in international law involving the collective security provisions and the relationship of the O.A.S. Charter with the other basic treaties of the inter-American system: the Treaty of Reciprocal Assistance (the Rio Treaty) and the American Treaty on Pacific Settlement (the Pact of Bogotá). Both are incorporated into the Charter by reference.¹⁵ Of these, the question of the Rio Treaty is the one before us.¹⁶

The question is an unusual one due to the dual obligation which is assumed in the Charter from overlapping provisions. Articles 24 and 25 of the Charter,¹⁷ in almost identical wording, incorporate the collective security provisions of the Rio Treaty and bind the Member states to "apply the measures and procedures established in the special treaties on the

extending from the North Pole, through Alaska and Greenland, to the Antarctic. The treaty refers to the area for the purpose of activating collective security machinery. It is noteworthy, however, that an attack within the defined area invokes the treaty regardless of whether the treaty has been ratified by the state attacked.

¹² See the position of Brazil: OEA/Ser.G/VII, CP/CAJP-10 (Corr.).

¹³ It is, of course, well to bear in mind that once criteria are established for membership, the specific grounds for withholding approval become academic, and the true grounds for one state withholding approval may never be revealed in the voting.

¹⁴ See Explanatory Note and Memorandum from the Delegation of Guatemala on the Need to Establish a Procedure for the Admission of New States to the Organization of American States. OEA/Ser.G/V/C-d-985. Rev. May 16, 1962.

¹⁵ The reference is implicit. See Arts. 23 and 25 of the Charter.

¹⁶ See note 19 below for the distinction made by the Charter in its reference to the two treaties. The Treaty of Reciprocal Assistance is the only treaty in the inter-American system besides the Charter which has been ratified by all 21 Member states. The Pact of Bogotá has been ratified by only nine states. Moreover, Canadian membership in the O.A.S., which has recently been the subject of renewed interest in view of Prime Minister Pearson's statements during the election campaigns of 1962 and 1968, has in the past caused much speculation on the acceptability of the Rio Treaty to that country.

¹⁷ Art. 24: "Every act of aggression by a State against the territorial integrity or the inviolability of the territory or against the sovereignty or political independence of an American State shall be considered an act of aggression against the other American States."

Art. 25: "If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an armed attack or by an act of aggression that is not an armed attack, or by an extracontinental conflict, or by a conflict between two or more American States, or by any other fact or situation that might endanger the peace of America, the American States, in furtherance of the principles of continental solidarity or collective self-defense, shall apply the measures and procedures established in the special treaties on the subject."

subject.”¹⁸ This is an unequivocal mandate regarding the application of the measures decided upon under the treaty: “shall apply” is clear and emphatic, and no alternative is envisaged.

Thus, any state which ratifies the Charter is, in effect, obligating itself to apply measures and procedures established in another treaty, while, on the face of the Charter, no express obligation exists to ratify that other treaty.¹⁹ What are the implications of a treaty relationship whereby a state, in ratifying one treaty, voluntarily undertakes such an obligation? Can a state be bound by decisions taken under a treaty which it does not expressly ratify? If not, is Article 25 meaningless, or does it establish another condition to membership in the Organization which is not apparent on the face of the Charter?

Given this statement of the interrelationship between the two documents, what is the prospect of a state which seeks admission to the regional organization? The Committee on Juridical and Political Affairs of the Organization has stated that

it is advisable for any state which desires to be admitted to the Organization to express, at the same time, its intention to sign and ratify, in addition to the Charter of the Organization, the Inter-American Treaty of Reciprocal Assistance.²⁰

Since this opinion has not been finally approved by the governments of the Member states, it might be well to examine other alternatives which remain. In summary form, there are three: (1) the Charter alone is the basic document of the Organization and its ratification is sufficient for admission, and the obligations assumed are limited only to those other treaties to which the state is a party; (2) the integral nature of the Rio Treaty and the Charter constitute both the basic documents of the O.A.S., and it is not only advisable but mandatory that both be ratified before a new state can be admitted; and (3) the Charter alone is the basic document of the Organization and its ratification is sufficient for admission, except that the ratifying state thereby automatically assumes the duties and obligations of the Rio Treaty which have been substantially incorporated as the duties and obligations of the Charter.

In seeking out the intention of the framers of the Charter, the debates of the Ninth International Conference are only partially helpful.²¹ The delegates were aware of the integral nature of the two documents. The

¹⁸ The Treaty of Reciprocal Assistance. Arts. 8 through 20.

¹⁹ A somewhat analogous situation arises between the Charter and the Pact of Bogotá. Art. 23 of the Charter, however, does not create an obligation to *apply* the measures in the special treaty. It provides only that: “a special treaty will establish adequate procedures for the pacific settlement of disputes and will determine the appropriate means for their application. . . .”

²⁰ Report of the Committee on Juridical and Political Affairs, *op. cit.* 5.

²¹ Unfortunately, the circumstances surrounding the Conference were not conducive to meticulous analysis. During the Conference, on April 9, 1948, riots broke out in Bogotá due to the assassination of a political leader, and the delegates had to retire to another location. See Fenwick, *The Organization of American States* 80 (Washington, 1963).

Argentine Delegation pointed to the fundamental unity of the basic treaties of the inter-American system,²² as did Dr. José Mora, present Secretary General of the O.A.S., in his report as rapporteur of Subcommittee A.²³ To the contrary, several delegates referred to the possibility of a Member state not ratifying the Rio Treaty, although they failed to give consideration to its implications.²⁴ The original draft of Article 25 made no reference to the application of "other treaties," referring instead to "measures for peace and security adopted under this Charter." The change to make specific reference to the Rio Treaty was suggested by the Colombian and Peruvian Delegations for reasons of clarity.²⁵ As finally adopted, the reference continued, but was indirect.²⁶ No delegate, as far as can be ascertained, addressed himself to the problem of ratification of the Rio Treaty as a condition of membership.

Considering the paucity of guidelines from intent, the search must turn elsewhere. Let us consider the alternative solutions individually: first, that the Charter alone is the basic document of the Organization, that its ratification is sufficient for admission, and that no obligations are thereby assumed under the Rio Treaty or any treaty to which the state is not a party. The argument relies on the wording of Articles 2 and 108, and states simply that the articles mean what they say; since there is no reference to the need to ratify another treaty, such a condition cannot be imposed without Charter amendment. The difficulty with this position is that it fails to account for the collective security obligation of the Charter contained in Article 25, and equivocates the clear obligation to "apply the measures . . . established in the special treaties" by implying a clause "if the state chooses to ratify a given special treaty."

The second argument points to the integral nature of the two treaties and, recognizing that a treaty must be ratified in order to bind a state, maintains that the obligation under Article 25 cannot be fulfilled unless the subsequent act of ratifying the Rio Treaty is completed. Failure to so ratify, this argument holds, would be an indication of unwillingness to fulfill Charter obligations.²⁷ This view considers the two documents as an integral unit and that, if a state obligates itself to the greater, it also obligates itself to the lesser. Since ratification is necessary to perfect that obligation, its requirement follows naturally. Earlier practices of the system²⁸ and the failure to provide expressly for ratification of the Rio

²² *Actas y Documentos, op. cit.*, Vol. III, p. 226.

²³ *Ibid.* 460.

²⁴ See comments of the delegate of Chile regarding the slowness of states ratifying the Rio Treaty, *ibid.* 136. Also the Delegation of Argentina, which observed on the wisdom of linking the Inter-American Defense Board to the treaty alone, for "if one State was not obligated by the Rio Treaty because it had not ratified or had denounced it, it could not form part of the Defense Board." *Ibid.* 455-456 and 531.

²⁵ *Ibid.* 227, 228.

²⁶ Report of the Committee on "Iniciativas." *Ibid.* 200.

²⁷ See the reasoning of Adolph Berle, *Latin America, Diplomacy and Reality* 88 ff. (New York, Harper and Row, 1962).

²⁸ See Res. 40 of the Ninth Conference of American States, Bogotá, 1948; also the fact, for example, that Costa Rica ratified the Charter prior to ratifying the treaty.

Treaty is attributed to the assumption by the delegates that ratification would naturally occur;²⁹ otherwise, it is argued, Article 25 would have been an empty gesture. Now that new states which are not accustomed to dealing with these matters in a "family way" are about to be admitted, the original group is confronted with a new problem, which should be met by interpreting the original implied intention as a requirement for admission. As strong a case as may be made for its practical necessity, the requirement of dual ratification leaves no explanation for the simple language of Articles 2 and 108, and imposes a new condition for membership without Charter amendment.

More in accord with the purposes of this line of reasoning would be a third alternative, namely, that upon signing and ratifying the Charter, thereby undertaking to comply with its objectives, the state automatically assumes the duties and obligations of the Rio Treaty. This interpretation assumes that the intention of the American states to link the two documents is clearly expressed in Article 25 of the Charter and in Article 26 of the Rio Treaty,³⁰ and that international law imposes no prohibition on the complete incorporation of the obligations of one treaty into another; therefore only one ratification is sufficient, and the necessity for Charter amendment is avoided. According to this theory, the mandate of Article 25 that the American states "shall apply the measures and procedures established in the special treaties" puts the ratifying state on notice that its obligation under the Charter extends beyond that instrument. Thus, the Rio Treaty is incorporated because of an obligation expressly contained in the Charter.

Although this practical solution side-steps the absence of clear wording in the Charter, it confronts other obstacles. Besides having little precedent in international law for a state assuming binding obligations under one treaty by inference from another, this solution runs contrary to the wording of the Rio Treaty itself, which in several articles refers to the states which have "ratified this treaty." For example, Article 11 indicates that the consultations referred to in the treaty shall be carried out by the Foreign Ministers of the states which have ratified the treaty; the same criterion is applied in Article 20 for the sanctions applied under Article 8.³¹ Moreover, what happens to the right to denounce the Rio Treaty? The problems within the treaties are too great, even if international lawyers could find authority for a "doctrine of incorporation."

Although it should not be interpreted as indicating support for this position, see the comments of Dr. Charles Fenwick that "when, on Dec. 13, 1951, the Charter entered into effect by the ratification of two-thirds of the members, no one was conscious that the old order had given place to the new; and the states that had not as yet ratified the Charter continued to sit and vote precisely as if their ratification had been completed." 50 A.J.I.L. 18, 27 (1956).

²⁹ This is a formidable assumption. At the time of drafting the Charter, only eight states had ratified the Rio Treaty.

³⁰ Treaty of Reciprocal Assistance, Art. 26: "The principles and fundamental provisions of this Treaty shall be incorporated in the Organic Pact of the Inter-American System."

³¹ See also Arts. 15 and 22 of the Rio Treaty.

A variation of this third alternative, however, which would apply the words of both the Charter and the Rio Treaty literally, is worth consideration. Under Article 25 of the Charter, a ratifying state undertakes to *apply* the measures and procedures of the Rio Treaty. The procedural mechanism and the competent organ of the inter-American system for decisions relating to collective security are established in the separate treaty, the Rio Treaty, but only those states which have ratified it can partake in the decision-making process. The obligation of the Charter relates only to the state's obligation to cooperate with the other states in executing the measures arrived at by the competent organ of the system.

A state, therefore, might choose not to ratify the Rio Treaty; it would gain no right to participate in the Organ of Consultation summoned for acts of aggression or danger to the peace.³² The corollary to this interpretation is that a state entering the O.A.S. will undoubtedly feel compelled to ratify the Rio Treaty at the risk of placing itself in the impossible position of allowing other states to make decisions for it. According to the Charter, it would be able to vote on whether a Meeting of the Organ of Consultation is to be held (Articles 39 and 52), but it would be unable to participate in the debates and votes on the application of the Treaty of Reciprocal Assistance unless it expressly ratifies that treaty. The measures decided upon as a result of these votes would be binding upon it under Article 25 of the Charter.

Clearly, this interpretation does not resolve the problem for a state which is reluctant to commit itself to the collective security provisions. Ratification of the Rio Treaty, although not, strictly speaking, a legal requisite, seems to be a practical necessity. It does, however, temporarily avoid the need for Charter amendment without doing a disservice to the word and spirit of the Charter. The final decision, however, must await the Council of the Organization, or, as recently requested by the Government of Argentina, may have to await the forthcoming Eleventh Inter-American Conference.³³

L. RONALD SCHEMAN *

SOME INFLUENCES UPON THE PLACE OF INTERNATIONAL LAW IN POLITICAL
SCIENCE CURRICULA: A REVIEW OF A SURVEY

In the preface to her recent book Rosalyn Higgins remarks that:

It is the view of many political scientists that the international lawyer hides himself in an illusory world of tidy rules and obeyed norms, and is little concerned with the realities of international relations.

³² It would, of course, be represented in Meetings of Consultation which were not called under the Rio Treaty but under the more general provisions of Art. 39 of the Charter. Such distinctions between the meetings are in fact made. The Seventh Meeting of Consultation at San José, Costa Rica, for example, was called under the provisions of the Charter, not the Rio Treaty.

³³ Doc. OEA/Ser.G/V. C-i-1188.

* Department of Legal Affairs, Pan American Union. The views herein expressed in no way reflect those of the General Secretariat of the Organization of American States.

Dr. Higgins reacted with a study of *The Development of International Law through the Political Organs of the United Nations*.¹ The American Society of International Law, concerned about the same belief, undertook, in collaboration with the American Political Science Association, a survey of the teaching of international law in political science departments. Questionnaires drafted by a small group of teachers² were sent to political science chairmen and to teachers chiefly of international law. Of 775 chairmen's questionnaires mailed out, 288 were returned, while teachers' questionnaires were received from 57 institutions from which chairmen's questionnaires were not returned. A report on the survey was prepared by Richard W. Edwards, Jr., with the assistance of Grizelda Grimond.³

The survey data permits identification of some variables affecting the status of international law in political science curricula. These variables include university enrollment, existence of a graduate program, stage of development of international studies program, number of political science majors, chairmen's perceptions of student and faculty interest, attitudes concerning the relative importance of international law compared with other political science offerings, size of political science staff, training and interests of staff members, and teaching methods.

Responses to questions put to chairmen indicate that the offering of international law courses is related to school enrollment. International law was offered in 1962-1963 by 16 percent of the schools having 600-999 students, 25 percent with 1,000-1,999 students, 41 percent with 2,000-4,999 students, 69 percent with 5,000-9,999 students, and 93 percent with 10,000 or more students. Only four of the universities listed in the 1962 *World Almanac* as having 10,000 or more students offered neither international law nor international law and organization.

As had been expected, a higher percentage of schools conferring advanced degrees offer either international law or a combined international law and organization course than of schools awarding only the bachelor's degree in political science. There is an additional relationship to the number of degrees awarded in political science. Either international law or the combined course is offered at over 70% of the universities awarding 0-5 political science Ph.D.'s, while over 90% of those awarding 6 or more such degrees offer either the separate or the combined course. Of colleges awarding only the A.B., a little over 10% of those graduating 0-5 political science majors, nearly 30% of those graduating 6-20, and nearly 40% of those graduating 21 or more offer either international law or the combined course. Where the M.A. is the highest degree, over 55% of the schools provide pertinent course offerings. It is assumed that the number

¹ London, New York, Toronto: Oxford University Press, 1963.

² Professors David R. Deemer, Tulane University; Richard A. Falk, Princeton University; Wesley L. Gould, Purdue University; and Richard C. Snyder, Northwestern University; together with H. C. L. Merillat, Executive Director of the Society.

³ American Society of International Law-American Political Science Association, *A Survey of the Teaching of International Law in Political Science Departments* (1963).

of recipients of political science degrees is roughly proportionate to the number of majors enrolled.

Average enrollment in the basic lecture course in international law open to undergraduates is 18 at schools offering only the A.B., 21 at universities offering the M.A., and 25 at those offering also the Ph.D. Thirty-eight institutions offered either a course of more than a single term's duration or more than one course. Particularly notable were Columbia University (6 courses with a total of 190 graduate students), Georgetown University (6 courses and 230 undergraduate and graduate students), American University (5 courses and 176 undergraduate and graduate students), and the University of Southern California (4 courses and 168 undergraduate and graduate students).

That the curriculum in international studies is usually rather well developed before international law is added is an expectation that seems borne out by the survey. However, a prior development of international studies does not imply that general courses in international relations are necessarily set as prerequisites for international law. Many schools establish no such prerequisite, reasons for the lack thereof not being indicated by the survey data. The data permits only the inference that a prior development occurs, and it must be assumed that, where no prerequisites are laid down, local situational reasons requiring lateral entry may govern. No clue is provided by the data as to the stage of development of international studies that is usually reached before international law is added. But it is clear that, besides the international studies program, the American Government program must also be reasonably well developed. Only four responses from undergraduate colleges and one from schools with graduate programs stated that international law was offered; but not a course either in constitutional law or in law and politics.

Although both teachers and chairmen were asked questions concerning student and faculty interests in international law and in its relevance to world affairs, only the chairmen's responses were tabulated. Even allowing for sparsity of schools offering advanced degrees but not international law courses, chairmen's perception of interest and of belief in relevance are apparently less related to whether international law is offered than to the highest degree awarded in political science. At colleges awarding only the A.B., 21 chairmen of departments offering international law reported undergraduate interest to be rising, and none reported it as declining; while chairmen of departments not offering international law divided 26 to 4. The difference on the ground of course offering is insignificant. In the cases only of schools offering international law, the ratio among chairmen where the A.B. alone is offered is 21-0, where the M.A. is offered it is 12-5, and where the doctorate is offered it is 9-7. In regard to graduate student interest the ratios are 6-5 and 8-7 and for faculty interest, 11-1, 5-6, and 3-9. For student belief in the relevance of international law to world affairs the ratios are 19-2, 11-9, and 6-11 and for faculty belief, 15-2, 3-5, and 6-14. These results, rather disturbing in regard to schools in which reliance must be placed

for the training of new teachers and researchers, may well be functions of three circumstances: (1) greater contact between students and faculty and among faculty at undergraduate colleges; (2) a marked increase in staffs for graduate programs unrelated or perceived as unrelated to international law; (3) chairmen's training and particular interests and attitudes. All three are probably operative, but the evidence so indicating, which has been dealt with elsewhere,⁴ is either insufficient or not in a form susceptible of statistical correlation.

In a probe of chairmen's attitudes, it was asked whether an understanding of international law is of more importance, of the same importance, or of less importance to the understanding of international politics than constitutional law is to understanding American politics. Only the schools offering international law show differences that may be of consequence, and the order of progression is the same. Only the negative answers, that is, those declaring international law to be of less importance than constitutional law, need be mentioned. At schools offering only the A.B., the figure is 45%, the M.A., 49%, and the Ph.D., 59%. My own effort to relate these answers to chairmen's specialties indicated the majority of international relations and of constitutional law specialists to be on the negative side, but there were too few chairmen in each category for the division to be meaningful. Whether a poll of disciplines would produce more useful identification of pockets of resistance to more widespread knowledge of international law may be debatable. In any case, it may be noted that, although not susceptible of statistical presentation, the comments asked for in relation to this question and the answers to the open-ended questions concerning the place of law and legal institutions and that of international law in the political science curriculum were often quite similar.

How frequently a political science staff is too small to permit the teaching of international law is not known, but it is quite evident from comments of both chairmen and teachers that size of staff is an important consideration. Size of staff is in part related to school policies about which disciplines are to be emphasized and so are not entirely a function of size of college or university. Preferences as to what to emphasize within a department are also of considerable importance. Quite a few of the smaller schools do teach or have recently added either international law or international law and organization. Some chairmen have indicated that they would not be averse to the addition of international law if they could find a man competent to handle the subject as well as essential lower-level courses. But, assuming no deficiencies in recruiting systems, it appears to be difficult to find men competent in both international law and international politics while, it may be noted, some departments hesitate to recommend international law to their students because the likelihood of finding a job opening is slim. Even when a teacher competent to

⁴ W. L. Gould, "International Law in Political Science Departments: A Brief Report and Commentary," 1963 Proceedings, American Society of International Law 18-26.

handle international law is on the staff, smallness of staff is likely to reduce the frequency with which international law is offered or, perhaps, suggest the offering of the combined course in international law and organization.

Not all schools that offer international law require that the teacher be a specialist in international law. This situation obtains at both large and small schools. Apparently an adverse effect is less likely to occur at small than at large schools. The teacher at the small school is more likely to be a generalist and as such avoids the unhappiness that can affect both the interest and the teaching practices of a specialist diverted from his overriding interest, perhaps in government in Southeast Asia, upon which promotion and reputation depend. Indeed, some teachers at small schools were quite happy after being assigned to teach international law.

That the caliber of teaching has an impact upon attitudes toward a scholarly subject is again verified by some respondents' explanations of their negative reactions to international law. Distaste appears to have been produced in these respondents' student days by teachers who apparently had not taken sufficient account of the differences between the professional interests and objectives of political science majors and those of law students. There is reason also to believe that habit and failure to comprehend newer social science approaches may be a contributing factor in the production of distaste for or disinterest in international law in some quarters.

The report shows that the three most frequently named American teachers or writers who have influenced the thought of responding teachers of international law, international organization, combined courses, and/or international relations are Philip C. Jessup (56), Quincy Wright (45), and Hans Kelsen (40), the numbers in parentheses indicating how often each was named. Only among the teachers of international relations and/or organization does the order differ in that Hans J. Morgenthau is slightly ahead of Kelsen and tied with Wright. More recent authors and teachers lag well behind, Myres S. McDougal, for instance, being named by 12 teachers, only three of whom were not international law teachers. The three foreign teachers or writers most frequently named are J. L. Brierly (66), Sir Hersch Lauterpacht (47), and Charles De Visscher (23). De Visscher is not among the three most frequently named by teachers of international relations and/or international organization, L. Oppenheim being named twice as often (10 times) as De Visscher (and also Julius Stone) and one more time than both Lauterpacht and Georg Schwarzenberger, all well behind Brierly (25). It is conceivable that this distribution results from some confusion as to which scholar should be credited with Lauterpacht's editions of Oppenheim. Be that as it may, these responses may be indicative of rather traditional approaches to teaching, even though there is an approximate 50-50 division between preference for the case method and for the non-case method. The five leading casebooks and textbooks as of the autumn of 1962 were Briggs (28), Bishop (12), Gould (11), Brierly (8), and Fenwick (8). Somewhat

in contrast, and indicative of interest in the non-traditional, the recent treatises most frequently declared to be stimulating were Kaplan and Katzenbach's *Political Foundations of International Law* (41) and De Visscher's *Theory and Reality in Public International Law* (24). No other book was named as often as ten times, although the totals for the three authors who had more than one book listed, Jessup (20), Stone (14), and McDougal (13), may be more meaningful. For teachers of subjects other than international law, the totals are Kaplan and Katzenbach 13, but with only one declaring Kaplan alone to have influenced him, De Visscher 7, Jessup 5, McDougal 3, just as with influence, and Stone 2. These figures suggest that it is highly questionable whether international law specialists are the only scholars lacking vision of new approaches to international law and of new areas to explore.

Teaching approaches most frequently employed by teachers of international law and of international law and organization were the descriptive (51), the historical (46), and the analytical (41). Teachers of other subjects, not inconsistently with their rating of Morgenthau's influence, most frequently checked descriptive (35), power politics (32), and historical (28). In response to a question about which new approaches have had some influence upon them, teachers of international law and of combined courses most frequently cited decision-making theory (35), conflict theory (24), and systems theory (24), while teachers of other subjects preferred decision-making theory (34), conflict theory (19), and negotiating theory (15). To some extent these interests appear in part responsible for suggestions that teaching materials might well include "casebooks" concerned with the genesis of international legal norms and with the rôle of such norms in foreign policy decision-making and in diplomatic interactions. It also appears that in quite a number of instances, although not in answers amenable to tabulation, there is indication that relatively little use of newer approaches is made and that they are not really understood even by teachers expressing interest in them. Only a few teachers were able to give examples of the utility of the newer approaches, but a majority (30-22) thought that they might be useful even though, in general, they had not attempted to use those approaches themselves.

What inferences can be made concerning the influences of the variables identified above upon the place of international law in political science and, more specifically, in international study programs? It might be easy to conclude that there has been no influence of consequence, for there has been a very modest increase in the number of institutions offering international law and in the number of courses offered. Moreover, the list of Ph.D. dissertations in progress or completed that is published annually in the *American Political Science Review* shows the number of international law dissertations remaining rather constant. But the 1950's saw significant increases in the number of dissertations in other areas of international relations. In view, then, of the rather distressing attitudes held at some schools, including those offering the Ph.D., it may be doubted

whether constancy is desirable in the face of increased attention accorded other facets of international affairs by political science departments and, as earlier studies have indicated⁵ and the Society's law school survey may be expected to show, increased attention to international law at law schools. Moreover, although this is in part a function of the assignment of an often disinterested non-specialist to the course even at certain large universities, there have been some worrisome drop-offs in course enrollment and some instances of less frequent offerings of international law. It may be added that information which I have received suggests that three or four large schools are hesitant to make commitments leading to the expansion of international law offerings due to doubt as to the capacities of specialists in international law to fit into going research programs. This viewpoint would seem to be corroborated by the failure of 40 teachers to name research centers doing important work in international law, while a tabulation of 50 others shows no political science department named as frequently as three times. Adding to this the incapacity to disassociate the law school from the training of such innovators as McDougal, Fisher, Falk, and Katzenbach in association with Kaplan, it seems appropriate to conclude that political science departments are doing less to take international law into new paths or to produce graduates dedicated to doing so than are law schools.

The Society's concern has not been to determine the situation and then to hope that something will happen to dispel the belief that international law specialists are lost in "an illusory world of tidy rules and obeyed norms." It has been receptive to ideas and suggestions and has actively sought advice concerning potentially fruitful courses of action. Without now going into the nature of suggestions made and of additional efforts to explore possibilities, it may be noted that first steps have been taken to try to ensure international law's being an integral part of teaching and research programs in political science departments.

WESLEY L. GOULD

RETRIEVAL OF INTERNATIONAL LEGAL MATERIALS

Following the current mode, I have used "retrieval" to designate possible systems or indices for finding relevant materials on international law.¹ It should be clear to anyone who has had the misfortune of researching on international law how miserable the job is. In most areas of domestic law in the United States, there exist elaborate key number systems, codified and annotated statutes, citators to trace mere wisps of ideas.² Yet in international law one can only hope, as he begins the

⁵ *E.g.*, John B. Howard, "International Legal Studies," 26 *University of Chicago Law Review* 577-596 (1959).

¹ See, for instance, Caldwell, *The Use of Electronic Computers for Information Retrieval in Medical-Legal Research*, 60D *MULL* (Modern Uses of Logic in Law) 146; and the articles in the January, 1960, issue of *MULL*.

² These resources for legal research are carefully set forth in several books, such as

search, that not too many of the relevant documents will be overlooked. At the same time the kind and number of documents relevant to international law is growing so fast that libraries cannot afford to keep abreast.³ Press releases,⁴ communiqués, certain private contracts and documents, the actions of states, the votes of nations at meetings, answers of a political figure at a press conference,⁵ all are becoming relevant as the international lawyers clutch at straws to prevent the planet from blowing to pieces before it smothers under the paper.

More serious than the inconvenience to scholars, or for that matter, to lawyers, is the lessened quality of the lawyer's product that is caused by the poor systems available for research in international law.⁶ Since legal resources are always limited, the lack of system means that fast or careful staff work is almost impossible, except perhaps by the senior and experienced counselor, who is (or should be) too busy working on something else. Mistakes or overcaution result; the lessons of the past are overlooked.

Implicit in the very concept of "world peace through world law" is the ability of humans to *find* the law, or at least to find the materials which are relevant to international law. Something can and should be done, and I suggest that the American Society of International Law is the appropriate nucleus and catalyst for action. Perhaps the most useful tool for research would be a periodic detailed digest of current *primary* documentation.⁷ This would necessitate first, a classification system more com-

Price and Bitner, *Effective Legal Research*. The comparative lack of search aids for international law can be seen from these books.

³ See Brimmer *et al.*, *A Guide to the Use of United Nations Documents* viii (New York, Oceana, 1962), where the authors note that few libraries can afford the personnel it takes to merely process and service a collection of United Nations documents.

⁴ See, for instance, 58 A.J.I.L. at 165 (1964).

⁵ One can see the diversity of relevant materials by perusing the section of the *JOURNAL* on "U. S. Contemporary Practice Relating to International Law."

⁶ The author naturally hesitates to point out other persons' mistakes since his own work is so vulnerable; however, perhaps one illustration of an omission that may have been caused by the lack of systematic search aids or documents is that suggested by Leo Gross in his article, "Expenses of the United Nations for Peace-Keeping Operations: The Advisory Opinion of the International Court of Justice," 17 *International Organization* 1 (1963) at p. 19, where he mentions a document relevant to the I.C.J. *Finances* case which escaped attention.

⁷ I am concentrating my attention in this comment upon primary documentation, since several extensive indices now exist for secondary works, namely, *Index to Legal Periodicals*, and *Index to Foreign Legal Periodicals*. These indices are not, however, very analytical, and there is certainly room for improvement in them. I doubt that the simple listing of contents of current periodicals, such as is done in the *AMERICAN JOURNAL OF INTERNATIONAL LAW*, has any use whatsoever. It should be noted that by digest I do not refer to the large works published by the Department of State (Hackworth, Moore, Whiteman) which are in reality texts and collections of documents. As useful as these are, they require an immense amount of work to prepare and consequently are not up-to-date for a very long period of time. Furthermore, they concentrate primarily on United States practice—a too limited view for a general research aid that is needed. The State Department "Digest" is useful and necessary, but *more* is needed.

plete and up-dated than any presently existing one;⁸ and second, the continuous gathering and classifying of documents, perhaps by assigning each document a short standard citation, plus as many "key numbers" as are relevant. The printing of the categories with all relevant citations under each category would be one aid of immense value. If followed by a listing of each citation with a short description, and a word index, the usefulness would be greatly enhanced. Ultimately, a system of international co-operation might be devised so that different journals take responsibility for different countries,⁹ with a common classificatory scheme and periodic gathering and re-publication in annual or more frequent volumes so that a set of digest volumes would exist as the first tool of international legal research. For the time being, however, a system which embraces the major international organizations¹⁰ plus the U. S. materials would be an excellent beginning. The publication by the Society of its "International Documentation" volumes¹¹ has been a welcome addition to resources for research, but I suggest that this is a less valuable effort than a digest.¹² Portions of the *American Journal of International Law* approach a digest scheme,¹³ but separate different sources (U. S. "practice" from Judicial Decisions), and do not systematically digest documents of international organization. In addition, no attempt is made (e.g., annually) to integrate and re-publish for a more extensive and useful period of time.

Naturally the suggestions made here are costly, yet the Society might well examine the small but extremely useful quarterly "Civil Liberties Docket" as a possible model.¹⁴ Likewise, an example of an interesting scheme for digesting and classifying can be found in the journal, *The American Behavioral Scientist*.¹⁵ Needless to say (and indeed the title suggests it), the computer could be a useful and cost-saving adjunct to

⁸ Cf. the classificatory systems contained in Hackworth, *Digest of International Law* (1942); Schwerin, *Classification for International Law and Relations* (1958); classifications contained in the *AMERICAN JOURNAL OF INTERNATIONAL LAW* and other similar journals. The author has been informed that both the Library of Congress and the Los Angeles County Bar Library have been working on classification systems on international law materials for library use.

⁹ See this JOURNAL, section on United States Contemporary Practice Relating to International Law; section on Judicial Decisions involving Questions of International Law; the British Year Book of International Law, decisions of British courts . . . involving questions of public or private international law; *Revue de Droit International Public*, *Jurisprudence Française en matière de droit international public*.

¹⁰ See the organizations listed in Peaslee, *International Governmental Organization* (2nd ed., 1961).

¹¹ The American Society of International Law, *International Legal Materials, Current Documents*.

¹² See also criticism of *International Legal Materials* in a review by Spaeth, 16 *Stanford Law Rev.* 229 (December, 1963). His remarks at the end of his review, I suggest, reinforce the thesis of this comment.

¹³ See note 9 above.

¹⁴ National Lawyers Guild, *Civil Liberties Docket* (quarterly).

¹⁵ See, for instance, 7 *The American Behavioral Scientist* 25 (December, 1963).

whatever scheme is devised.¹⁶ In addition to performing the sorting and indexing functions after the initial classifying is accomplished,¹⁷ the computer can reduce our fear of starting with an imperfect classificatory scheme which might become outdated in several decades. The computer itself can, when needed, overhaul the classification and be utilized to do most of the reclassifying of previously indexed materials.¹⁸

Why cannot a committee be formed to look into this matter? Would there not be interest and support from U.S.¹⁹ and international agencies²⁰ as well as foundations?²¹ Might it not be possible to co-ordinate the present extensive but divergent classificatory activities of a number of different journals, libraries and agencies in international law to the mutual benefit of all concerned?²² Is it not possible that a scheme like that de-

¹⁶ See Loevinger, "Jurimetrics: The Methodology of Legal Inquiry," 28 *Law and Contemporary Problems* 5 (Winter, 1963). The author there describes the use of the computer for information retrieval in the Anti-Trust Division of the Department of Justice. See also Eldridge and Dennis, "The Computer as a Tool for Legal Research," 28 *Law and Contemporary Problems* 78; American Law Student Association, *A Techno-Legal Bibliography for Law Students and Young Lawyers* (1963).

¹⁷ The author is using a small, rudimentary indexing scheme with the computer for certain international legal documents at the School of Law, University of California, Berkeley.

¹⁸ The quality of existing key number systems in other branches of the law is already being challenged as outdated in many respects. One of the subjects which is difficult, if not impossible, to follow in those systems is international law. In an editorial comment in this *JOURNAL* 15 years ago, Herbert W. Briggs noted the problem of finding international law materials. In the *General Digest* for 1941-1942 he states, only 42 decisions are listed under the rubric "International Law," while, by making his own index, Briggs found 124 cases for the same period that turned on some question of international law. "Finding International Law," 42 *A.J.I.L.* 101 (1948).

More advanced ideas of document retrieval than key number systems are described in articles cited in note 16 above.

¹⁹ The U. S. State Department and the U. S. Mission to the United Nations have an extensive and expensive system of indexing all U.N. documents. This indexing, which is obviously essential for any effective governmental representation to the United Nations, is done largely by hand. If this indexing service could be made available on a contract basis to the United States Government, as well as to other governments, libraries and universities, substantial savings could be possible. Consequently, the State Department might be an interested party to committee discussions. Likewise, the United States Arms Control and Disarmament Agency, with some of the funds which it has available for research, might realize the substantial impact that effective international legal research systems could have on arms control and disarmament, and lend some support to the project. The Defense Department or some of its alter egos like Rand or Systems Development Corporation (the latter is already extensively involved in information retrieval research with computers) should be interested.

²⁰ The Dag Hammarskjöld Library at U.N. Headquarters might be a partner to the project described herein. If the United Nations and the specialized agencies were persuaded to co-operate so that their respective library and publication staffs would arrange for classification of the documents issued by those organizations at the source, and the marking of these classifications directly on the documents at publication time, considerable effort could be saved.

²¹ The Rockefeller Foundation supported publication of the very useful "Guide to League of Nations Documents" by Hans Aufrecht (Columbia University Press, 1951).

²² Co-operation from universities and libraries might be financially worthwhile to

scribed here could have more long-range impact on world affairs and rule of law than any other of the many expensive projects now financed? Only when an improved system of search aids for international legal materials exists, can the fields of international law become more rigorously disciplined.

JOHN H. JACKSON
Professor of Law,
University of California, Berkeley

FREEDOM OF THE SEAS

The American Bar Association at its recent meeting in New York endorsed a resolution urging separate consideration of the width of the territorial sea from problems of fishery protection. It was believed that treating these matters together created a confusion which contributed to the defeat of our Government's attempts at Geneva in 1958 and 1960 to secure agreement on a narrow territorial sea, as well as dissatisfaction with the fishery outcome. There was some inference that those fishery interests, including some of our own, which, like the Japanese, desire to engage in the coastal fisheries of other nations without restraint may have encouraged the confusion.

It was recalled that when Hugo Grotius so ably pleaded for "freedom of the seas" he was motivated by the Dutch people's desire to enter the East Indies spice trade and to continue their herring fishing off the British coast. However commendable these objectives may have been, there is no such logical connection between them as to require their constant consideration jointly, nor has this always occurred in the past.

A narrow territorial sea is today as desirable from the standpoint of trade and navigation in, on and above the sea as in the days of Grotius, probably more so, but the importance of protecting the great food resources of the sea to meet the world-wide population explosion requires a totally different approach from that of the days of sailing ships and dories.

There would seem to be no legal obstacle to reconsideration of these matters. The Geneva conferences left the width of the territorial sea unsolved, and the proposed Geneva fishery treaty is the one out of four which has not received enough ratifications to put it into effect. This may be partly due to the fact that so much of it is legislative in character as well as because it contains many compromises which may lack appeal. Even the United States attached a reservation before ratification. Ratification by twenty-two nations may not be conclusive forever on the entire world.

A salient portion of the American Bar Association resolution reads:

REGARDING, freedom of navigation in, on and above the high seas, and conservation of the living resources of the high seas, as both being in the mutual long-range interest of all states, therefore

those institutions on the basis of time saved on cataloguing and filing, especially if punched cards are furnished them as a by-product of the classification effort.

RECOMMEND, that the American Bar Association strongly urge that the United States Government:

1. Publicly proclaim its willingness to join with other states in reaching separate agreements for:

(a) Substantial uniformity of breadth of the territorial sea for the purpose of ensuring free and unhampered navigation in, on and over the maximum expanse of the high seas, and

(b) fishery controls for sound utilization and conservation of the living resources of the sea, including agreement upon reasonable zones for exclusive fishery rights in coastal states.

EDWARD W. ALLEN

MISCELLANEA

Österreichische Zeitschrift für Aussenpolitik

This journal, published by Verlag für Geschichte und Politik in Vienna, was founded in 1960 by the Austrian Society for Foreign Policy and International Relations under the presidency of Professor Alfred Verdross. Published six times a year, it contains documents, a chronicle of Austrian foreign policy and of international diplomacy, reviews of books on foreign policy, and, first of all, valuable articles, particularly on European integration and on the law and policy of permanent neutrality. It is a journal on a high scientific level and is exchanged with journals of the same type on a world-wide scale.

JOSEF L. KUNZ

Co-Existence

A new international journal, under the editorship of Rudolf Schlesinger of Glasgow, assisted by a board of editors drawn from five Western European countries, India, Japan, and the United States, has now made its appearance under the title: *Co-Existence: A Journal for the Comparative Study of Economics, Sociology and Politics in a Changing World*. Published at Pickering, Ontario, Canada, the first number appeared in May, 1964. At present two issues per year are planned. While the announced objective of the journal is to "formulate co-existence in a realistic rather than polemical manner, providing a meeting ground for a diversity of views," the articles in the first issue devoted to the subject repeat familiar themes. Two of the articles touch lightly upon the periphery of international law. Given the broad coverage of disciplines indicated both in the subtitle of the journal and in a separate announcement of articles in preparation, only occasional inclusion of articles dealing directly with international law is to be expected. The greatest value of *Co-Existence* might well turn out to be its presentation of articles from the Communist and the Afro-Asian worlds.

WESLEY L. GOULD

Catalogue of International Law and Relations

The Harvard Law School Library has announced the publication of its *Catalog of International Law and Relations*, to be distributed by Oceana Publications of Dobbs Ferry, New York, beginning in January, 1965.

The catalogue of 360,000 cards will be reproduced in book form, and will cover the collection of materials on international law, including the private library of the Marquis de Olivart, accumulated by the Harvard Law School Library for over a century. The collection includes complete sets of treaties of the principal countries of the world; diplomatic correspondence and other historical materials; international adjudications and arbitrations; and documents of international organizations and agencies. Added to this are recent acquisitions in the fields of foreign trade, international taxation, foreign investments, and economic growth of underdeveloped countries.

Bibliographic information will include authentic names and dates of authors, edition, publisher, date and place of publication, number and size of pages, and some bibliographic notes.

The *Catalog* will be issued in 20 volumes of approximately 1,000 pages each, at intervals of six weeks, beginning in January, 1965. The price of the whole set is \$1,000, each volume being billed separately as shipped. Orders may be placed with Oceana Publications.

E. H. F.

NEWS OF THE SOCIETY

AMERICAN SOCIETY OF INTERNATIONAL LAW: ANNUAL REPORT OF THE EXECUTIVE DIRECTOR FOR 1963-64

During the year 1963-64 some of the activities begun as part of the Society's expanded program began to come to fruition. These activities have included research programs on the legal aspects of foreign investment, of space activities, and of federalism and other forms of regional association; programs to strengthen the teaching of international law; publication of the new bimonthly periodical *International Legal Materials*, a collection of current documents on the international aspects of law; an expanded program of local and regional meetings; and a conference on the rôle of governmental legal advisers in the conduct of foreign affairs.

Foreign Investment Law. Five research fellowships were awarded by the Society in 1962 for studies of the legal framework for foreign private investment in five selected countries, considered in the context of political, economic, and social developments in those countries. The research fellows are: Professor Dan Fenno Henderson, University of Washington Law School, for a study of Japan; Mr. Matthew J. Kust, of the District of Columbia Bar, for a study of India; Professor Paul O. Proehl, University of California (Los Angeles) Law School, for a study of Nigeria; Professor Harry K. Wright, University of Texas Law School, for a study of Mexico; and Professor Seymour W. Wurfel, University of North Carolina Law School, for a study of Colombia.

The research program was designed to help meet a need for greater understanding of the legal factors that impede or facilitate foreign private investment in individual countries and of the problems facing capital-exporting and capital-importing countries in the transfer of private capital, technology, and management skills to developing countries. In each country study an advisory group of scholars, practicing lawyers, and national and international officials, experienced in the country under study, has worked with the research fellow.

Mr. Kust's study of India was completed during the year and will be published late in 1964 by the University of North Carolina Press, which has undertaken to publish the whole series. Professor Wurfel's study on Colombia and Professor Proehl's on Nigeria will probably be published early in 1965.

Federations and Other Forms of Regional Association. Ten research fellowships have been awarded for studies of the legal and organizational problems encountered in efforts to work out closer forms of association among groupings of states. Three studies were completed in the course of the year and will be published in 1964. Kazimierz Grzybowski's study of international institutions within the Soviet bloc, entitled "The Socialist Commonwealth of Nations," and the study by Professor Thomas M.

Franck, New York University Law School, on efforts of former British territories in East Africa to find an institutional form for close association, entitled "East African Unity through Law," will be published by the Yale University Press. Judge J. Y. Brinton of Cairo has completed a survey of federal movements in the Near East and North Africa. A volume by Judge Brinton entitled *Federations in the Middle East* has been published by the Egyptian Society of International Law, covering federal movements in Libya, Ethiopia-Eritrea, Iraq-Jordan, United Arab States, and the United Arab Republic. A separate study on the Federation of South Arabia is being published as an Occasional Paper by the American Society of International Law.

Strengthening Teaching of International Law. During the year the Society completed and distributed a "Survey of the Teaching of International Law in Political Science Departments" in colleges and universities in the United States. This is a report on a survey of course offerings, course construction, teaching materials, teacher and student interest, and other teaching problems, undertaken jointly by the Society and the American Political Science Association. The report was written by Mr. Richard W. Edwards, Jr., Program Assistant on the Society's staff.

When the survey was completed an advisory group of teachers in political science departments, with Professor Percy E. Corbett as chairman, met to consider what activities the Society or others might undertake to help strengthen teaching in this field. The first specific project undertaken is the preparation of a bibliography of social science materials relevant to international law, by Mr. Michael Barkun of the Law and Society program at Northwestern University, under the direction of Professor Wesley L. Gould of Purdue University.

During the year the Society also began a survey of the teaching of international and foreign law and international transactions in American law schools. The report of the survey, undertaken with the co-operation of the Association of American Law Schools, is expected to be available before the end of 1964.

The American Journal of International Law. Both subscriptions to the *Journal* and memberships in the Society increased during the year. At the end of the year the *Journal* was going to 5079 members or subscribers. In 1964 the *Journal* entered its 58th year of publication. At the annual meeting the Board of Editors, including Professor William W. Bishop, Jr. as Editor-in-Chief, was re-elected except for the following changes: The Honorable Covey T. Oliver, who has been appointed United States Ambassador to Colombia, resigned, and Professors Richard A. Falk and Stanley D. Metzger were elected to the Board.

International Legal Materials. The Society's new periodical publication of current source documents on the international aspects of law was first issued on an experimental basis in 1962. *International Legal Materials* is now published regularly six times a year. The enthusiastic response of scholars, officials, and practicing lawyers in all parts of the world indicates that the publication is helping significantly to fill a need long felt

by these groups for prompt and convenient access to source materials on developments in the international sector of law. During the year 1963-64 subscriptions reached a level that seems to assure the continued publication of this periodical collection of official documents.

Legal Advisers and Foreign Affairs. The rôle of one important group of actors in the international legal process—those who advise their governments on the legal aspects of international affairs—has been relatively neglected in the literature of international law. To help clarify the ways in which legal advice is brought to bear in the decision-making process in the conduct of foreign relations, the Society convened a three-day meeting of governmental legal advisers and interested scholars from twelve countries, the United Nations Secretariat, and the World Bank, in Princeton, New Jersey, in September, 1963. A summary report of the conference and the background papers on national organization and procedures for legal-advising functions have been published by Oceana Publications in a volume entitled *Legal Advisers and Foreign Affairs*. The Society has decided to take a continuing interest in this important field of activity and is making plans for additional conferences.

Meetings and Conferences. Apart from the unusually well-attended Annual Meeting in Washington in 1964, fully reported in the Society's *Proceedings*, the Society helped to organize and sponsor, and in some instances to finance, regional meetings in other parts of the country and some special conferences. During 1963-64 the Society assisted the following regional meetings:

Austin, Texas: University of Texas, "Latin America and the European Common Market" (Principal organizers: E. Ernest Goldstein and Howard Taubenfeld)

Durham, North Carolina: Association of Student International Law Societies and Duke University Law School, "Soviet Impact on International Law" (organized by the Student Association)

Minneapolis, Minnesota: University of Minnesota World Affairs Center, series of meetings on "Law and World Politics" (Principal organizer: William C. Rogers)

Syracuse, New York: Syracuse University College of Law, "Procedural Aspects of International Law" (Principal organizer: Richard B. Lillich)

In addition the Society co-sponsored a regional meeting at Ohio State University, organized by Roland J. Stanger, on "Self-Defense in the Nuclear Age," and a Course of Study on International Business Transactions in Seattle, Washington, organized by the A.L.I.-A.B.A. Joint Committee on Continuing Legal Education, in which the Society's President, James Nevins Hyde, was a principal speaker.

Special conferences organized during the year included a two-day meeting of officials of U. S. Government agencies having responsibilities under the Communications Satellite Act, on international aspects of the communications satellite program; the conference of legal advisers men-

tioned above; and a conference on teaching and research, held at the time of the annual meeting, organized by Professor Wesley L. Gould.

Library. The Society's Library in Tillar House continued to develop as a good working collection in its specialized field. The collection has grown to about 12,000 items, including books, documents, periodicals, pamphlets, reprints, and briefs. A special effort is made to acquire briefs, unpublished papers, and offprints not readily available in most law libraries. During the year the Librarian, Miss Klooz, collected all available papers from past regional meetings of the Society. The Assistant Librarian, Mrs. Philos, has made substantial progress in cataloguing the collection. Through exchanges with 22 other libraries, the Society has helped to build up collections in international law elsewhere, and substantial gifts of duplicate books and materials were made to four libraries in Africa.

Finances. The Society ended the year in a strong financial position. Over the five-year period 1959-60 to 1963-64 the Society's revenues (apart from major foundation grants) have increased from about \$46,000 to more than \$126,000. In the same period its regular expenditures (apart from those for special foundation projects) increased from about \$52,500 to about \$159,400. The difference between expenditure and income has been financed from foundation grants for general support purposes.

During the year the grant of \$40,000 made by the Carnegie Corporation in 1961 was exhausted. About \$243,000 of the Ford Foundation's grant, made in 1961, remained unexpended at the end of 1963-64.

Funds from the Carnegie Corporation's grant have been used to finance planning activities for the Society's expanded program, preparation of a cumulative index for the *Journal* covering the years 1941-1960, and general staff support. Special projects financed by the Ford Foundation's grant have been the research fellowships in selected problem areas and conferences in those same problem areas, the activities to strengthen the teaching of international law, regional meetings of the Society, and the conference on the rôle of legal advisers. Grants from the Asia Foundation have enabled the Society to introduce its periodical publications to libraries and government offices in Asian countries and to help Asian students in this country to attend the Society's annual meeting.

Individual contributions beyond required dues are an important source of revenue for the Society. At the end of 1963-64 there were 24 Supporting Members (\$100 dues) compared with 14 a year earlier, and 57 Contributing Members (\$50) compared with 42.

The Staff of the Society. The following, in addition to the Executive Director, were members of the staff of the Society, with headquarters in Tillar House in Washington, at the end of the year: Eleanor H. Finch, Secretary of the Board of Editors of the *Journal*; Harry C. Stouffer, Chief Clerk; Ellen Morris McClellan, Administrative Assistant (and Production Editor of *International Legal Materials*); Richard W. Edwards, Jr., Program Assistant (and Assistant Editor of *International Legal Materials*); Marie S. Klooz, Librarian; Helen S. Philos, Assistant Librarian; Secretary

and Subscriptions Assistant for the *Journal*, Rosemary G. Conley; Membership Secretary, Clare McManus; Subscriptions Assistant for *International Legal Materials*, Margaret E. Dietz; Secretaries, Laurel Reznick and Helen S. Smith; and Clerk, John Dimond.

I want to take this opportunity to thank the staff for their effective and loyal service to the Society, in a rapidly developing program that called for flexibility and initiative. I want also to express my warm gratitude to the officers, Executive Council, and committees for their support and encouragement. The busy people in these groups have given generously of their time and energies to the Society's work. The Executive Committee and other committees concerned with planning the Society's future program of activities deserve the special gratitude of the Society.

H. C. L. MERRILLAT
Executive Director

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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TERRITORY

Unauthorized intrusion in territorial sea—Cuban fishing boat incident—retaliation

On February 7, 1964, Ambassador Adlai E. Stevenson, United States Representative to the United Nations, transmitted the following letter to the President of the United Nations Security Council:

I refer to the letter sent to you by the Permanent Delegation of Cuba on February 4, 1964 (Document S/5530) protesting the alleged illegal seizure by the Government of the United States of four Cuban fishing boats in the area of the Dry Tortuga Island. In order that members of the Security Council will be properly informed on this matter, I am addressing this note to you to set forth the facts of the situation.

The facts of the case were communicated by my Government to the Government of Cuba in a note delivered on February 4, 1964, protesting the violation of the territorial sea of the United States by the Cuban fishing boats. The facts communicated and subsequent developments are as follows:

1. On February 2, 1964, four Cuban fishing vessels were observed by units of the United States Coast Guard to be fishing within the territorial sea (i.e., inside the three mile limit) of the United States off East Key in the Dry Tortugas.

2. The United States Coast Guard patrol craft ordered the Cuban vessels to anchor and stand by for boarding and search which they did. When they anchored, the various vessels were between 1.5 and 1.9 miles off East Key. Two of the masters of the fishing boats—Jose Manuel Ventura of the Cardenas No. 14 and Manuel Gomez Barrios of the Lambda No. 8 admitted to United States Coast Guard officials that they were knowingly fishing in United States waters.

3. On the morning of February 3, 1964, following a preliminary search of the vessels and questioning of their masters, the United States Coast Guard vessels brought the Cuban fishing boats to Key West for further investigation and interrogation in connection with violation of Federal law. The boarding, inspection and escort of the boats from East Key to Key West by personnel of the United States Coast Guard was conducted in the normal manner with due regard for the welfare of crews.

4. During this entire procedure and until such time as the four boats were within the naval base at Key West, they had unrestricted

use of their radio communications. Clear evidence of this is to be found in the fact that conversations between the boats and Habana were monitored by commercial monitoring services in the Florida area. Once the Cuban vessels had docked at Key West, they were at liberty to communicate with the Czechoslovakian Embassy in Washington, D. C., which is representing Cuban interests in the United States, had they chosen to do so.

5. Federal authorities completed their investigation and interrogation of the crews on February 5, 1964. The authorities concluded that the Cuban vessels were fishing in the territorial waters of the United States contrary to Section 251 of Title 46 of the United States Code. However, as this statute contains no sanctions, prosecution by Federal authorities was not undertaken. At the same time, the Cuban fishing boats were also in probable violation of laws of the State of Florida and thus subject to prosecution by state authorities. State officials formally requested the United States Coast Guard to turn the boats and crews over to the jurisdiction of the state. In accordance with United States law, this was done on February 5, 1964. Legal proceedings before the state courts are pending.

6. Two crews' members have on their own initiative requested political asylum in the United States. This has been granted.

In summary, Mr. President, this is a case involving the unauthorized intrusion into the territorial sea of the United States in violation of international law and the laws of the United States. Those charged with the violation stand before the appropriate court where they will receive a fair trial surrounded by the full guarantees offered by the Constitution and laws of this country. I reject the political motives ascribed by the Cuban Government to the action which has been taken.

As the facts of the case demonstrate, there is absolutely no basis for the intemperate and distorted language in the Cuban letter. I can only conclude that the purpose of the letter was to obscure the fact of the clear violation of international laws and of the laws of the United States.

In the letter referred to in the first paragraph of the above letter, the Chargé d'Affaires of the Cuban Mission to the United Nations had transmitted to the President of the Security Council a letter from the Cuban Minister of Foreign Affairs denouncing the action of the United States as "an act of intolerable aggression." The Cuban letter stated that the vessels were "in international waters" and "five miles off the coast of the Dry Tortugas"; that "the United States Government was notified in advance of the fishing operation"; and that the act of the United States was an "act of piracy," "a violation of the Charter of the United Nations," "a threat to international fishing agreements," and "deliberate disregard for international law."

On February 6, the Cuban Government announced that in retaliation it was suspending water supply to the United States Naval Base at Guantanamo Bay, Cuba, and that the suspension would be maintained until the Cuban fishermen under detention in the United States were put at liberty. On February 9, the United States sent a note to the Cuban Government, transmitted through the Swiss Embassy in Havana, in which it stated that in light of "the clear violation of international law and of the laws of the United States" committed by the fishing vessels, Cuba had

"no justification whatsoever for the arbitrary and irresponsible act of suspending water service to the Guantanamo Naval Base in direct violation of the existing contract between the water company and the Base which runs until 1969." (Dept. of State Press Release No. 59, Feb. 11, 1964; 50 Dept. of State Bulletin 282 (1964).)

Seven of the crew members who were minors were released by the United States authorities and were returned to Cuba via Mexico on February 16. The remaining members of the crew were arraigned before the Florida court on February 18. The four captains were fined \$500 each. The fines were paid through the Embassy of Czechoslovakia, and the crews and boats were returned to Cuba on February 21. The Cuban Government thereupon indicated that it would permit the supply of water to the Guantanamo Naval Base. However, the United States Government has to date refused to accept this water in the Base area and has furnished its own water supplies.

The new United States legislation with respect to fisheries in the territorial sea is reproduced on page 1090 below.

JURISDICTION

Concurrent disciplinary jurisdiction of sending country over military personnel in the United States

A representative of the Government of Australia sent a letter asking about the extent to which Australian authorities might exercise their disciplinary powers under Australian law with regard to Australian military personnel undergoing training or based in the United States. There is no treaty governing criminal jurisdiction over Australian military personnel in the United States. In response to the letter, representatives of the Department of Defense wrote (in pertinent part):

There is no specific statutory provision in the United States which would prohibit Australian authorities exercising their disciplinary powers under the Australian Naval Discipline Act. In these cases the United States Government takes the position that the right of a friendly foreign force to exercise disciplinary jurisdiction over its members by means of service courts is implicit in its permitted presence in this country.

(Letter on file in the Office of the Assistant General Counsel (International Affairs), Department of Defense.)

RECOGNITION

Tripartite statement concerning "agreement" between the Soviet Union and Eastern Germany—Berlin

On June 26, 1964, the Governments of the United States, Great Britain and France simultaneously issued the following Tripartite Declaration regarding the agreement signed on June 12 between the Soviet Union and the "German Democratic Republic":

The Governments of France, the United Kingdom and the United States, after consulting with the Government of the Federal Republic of Germany, wish to state the following with regard to the agreement signed by the Soviet Union and the so-called "German Democratic Republic" on June 12, 1964. This agreement, among other things, deals with questions related to Germany as a whole and to Berlin in particular.

1. As the Soviet Government was reminded before the signing of this agreement, it is clear that any agreement which the Soviet Union may make with the so-called "GDR" cannot affect Soviet obligations or responsibilities under agreements and arrangements with the Three Powers on the subject of Germany including Berlin and access thereto. The Three Governments consider that the Soviet Union remains bound by these engagements, and they will continue to hold the Soviet Government responsible for the fulfillment of its obligations.

2. West Berlin is not an "independent political unit." Within the framework of their responsibilities regarding Germany as a whole, the Four Powers have put the German capital, the city of "Greater Berlin", under their joint administration. Unilateral initiatives taken by the Soviet Government in order to block the quadripartite administration of the city cannot in any way modify this legal situation nor abrogate the rights and responsibilities of the Four Powers in regard to Berlin. While reserving their rights relating to Berlin, the Three Western Powers, taking account of the necessities for the development of the city, have authorized, in accordance with the agreements of October 23, 1954, the establishment of close ties between Berlin and the Federal Republic of Germany, including permission to the Federal Republic to ensure representation of Berlin and of the Berlin population outside Berlin. These ties, the existence of which is essential to the viability of Berlin, are in no way inconsistent with the quadripartite status of the city and will be maintained in the future.

3. The Three Governments consider that the Government of the Federal Republic of Germany is the only German government freely and legitimately constituted and therefore entitled to speak for the German people in international affairs. The Three Governments do not recognize the East German regime nor the existence of a state in eastern Germany. As for the provisions related to the "frontiers" of this so-called state, the Three Governments reiterate that within Germany and Berlin there are no frontiers but rather a "demarcation line" and the "sector borders" and that, according to the very agreements to which the agreement of June 12 refers, the final determination of the frontiers of Germany must wait a peace settlement for the whole of Germany.

4. The charges of "revanchism" and "militarism" contained in the agreement of June 12 are without basis. The Government of the Federal Republic of Germany in its statement of October 3, 1954, has renounced the use of force to achieve the reunification of Germany or the modification of the present boundaries of the Federal Republic of Germany. This remains its policy.

5. The Three Governments agree that the safeguarding of peace and security is today more than ever a vital problem for all nations and that a just and peaceful settlement of outstanding problems in Europe is essential to the establishment of lasting peace and security. Such a settlement requires the application in the whole of Germany of the principle of self-determination. This principle is reaffirmed in the United Nations Charter, which the agreement of June 12 itself invokes. By ignoring this principle, the agreement of June 12 seeks to perpetuate the arbitrary division of Germany, which is a continuing source of international tension and an obstacle to a peaceful settlement of European problems. The exercise of self-determination, which should lead to the reunification of Germany in peace and freedom, remains a fundamental objective of the Three Governments.

6. The Three Governments are convinced that such a settlement should be sought as soon as possible. This settlement should include progressive solutions which would bring about German reunification and security in Europe. On such a basis, the Three Governments are always ready to take advantage of any opportunity which would peacefully reestablish German unity in freedom.

(Dept. of State Press Release No. 300, June 26, 1964;
51 Dept. of State Bulletin 44 (1964).)

TREATIES

Human Rights Conventions—U. S. policy

In an address before the American Jewish Committee on April 30, 1964, in New York City, the Hon. Harlan Cleveland, Assistant Secretary of State for International Organizations Affairs, in referring to international conventions in the field of human rights, stated:

These conventions and declarations have set minimal standards of civilized behavior for the nations of the world—especially for the new nations, which had to take their starting standards from somewhere and have often taken them from the United Nations. Some of the best minds of our time have codified our social experience and helped spread it around the world.

It is not exactly exhilarating to mention it out loud, but the fact is that the United States for eight years virtually abdicated all responsibility for helping to draft or consider legally any form of declaration or convention in the field of human rights. For ten years, from 1953 to 1963, no conventions were submitted to the Senate for action. We simply watched passively while others re-shaped social doctrine which Americans earlier helped invent and bring to life.

Then the Kennedy Administration reversed this policy in the conviction that this country's interest would be served by contributing to the drafting of these instruments and considering their submission to the Senate on the basis of their individual merits and appropriateness. Last year President

Kennedy sent to the Senate three conventions, on Slavery, Forced Labor and the Political Rights of Women.

In our constitutional system, the ratification of these instruments is a shared responsibility: the President ratifies only after receiving the Senate's advice and consent. The Executive Branch favors the ratification of these conventions. Dozens and even scores of countries have already ratified some of these human rights documents. Even though the rights covered in these international conventions are fully secured by our Federal and State laws, we should feel uncomfortable standing aside from the internationalization of social doctrine which we ourselves hold among our most cherished national assets. There is, after all, something other-worldly about the spectacle of a United States Government too squeamish or too indifferent to take a stand against human slavery or forced labor.

Also pending in the Senate is another important instrument, the convention against genocide, the practice of ethnic extermination. We continue to support ratification of this convention as well.

(Dept. of State Press Release No. 199, April 30, 1964.)

Ratification—continuing validity

On March 23, 1961, President Kennedy signed the United States instrument of ratification of the Treaty between the United States and Canada Concerning the Cooperative Development of the Water Resources of the Columbia River Basin, signed at Washington on January 17, 1961 (Senate Executive C, 87th Cong., 1st Sess.). In June, 1964, in making preparations for the exchange of instruments of ratification at Ottawa, the American Embassy inquired whether it would be necessary to have the United States instrument of ratification re-executed by President Johnson. The Department of State informed the Embassy as follows:

An instrument of ratification of a treaty, when executed by the President, countersigned by the Secretary or Acting Secretary of State, and bearing the Great Seal of the United States of America, is a fully effective legal document of continuing validity. Changes in executive or administrative personnel do not affect the validity as a legal document of an instrument of ratification fully executed therefore in the name of the Government of the United States of America.

(Department of State Airgram to the American Embassy at Ottawa, dated June 26, 1964.)

ANTARCTICA

Antarctic Treaty—Agreed Measures for the Conservation of Antarctic Fauna and Flora

At the Third Antarctic Treaty Consultative Meeting, held in Brussels June 2-13, 1964, representatives of contracting governments entitled to participate therein under Article IX of the Antarctic Treaty formulated and recommended to their governments for approval and implementation

"Agreed Measures for the Conservation of Antarctic Fauna and Flora." The U. S. Delegation to the Consultative Meeting concurred in this recommendation.

The Agreed Measures implement Article IX, paragraph 1 (f) of the treaty which authorizes measures regarding "preservation and conservation of living resources in Antarctica." The participating governments recognize the Antarctic Treaty area as a "Special Conservation Area," where they will prohibit, except by permit, the killing, wounding, capturing or molesting of native mammals or birds and the importation of non-indigenous animals or plants. Governments obligate themselves otherwise to take measures to minimize harmful interference with the normal living conditions of native mammals or birds and to alleviate pollution of the waters adjacent to coasts and ice shelves. Annexes designating specially protected species and areas are to be agreed subsequently.

The Agreed Measures will become effective when all governments entitled to participate in the Antarctic Treaty consultative meetings have notified their approval. In a separate Recommendation the representatives recommend to their governments that until that time the Agreed Measures be considered as guidelines.

(Report of the Third Antarctic Treaty Consultative Meeting, Doc. 17/FINAL, June 13, 1964, Recommendation III-VIII.)

SOVEREIGN IMMUNITY

Proper procedures for presenting to a court pleas of sovereign immunity

On March 12, 1964, the United States Court of Appeals for the Second Circuit ordered that the appeal in *Petrol Shipping Corp. v. Kingdom of Greece*, 326 F. 2d 117 (January 7, 1964) be reconsidered *en banc*. The court requested the United States to file a brief expressing the views of the government regarding the proper procedures for presenting to a court the plea of sovereign immunity.

The case involved a suit to obtain an order compelling the Kingdom of Greece to arbitrate a dispute in accordance with the terms of an arbitration clause contained in a charter party between the plaintiff and the Ministry of Commerce of the Kingdom of Greece. Process was served by mail. The Greek Ambassador appeared specially by counsel and suggested to the District Court that "The Kingdom of Greece is a sovereign not subject to suit in this Honorable Court without its consent, which, in this case, it declines to accord." The trial court ordered the complaint dismissed on the ground of sovereign immunity.

In a *per curiam* opinion, the majority of the three-judge panel of the Court of Appeals affirmed the dismissal below on the ground that the Ambassador's suggestion was sufficient to sustain the defense of sovereign immunity, even though the Greek Government had not established "its right to immunity through channels of [U. S.] State Department." The

late Judge Clark dissented on the ground that a claim of sovereign immunity should not be upheld without any advice from the Department of State.

In its brief *amicus curiae*, the Department of Justice stated in part:

* * * * *

The Government's position regarding the manner of presenting to a court a claim of foreign sovereign immunity, and the consequences thereof, differs from the positions taken by either of the parties in their briefs and from the views adopted by the majority and the dissenting opinions of the three-judge panel of this Court. To summarize: *First*, under the decisions of the Supreme Court, the claim need not be established through channels of the State Department. The foreign sovereign may apply to the Executive Branch of this Government for recognition of the sovereign immunity claim, and, if the Executive Branch does recognize the claim, the Government may through the Department of Justice so inform the court. On the other hand, the foreign sovereign, or its appropriate representatives, either without applying to the Executive Branch or if the Executive Branch has not supported its claim, may itself present to the court the suggestion of sovereign immunity. *Second*, the consequences differ depending upon which of the above methods is followed in making the sovereign immunity suggestion to the court. If the Executive Branch supports the claim and so indicates to the court, such determination is conclusive upon the court. However, if the sovereign or its representative makes the suggestion to the court, without the support of the Executive Branch, the court should examine the claim in light of the facts as they have been or may be developed, and decide whether the case is an appropriate one for recognizing the sovereign immunity defense. *Third*, we do not believe that any distinction should be drawn between *in personam* actions of this type and actions where the district court acquires jurisdiction over a vessel. In either case, the procedures for claiming sovereign immunity and the role of the Court with respect to the claim, should be the same.

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. . . The majority opinion of the three-judge panel of this Court in the present case, relying upon *Puente v. Spanish Nat. State*, 116 F. 2d 43 (C.A.2), drew a distinction in regard to the procedure for asserting sovereign immunity between *in personam* actions and actions where the district court had acquired jurisdiction over a vessel. However, we perceive no basis for making such differentiation.

There is no real difference, with respect to the question here involved, between actions against the sovereign and actions against property owned by the sovereign. As to the immunity of the United States, it was pointed out by the Supreme Court long ago that the immunity for the sovereign's property was merely an extension of the sovereign's *in personam* immunity, *The Siren*, 7 Wall. 152, 154: "The same exemption from judicial

process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, there is no distinction between suits against the government directly, and suits against its property." While the Supreme Court's decision dealing with the appropriate procedures for presenting a claim of foreign sovereign immunity have in fact involved claims against vessels, there are no indications in the Court's opinions that the approved procedures should not be followed where the sovereign immunity defense arises in a different context.

Furthermore, the Court's analysis of the sovereign immunity defense in *Ex Parte Peru*, 318 U. S. 578, decided after this Court's decision in *Puente v. Spanish Nat. State*, *supra*, would appear to be inconsistent with the alleged distinction between *in personam* actions and suits involving the seizure of vessels. The distinction drawn by this Court in the *Puente* case, stems from the theory that in actions against vessels, the district court already has jurisdiction over specific property which the sovereign is claiming, whereas in *in personam* actions of the present type, "there is no vestige of apparent jurisdiction * * * ." 116 F. 2d at 45. However, in *Ex Parte Peru*, decided two years later, the Court stated, 318 U. S. at 587-588:

This case presents no question of the jurisdiction of the district court over the person of a defendant. Such jurisdiction must be acquired either by the service of process or by the defendant's appearance or participation in the litigation. Here the district court acquired jurisdiction *in rem* by the seizure and control of the vessel, and the libellant's claim against the vessel constituted a case or controversy which the court had authority to decide. Indeed, for the purpose of determining whether petitioner was entitled to the claimed immunity, the district court, in the absence of recognition of the immunity by the Department of State, had authority to decide for itself whether all the requisites for such immunity existed—whether the vessel when seized was petitioner's, and was of a character entitling it to the immunity. See *Ex Parte Muir*, *supra*; *The Pesaro*, 255 U. S. 216; *Berizzi Bros. Co. v. The Pesaro*, 271 U. S. 562; *Compania Espanola v. The Navemar*, *supra*. Therefore the question which we must decide is not whether there was jurisdiction in the district court, acquired by the appearance of petitioner, but whether the jurisdiction which the court had already acquired by seizure of the vessel should have been relinquished in conformity to an overriding principle of substantive law.

Thus, the Court seemed to be indicating that the immunity of sovereign did not present a "jurisdictional" defect such as improper service of process might. Under the Supreme Court's analysis, it appears that in an action against a sovereign just as in any other suit, jurisdiction must be acquired either by service of process, or by the defendant's appearance in court, or *in rem* by seizure and control of property. Only after such jurisdiction is acquired, does the sovereign immunity defense properly come into consideration. Instead of being a "jurisdictional" matter in the same sense as acquiring jurisdiction over a person or property, sov-

oreign immunity presents a ground for relinquishing the jurisdiction previously acquired. By treating jurisdiction acquired by service of process upon the defendant just the same as jurisdiction *in rem*, and by going on to treat sovereign immunity as a ground for relinquishing such acquired jurisdiction, the Court's opinion certainly appears to negate the distinction recognized in *Puente*.

Sovereign immunity is a defense based, *inter alia*, upon principles of comity and foreign relations. It may or may not be recognized in a particular case, depending upon the application of these principles in light of the circumstances of the case. However, these considerations of comity and foreign relations furnish no ground for drawing rigid distinctions between *in personam* and *in rem* actions. The policy of the State Department, which is one of the guides to be used by a court in considering a sovereign immunity claim, might in a particular *in personam* action point towards non-recognition of the claim, just as in another *in rem* action such policy could point towards recognition.

In sum, it is the position of the Government that the procedures for suggesting sovereign immunity to a court, and the consequences of choosing one route rather than another, do not in any way depend upon whether the action is *in personam* or is one against a vessel.

DIPLOMATIC IMMUNITY

Parking violations—issuance of violation notices in the District of Columbia

On April 1, 1964, the Department of State issued the following announcement:

Foreign diplomats now receive regular parking violation notices in the District of Columbia under a new policy established by the Department of State and District authorities. . . .

In the past, holders of diplomatic license plates have been issued only warning notices, and the regular notices issued to other employees of diplomatic missions have been canceled by the Department. In recent years there has been a marked increase in the number of these warnings.

The basis for the change in policy is the serious traffic problem caused by these increasing violations and the Department's belief that members of diplomatic missions should be responsible for operating their automobiles in accordance with local traffic laws and regulations.

The Department insists that traffic laws and regulations be observed by United States diplomatic representatives abroad and specifically that any charges imposed for failure to abide by parking laws and regulations shall be promptly paid. The Department believes it reasonable and proper to expect diplomatic missions of other countries to follow the same course.

The Department recognizes that there is a serious shortage of parking spaces near certain chanceries. The Department has been working with District authorities to increase the parking facilities for these chanceries

and the number of parking spaces reserved for diplomats near United States Government buildings which they must visit. The Department expects these problems to be resolved in the next few weeks. Until this has been done, however, the Department will not count, under its new policy, parking violation notices received by diplomats from those foreign chanceries lacking sufficient parking space, provided the notices are received during normal working hours and in the vicinity of the chanceries where these diplomats work.

Under the new policy, the District police issue regular notices for parking violations by vehicles bearing DPL plates and the Department will not authorize issuance of DPL plates to diplomatic officials against whom charges for parking violations are outstanding. This policy does not in any way infringe upon the diplomatic immunity of foreign diplomats stationed in Washington. Under no circumstances will diplomatic officials be subject to arrest or detention for failure to pay charges incurred for parking violations.

Cases of moving violations will be handled by the Department directly with the Embassy involved and not under the procedure covering parking violations.

The Department held several meetings last winter with the Dean of the Diplomatic Corps during which the proposed new policy was fully explained with the request that it be conveyed to the members of the Diplomatic Corps. The Department informed all missions in Washington on March 4 that the new policy would go into effect in the near future.

(Dept. of State Press Release No. 140, April 1, 1964.)

NATIONALITY

Dual nationals—military service in France—sequestration of property in country of other nationality

A dual national having both French nationality and United States citizenship had certain property in France sequestered by the French authorities for failure to respond to a call under the French Selective Service System. The Department, in a letter of reply stated, *inter alia*:

The Department generally does not render opinions regarding private matters and in this particular case does not have the expertise to advise you definitively on the applicable French law. It is usual in such matters for the persons concerned to retain local legal counsel. . . .

Under general principles, in accordance with *jus sanguinis*, France can under its municipal law confer French citizenship on your client even though he was born in the United States of French parents. Your client would be a dual national having both French nationality and United States citizenship. The nationality link with France is sufficient legally for France to exercise *in personam* jurisdiction over your client in appropriate cases, even *in absentia*, although the enforcement of sanctions may at times

not be possible. With regard to property situated in France, under the rule of territorial supremacy a state can normally exercise *in rem* or *quasi in rem* jurisdiction regarding it, even though it belongs to an alien, provided it does not amount to a denial of justice, and it is not in violation of any express international agreement.

Dual nationals are oftentimes placed in an unfortunate position with regard to calls for military service. They are subject to call for service in the armed forces of the countries of both nationalities. In some cases, this predicament is relieved somewhat by a treaty of naturalization. Unfortunately, no such treaty has been concluded between the United States and France.

According to available information, under the French Selective Service System, all male persons eighteen years old must register in a military census, or suffer certain penalties. Those who fail to register are registered automatically. . . . Once registered, a person is regarded as a deserter if he does not answer his call to military service. If he is residing outside of France but returns, he is subject to punishment for failure to respond to the call up to age fifty. It would seem that the sequestration of your client's property . . . in France is a result of the failure of your client to answer the call. Of course, the French sanctions cannot be enforced against your client personally in the United States. Redress or relief must be sought under French law.

The Department understands that a dual national with both French nationality and United States citizenship would be exempt from French military service if he has served under certain conditions in the armed services of a NATO country other than France. To claim this exemption, the dual national must produce official documents showing that such service had been involuntary and under compulsion in the armed forces of that NATO country. Thus, such dual national would be relieved of military obligations in France by virtue of his having been drafted and having served in the United States Army.

The dual national may also relieve himself under certain circumstances of his obligation to serve in the French military service by divesting himself of the French citizenship. . . .

(Letter dated February 20, 1964, on file in the Office of the Legal Adviser, Department of State.)

ESTATES

Inheritance by foreign legatees—residents of certain Communist countries

Following upon the decision in the matter of the *Estate of Anton Belemecich v. Commonwealth of Pennsylvania* by the U. S. Supreme Court on January 6, 1964, the Department received an inquiry as to the effect this case might have on the rights of foreign nationals residing in certain Iron Curtain countries to receive distribution from decedent's estates and

trusts located in the United States. The Department's letter of reply stated, *inter alia*:

You will recall that this decision concerned actions by authorities of the Commonwealth of Pennsylvania with respect to rights of disposition of estates inherited in the United States, claimed by citizens of Yugoslavia, resident in that country. These rights were claimed under the Convention for Facilitating and Developing Commercial Relations between the United States and Serbia, signed at Belgrade October 2/14, 1881 (22 Stat. 963; TS 319; II Malloy 1613) which was held by the United States Supreme Court to have continued in force as between the United States and Yugoslavia in *Kolovrat et al. v. Oregon*, 366 US 187 (1961).

The following treaties appear to be apposite:

Treaty of Friendship, Commerce and Navigation between the United States and China, signed at Nanking November 4, 1946, and entered into force November 30, 1948 (63 Stat. 1299; TIAS 1871; 25 UNTS 69).

Treaty of Friendship, Commerce and Consular Rights between the United States and Estonia, signed at Washington December 23, 1925, and entered into force May 22, 1926 (44 Stat. 2379; TS 736; IV Trenwith 4105; 50 LNTS 13).

Treaty of Friendship, Commerce and Navigation between the United States and Germany, signed at Washington December 8, 1923, and entered into force October 14, 1925 (44 Stat. 2132; TS 725; IV Trenwith 4191; 52 LNTS 133, as amended).

Treaty of Friendship, Commerce and Consular Rights between the United States and Latvia, signed at Riga April 20, 1928, and entered into force July 25, 1928 (45 Stat. 2641; TS 765; Trenwith 4400; 80 LNTS 35).

Treaty of Friendship, Commerce and Navigation between the United States and Korea, signed at Seoul November 28, 1956, and entered into force November 7, 1957 (8 UST 2217; TIAS 3947; 302 UNTS 281).

Treaty of Amity and Economic Relations between the United States and Vietnam, signed at Saigon April 3, 1961, and entered into force November 30, 1961 (12 UST 1703; TIAS 4890).

In the absence of pertinent provisions in treaties or Federal statutes, the administration of estates is a matter solely within the jurisdiction of the various states so that the court having funds to distribute to beneficiaries abroad is the appropriate body to determine whether, in accordance with state law, distribution should be made. The above treaties contain provisions relating to the acquisition and disposition of inherited property comparable to the provisions in the Yugoslav Treaty. Nevertheless, it is the Department's view that there are sufficient differences in factual circumstances relating to these countries and in the attitudes of Governmental authorities who are recognized by the United States with

respect to these countries so that the decision in the *Belemecich* case is not necessarily a precedent. In this connection, the Department of State is reserving its position until the matter arises in litigation in particular cases. However, the following comments may be helpful in giving further background:

(1) In the case of the 1946 Treaty with China, it should be noted that the United States recognizes the Government of the Republic of China, the capital of which is on Formosa, as the only legitimate Government of all Chinese territory, including the mainland. The United States does not recognize the so-called "Chinese People's Republic" and does not maintain diplomatic or consular representatives on the mainland of China. With respect to potential recipients residing on the mainland of China of funds from persons or sources within the United States, to territories or possessions, your attention is invited to the Foreign Assets Control Regulations of the Department of the Treasury (31 C.F.R. 500.201; 15 Fed. Reg. 9040 as amended), under which any transactions involving the transfer of property, including inheritances, to those areas of China under Communist domination or control is prohibited, in the absence of a license from the Department of the Treasury. Application of controls to property transfers between the United States and those areas of China under Communist domination or control was acquiesced in by the Chinese Ambassador at Washington in a note to the Secretary of State dated July 28, 1951. It is understood that these regulations do not affect the right of inheritance, although its enjoyment may be postponed by reason thereof.

(2) In the case of the 1961 Treaty with Vietnam, it should be noted that the Geneva Agreements and Declaration of July 20-21, 1954 (I Amer. For. Pol. 750 (1937)) established a Southern and Northern zone of administration for Vietnam separated by a Provisional Military Demarcation Line. It should also be noted that the United States recognizes the Government of the Republic of Vietnam, the capital of which is at Saigon, as the Government of all Vietnam. The United States does not recognize the Northern Zone of Vietnam as a state nor the so-called "Democratic Republic of Vietnam" as a government, and maintains no diplomatic or consular relations with the regime in North Vietnam.

The Government of the Republic of Vietnam does not claim to exercise authority and control over territory north of the Demarcation Line and did not claim such control at the time the Treaty was negotiated. In view of the circumstances, it was understood at the time the Treaty was negotiated that the territory to which the Treaty applied was the Southern Zone of Vietnam.

(3) With respect to the 1956 Treaty with Korea, Article 23 therein provides that the Treaty is applicable only to territories under the sovereignty or authority of the Republic of Korea. The Armistice

Agreement of July 27, 1953, signed at Panmunjon (4 UST 234; TIAS 2782), establishes a Military Demarcation Line between the Southern and Northern sectors of Korea. The Treaty is not applicable to the territory north of the Military Demarcation Line, referred to as North Korea. It should be noted that the United States recognizes the Government of the Republic of Korea, the capitol of which is at Seoul, as the only legitimate government in Korea. The United States does not recognize the North Korean sector as a State or the so-called "Democratic People's Republic of Korea" as a Government, and maintains no diplomatic or consular relations with that sector. Your further attention is invited to 31 C.F.R. 500.201, 15 Fed. Reg. 9040, as amended.

(4) With respect to Germany, it should be noted first that the United States concluded on October 29, 1954 a Treaty of Friendship, Commerce and Navigation with the Federal Republic of Germany (7 UST 1839; TIAS 3593; 273 UNTS 3; entered into force July 14, 1926). Pursuant to paragraph 1 of Article XXVI therein, that Treaty is applicable only to territory under the authority of the Federal Republic of Germany and its provisions supersede the provisions of the 1923 Treaty. The 1954 Treaty is not applicable to the territory referred to as the Soviet Zone of Germany. The Department of State considers that the provisions of Article IV of the 1923 Treaty with Germany, which relate to rights of inheritance and succession to property, may still be applicable with respect to rights of residents of that part of Germany referred to as the Soviet Zone of Germany. It should be noted that the United States does not recognize the Soviet Zone of Germany as a state and that the United States considers that the Soviet Union remains responsible for this area. The Soviet Union has purported to turn control over this area to the so-called German Democratic Republic and has denied further responsibility for governmental activities in that Zone. The United States does not recognize the German Democratic Republic as a government.

(5) In the case of the 1925 Treaty with Estonia and the 1928 Treaty with Latvia, the United States does not recognize the incorporation of Estonia and Latvia into the Soviet Union. The United States continues to maintain relations with Estonian and Latvian officials located in the United States, who represent the interests of Estonia and Latvia. While the United States views these Treaties as in force with respect to the Republics of Estonia and Latvia, it must be noted that the Soviet authorities treat the constitution and Federal laws of the U.S.S.R. as overriding and paramount to any Estonian or Latvian legislation and commitments inconsistent therewith.

(6) In the case of the territories in question under the control of regimes which we do not recognize as states or governments there exists a lack of normal diplomatic channels and the practicalities of the situation are such that the United States cannot effectively insist

upon compliance by these regimes with the obligations under the terms of applicable treaties and conversely these regimes are not in a position to demand formally or insist upon the fulfillment of obligations of the United States set forth therein.

(Letter dated February 21, 1964, on file in the Office of the Legal Adviser, Department of State.)

Inheritance by foreign legatees—residents in East Germany and the Soviet Union

In response to an inquiry as to whether there were any restrictions on transfers of funds derived from estates in the United States to residents of East Germany and the Soviet Union, the Department, in a letter of reply, stated, *inter alia*:

There are no Federal restrictions or regulations governing remittances of dollar funds from private sources, including estates, in the United States to persons residing in either East Germany or the Soviet Union. Such funds may be transmitted through private banking channels. The question whether the transmittal of estate shares to beneficiaries resident in East Germany or the Soviet Union should be made is properly for the appropriate state courts to determine.

The Treasury Department, pursuant to its Circular No. 655 (31 C.F.R. 211.3), issued under authority of Section 5 of Public Law 828, approved October 9, 1940 (54 Stat. 1087, 31 USC 127) requires that United States Government checks and warrants in payment of Federal benefits intended for delivery in certain enumerated countries be withheld, following determinations by the Secretary of the Treasury that there is no reasonable assurance that the payee of the check or warrant will actually receive it and will be able to negotiate it for full value. The countries enumerated in the Circular at present comprise substantially the Soviet Union and states affiliated politically thereto, including the regime in East Germany, but not including Poland, Rumania and Bulgaria. The latter three countries were formerly included among the prescribed countries, but were removed on June 7, 1957 (Vol. 22, No. 113 Fed. Reg. 4134; see TIAS 4545), April 19, 1960 (Vol. 25, No. 79 Fed. Reg. 3526; see TIAS 4451), and August 1, 1963 (Vol. 28, No. 152 Fed. Reg. 7975; see TIAS 5387), respectively in connection with the bilateral settlement of claims and other economic matters. See, for example, Agreement between the United States and Bulgaria Regarding Claims of United States Nationals and Related Financial Matters and exchange of letters thereto, signed at Sofia, July 2, 1963, TIAS 5387 (Department of State Press Release No. 354, July 2, 1963).

The determinations made by the Secretary of the Treasury under 31 C.F.R. 211.3 apply solely to the Federal law and regulations involved and not to questions of law or fact concerning remittances of private funds, including inheritances and insurance benefits. It should be noted that such determinations may involve considerations not relevant to remit-

tances of private funds or other transactions involving rights of private parties.

(Letter dated February 6, 1964, on file in the Office of Legal Adviser, Department of State.)

In response to an inquiry regarding the applicability of the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, signed on December 28, 1923 (44 Stat. 2132), the Department, in a letter of reply, stated, *inter alia*:

Pursuant to paragraph 1 of Article XXVI of the Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany signed October 29, 1954 (7 UST 1839), that Treaty is applicable to all territories under the sovereignty or authority of the Federal Republic of Germany. Consequently, the 1954 Treaty is not applicable to the territory referred to as the Soviet Zone of Germany. Article IV of the 1923 Treaty contains provisions relating to rights of inheritance and succession to property. The Department of State considers that the provision of Article IV of the 1923 Treaty may still be applicable with respect to rights of residents of the Soviet Zone of Germany. The United States does not recognize the Soviet Zone regime as a government, and consequently no diplomatic or consular relations exist between the United States and that regime.

The provisions of the Treaty, regardless of the matters described in the preceding paragraphs, are in no way intended to interfere with the will of the testator who is, of course, free to condition the passing of inheritances to beneficiaries designated by him in whatever way is possible under the laws of the state in which the will is probated or in which the property may be located.

(Letter dated February 7, 1964, on file in the Office of the Legal Adviser, Department of State.)

Inheritance by foreign legatees—residents of Yugoslavia

In response to an inquiry as to whether there were any restrictions on transfers of funds to Yugoslavia derived from estates in the United States, the Department, in a letter of reply, stated, *inter alia*:

The Department of State is of the view that while Yugoslavia is a Communist country, it is not considered a so-called 'Iron Curtain' country since it is not a member of the Soviet Bloc. Since 1948 when Yugoslavia was excluded from the Soviet-dominated Cominform, Yugoslavia has pursued an independent policy as a non-bloc, non-aligned state.

* * * * *

Matters of inheritance and rights to dispose of inherited property as between citizens of the United States and of Yugoslavia, with respect to properties located in either country, are the subject of provisions of the

Convention of Commerce and Navigation between the United States and Serbia, signed at Belgrade October 2/14, 1881 (Treaty Series 319; 22 Stat. 963; II Malloy 1613). That Convention is considered by the Government of the United States and the Government of Yugoslavia, a successor Government to that of Serbia, as having continued in force between the two countries without interruption.

The United States Supreme Court twice has had occasion to interpret this Convention regarding certain actions taken by State officials with respect to the rights of Yugoslav heirs claiming shares of estates of persons having died in the United States. See *Kolovrat et al. v. Oregon*, 366 U. S. 187 (1961) and *Consul General of Yugoslavia, etc. v. Pennsylvania* (the *Belemecich* case), Supreme Court No. 566, decided January 6, 1964. The Department of State interprets these decisions to mean that Yugoslav citizens resident in Yugoslavia are entitled to the same rights to dispose of inherited property as possessed by United States citizens resident within the United States, its territories or possessions.

Yugoslavia, it should be noted, is not included among these countries (listed in 31 C.F.R. 211.3) to which the United States Treasury checks are not sent under authority of the Secretary of the Treasury (31 U.S.C. 123), because of certain local conditions. United States Government checks and warrants issued for any purpose whatsoever are being sent to payees in Yugoslavia. Transfers of funds may be effected through normal banking channels.

(Letter dated February 7, 1964, on file in the Office of the Legal Adviser, Department of State.)

UNITED NATIONS

South Africa—Security Council resolution condemning the Rivonia trials—U. S. abstention

On June 9, 1964, the Security Council adopted resolution S/5761 which, *inter alia*,

1. Urges the South African Government: (A) to renounce the execution of the persons sentenced to death for acts resulting from their opposition to the policy of *apartheid*,

(B) to end forthwith the trial in progress, instituted within the framework of the arbitrary laws of *apartheid*; and (C) to grant an amnesty to all persons already imprisoned, interned or subjected to other restrictions for having opposed the policy of *apartheid*, and particularly to the defendants in the Rivonia trial;

The United States abstained on this resolution. In explaining the U. S. abstention, Ambassador Francis T. P. Plimpton, Deputy United States Representative, stated, *inter alia*:

The United States Government made its views known as to the trial of persons whose only offense was their opposition to the policies of *apartheid*

when it voted for the Security Council resolutions of August 7, 1963, and December 4, 1963, and General Assembly resolution 1881. In the latter instance, however, the United States abstained on the second operative paragraph which dealt with the trials. In explaining the United States vote at that time, I said:

"The United States is uncompromisingly and irrevocably opposed to legislation such as the legislation under which these defendants are being tried, which permits incarceration without hearing and without trial—and extended incarceration—and which puts on the defendant the burden of proving himself innocent. There remains, Mr. President, the fact that any country does have the right and the duty to defend itself, its citizens, its women and its children against criminal violence as such, provided the defense is under proper legislative safeguards for the accused. We question whether any member state here represented would feel that it was appropriate for any other state or for any international organization to interfere with its own sovereignty to conduct, under proper legislative safeguards for the prisoners, its defense against criminal violence that will hurt all its citizens."

The trial of several well-known African political leaders and other opponents of apartheid is still in progress. That being so, the United States does not believe that the Security Council should at this time take action which could be construed as interference in the judicial process of a member state. The United States Government has, therefore, abstained on this resolution.

I reiterate, however, that my government shares the concern of other members of the Council about the circumstances giving rise to the security trials in South Africa, concern about the laws under which opponents of apartheid are being detained and tried, and concern about the consequences that could ensue both from the trials and from persistence in the policies of which the trials are an aspect. I assure you, Mr. President, that my government will continue to examine carefully the circumstances and study all opportunities to assist in steps looking toward a humane and just solution of these pressing and painful problems.

(U. S. Mission to the U.N., Press Release No. 4410, June 9, 1964.)

JUDICIAL DECISIONS

By JOHN R. STEVENSON *

Of the Board of Editors

CASE NOTES

UNITED STATES COURTS

Aliens—inability to inherit property under reciprocity provisions of State law unaffected by treaty

Decedent, a Greek national living in the United States, executed a will leaving his entire estate to his wife and niece, United States citizens. Appellant, a non-resident Greek national who had been adopted by decedent subsequent to the execution of the will, claimed two-thirds of the estate as decedent's heir.

The Supreme Court of Iowa, in a 5-4 decision, affirmed a lower court determination that the 1954 Treaty of Friendship, Commerce and Navigation between the United States and Greece did not permit appellant to share in decedent's estate. No conflict was found between the terms of the treaty and an Iowa statute restricting the right of aliens to inherit property to the extent that Americans have a reciprocal right in the alien's country to inherit property on the same terms and conditions as residents and citizens of the alien's country. Since appellant did not carry her burden of establishing reciprocity, she could not prevail. The court also held that failure to include the most-favored-nation clause, applicable to much of the treaty, in the inheritance section manifested an intent not to have it applied to that section.

Finally, appellant argued that even if she could not inherit the property, she had five years in which to dispose of it and be entitled to the proceeds. She based her claim on a clause of the treaty which provided:

2. Nationals and companies of either Party shall be permitted freely to dispose of property within the territory of the other Party with respect to the acquisition of which through testate or intestate succession their alienage has prevented them from receiving national treatment, and they shall be permitted a term of at least five years in which to effect such disposition.

The term "national treatment" means treatment accorded within the territories of a Party upon terms no less favorable than the treatment accorded therein, in like situations, to nationals . . . of such Party. The term does not imply immunity from the laws and regulations of a Party which apply in a non-discriminatory manner to nationals . . . of both Parties.

* Assisted by Peter S. Paine, Jr., of the New York and English Bars, William J. Williams, Jr., of the New York Bar, and Robert A. B. MacLennan of the English Bar.

The court held that, before disposing of the property, the alien must acquire it and this she could not do under Iowa law without establishing reciprocity.

The dissenters, pointing out that treaties are supreme over State laws, and should be liberally construed when two interpretations are possible, argued that the "five year" clause of the treaty rendered the Iowa statute ineffective unless aliens attempted to hold the property more than five years. *Corbett v. Stergios*, 126 N.W. 2d 342 (Sup. Ct. Iowa, Feb. 11, 1964).

Consuls—authority to act for foreign state determined by existence of exequatur

In an action by a consul of the Dominican Republic to enjoin his vice consul from acting as consul, where both parties had been appointed by the defunct Bosch régime, the court held that the mere demise of the Bosch régime did not invalidate the defendant's authority to act on behalf of the Dominican Republic, but that the determining factor was whether his *exequatur* had been revoked by the United States. Since the defendant's *exequatur* had not been disturbed, but the plaintiff's had been revoked, the plaintiff had no standing to bring the action on behalf of the Dominican Republic. *Dominican Republic v. Peguero*, 225 F. Supp. 342 (U. S. Dist. Ct., S.D.N.Y., Dec. 5, 1963).

Cuban government agency—may maintain action in United States courts despite severance of diplomatic relations—United States continues to recognize Castro Government

In an action in Puerto Rico by a Cuban bank for loss resulting from the failure of a shipping company to deliver cargo, the District Court held that the bank was not barred from access to the Federal courts, even though it was an instrumentality of the Cuban Government. Acting on the instructions of the Court of Appeals for the First Circuit to ascertain from the Department of State the bank's relationship with the Cuban Government and the status of that government in the courts of the United States during the period of cessation of diplomatic relations, the District Court accepted the views of the Department of State that the severance of diplomatic and consular relations with the Government of Cuba did not constitute a cessation of recognition by the United States of the Castro Government, which recognition continued until the time of the action. *Banco para el Comercio Exterior de Cuba v. Steamship Ruth Ann*, 228 F. Supp. 501 (U. S. Dist. Ct., Puerto Rico, April 22, 1964).

Federal Tort Claims Act—inapplicable to tort occurring within the United States Embassy

In an action for damages under the Federal Tort Claims Act (28 U.S.C.A. §§1346(b), 2671-2680) for personal injuries suffered within the physical confines of the American Embassy at Bangkok, Thailand, the

court held that a common sense interpretation of the exclusion under the Act of claims "arising in a foreign country" barred recovery by the plaintiff. The legislative history indicates that Congress excluded claims arising "in a foreign country" because liabilities were to be determined by the law of the place where the tort occurred and Congress was unwilling to subject the United States to liabilities dependent upon foreign law. In this sense, since the law applicable to a tort committed within the American Embassy premises would be the law of Thailand, such premises should be considered "in a foreign country." *Meredith v. United States*, 330 F. 2d 9 (U. S. Ct. App., 9th Cir., March 24, 1964).

Immunity lacking for commercial acts of foreign government

Plaintiff, owner of a merchant vessel, sought to compel arbitration of claim against defendant branch of the Ministry of Commerce of the Spanish Government for damage to the vessel which the Government chartered to carry wheat from the United States to Spain, the charter providing for arbitration. The court struck defendant's motion to dismiss on the ground of defendant's alleged sovereign immunity, District Judge Murphy saying of the charter party: "This, we think, is a commercial operation of the Spanish government and as such the defense of sovereign immunity is not available." He rejected the argument that the transaction was a sovereign or public act merely because the shipment of the wheat was pursuant to a Surplus Agricultural Commodities Agreement between the United States and Spain, distinguishing this international agreement from the charter party. He also rejected defendant's attempt to call the issue one of "act of state," since defendant's acts could not be considered "official acts." *Steamship Hudson*, 1964 Am. Mar. Cas. 698 (S.D.N.Y., Nov. 14, 1963).*

Jurisdiction—refusal to respect parties' choice of foreign forum on grounds of public policy

Respondents moved to dismiss, on the grounds of *forum non conveniens*, appellants' suit to recover for personal injuries suffered while passengers on respondent's vessel. The passage contract provided that all legal actions were to be governed by Italian law and must be instituted in Genoa. Choosing to apply the majority view that such agreements which seek, in advance of the occurrence of a cause of action, to deprive an otherwise competent court of jurisdiction are unenforceable as against public policy, the court denied the motion. It pointed out, however, that even if it had taken the position that such agreements are enforceable, provided they are reasonable, it would be unreasonable to remand the case to a foreign court where such action might, in effect, deprive appellants of their remedy, since appellants (although Italian citizens) were permanent residents of the United States and of the District in which the court was sitting. *Muoio v. Italian Line*, 228 F. Supp. 290 (U. S. Dist. Ct., E.D. Pa., April 7, 1964).

* Digested by Wm. W. Bishop, Jr.

Jurisdiction—refusal to respect parties' choice of foreign law and foreign forum on grounds of public policy

In libels in admiralty for damage to cargo shipped from the United States to Germany on bills of lading as to which the Carriage of Goods by Sea Act (46 U.S.C.A. §1300 *et seq.*) applied, but which contained choice of law clauses in favor of German law as well as a clause submitting all disputes to the German courts, the court refused to decline jurisdiction so as to allow the parties to pursue the matter in Germany. The court reasoned that, though it would normally be inclined to respect the parties' expressed intentions as to choice of law and forum, in this instance German law was clearly more favorable to the carrier on the issue of limitation of liability than the Carriage of Goods by Sea Act, and there was no indication that the German courts would apply that Act. To decline jurisdiction would therefore thwart the applicability of the Act and the strong public policy which it embodied. *General Motors Overseas Corporation v. S. S. Goettingen*, 225 F. Supp. 902 (U. S. Dist. Ct., S.D.N.Y., Jan. 14, 1964). *Cf. Pakhuismeesteren, S. A. v. S. S. Goettingen*, 225 F. Supp. 888 (U. S. Dist. Ct., S.D.N.Y., Dec. 16, 1963).

Nationality—naturalized citizen who resides continuously for three years in foreign state of which formerly a national or in which born does not lose citizenship

Section 352(a)(i) of the Immigration and Nationality Act of 1952, 66 Stat. 269, 8 U.S.C. §1484, provides that, with certain exceptions, a person who has become a national by naturalization loses his nationality by "having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated." The Supreme Court held this provision unconstitutional on the ground that withdrawal of citizenship is not a reasonably calculated means to an otherwise legitimate end and so discriminates against naturalized citizens as to constitute a violation of the due process clause of the Fifth Amendment. *Schneider v. Rusk*, 377 U. S. 163 (U. S. Sup. Ct., May 18, 1964).

Passports—President's power to restrict travel to specified areas

In two separate suits, Federal District Courts held that the Passport Act of 1926, 22 U.S.C.A. §211(a) and the Immigration and Nationality Act of 1952, 8 U.S.C.A. §1185 are not unconstitutional and validly delegate to the President the power to restrict travel to Cuba and other areas. *MacEwan v. Rusk*, 228 F. Supp. 306 (U. S. Dist. Ct., E.D. Pa., April 20, 1964); *Zemel v. Rusk*, 228 F. Supp. 65 (U. S. Dist. Ct., D. Conn., Feb. 20, 1964).

Passports—right of member of Communist organization to hold and use United States passport upheld

Section 6 of the Subversive Activities Control Act of 1950, 64 Stat. 993, 50 U.S.C. §785, provides that:

(a) When a Communist organization . . . is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or (2) to use or attempt to use any such passport.

The Supreme Court held this provision unconstitutional on the ground that the relationship between the "bare fact of organizational membership and the activity Congress sought to proscribe" was too tenuous to support this broad and indiscriminate prohibition of the right to travel abroad which is guaranteed by the Fifth Amendment. *Aptheker v. The Secretary of State*, 378 U. S. 500 (U. S. Sup. Ct., June 22, 1964).

UNITED KINGDOM COURTS

War damages—compensation payable for oil installations destroyed as part of long-term strategy to deny advancing enemy their use

The Burmah Oil Company sued the Crown for compensation to make good the damage suffered when oil installations near Rangoon owned by it were destroyed in 1942 by British forces to prevent them from falling into the hands of the advancing Japanese. The House of Lords held that if, in the exercise by the Sovereign of the royal prerogative in relation to war, a subject was deprived of property for the benefit of the state, he would be entitled to compensation at public expense unless the deprivation of property constituted battle damage for which no compensation was payable. However, the battle damage exception did not in the House's view extend to destruction which was part of deliberate long-term strategy in the nature of economic warfare and was not so connected with the purposes of immediate battle operations that the destruction would have been done in any event for the sake of such operations. The House, taking a different view of the facts from the court below,¹ concluded that the destruction in this instance was not battle damage and awarded compensation to the plaintiffs. *Burmah Oil Company v. Lord Advocate*, [1964] 2 W.L.R. 1231; 2 All E.R. 348 (House of Lords, April 21, 1964).

Diplomatic immunity—applicable to officials of the European Commission of Human Rights

Plaintiff, a German national, brought an action in England against the ex-President and the Secretary of the European Commission of Human Rights with respect to acts done in their official capacities involving a matter before the Commission. The Court of Appeal held that both defendants were entitled to diplomatic immunity under the International Organizations (Immunities and Privileges) Act, 1950, and an Order in Council made thereunder. Even if the ex-President's name were not still

¹ *Burmah Oil Company v. Lord Advocate* (Scot Ct. of Session, 1st Div., March 14, 1968), 58 A.J.I.L. (1964).

on the official list (which was conclusive proof under the 1950 Act that he was entitled to the immunities granted thereunder), his immunity could never be impugned with respect to acts done in his official capacity during the tenure of his office. *Zoernsch v. Waldock and Another*, [1964] 2 All E.R. 256 (Ct. of App., March 24, 1964).

JAPANESE COURTS

Atomic bombs—use against Hiroshima and Nagasaki violated international law, but individual Japanese citizens have no remedy

In an action by five Japanese citizens against the Japanese Government claiming damages for injuries sustained by them in the atomic bomb raids by United States forces on Hiroshima and Nagasaki during World War II, the court held that the plaintiffs were not entitled to recover.

The court accepted the plaintiffs' argument that the dropping of atomic bombs on Hiroshima and Nagasaki constituted a violation of international law on the ground that the dropping of said bombs not only constituted an indiscriminate bombardment of undefended cities far beyond the requirements of destroying military objectives within those cities, but also violated the general principle of international law (which it derived from the specific treaty limitations on the use of poisonous gas and bacteria) that weapons which give rise to "unnecessary ailments" to enemy personnel must not be used. However, the court recognized clearly that individual citizens, in the absence of treaty provisions, have no standing under international law. Since the plaintiffs had no legal means to seek reparation for their damages, their claims could not be objects of the general waiver of all claims of Japan and its nationals contained in Article 19a of the Peace Treaty of 1951 between the Allied Powers and Japan. Consequently, the Government of Japan incurred no liability to the plaintiffs. Joint Civil Damage Suit 1955 (wa) 2914 and 1957 (wa) 4177 (Tokyo District Court, Dec. 7, 1963), reported in *The Jurist*, No. 293 (March 1, 1964), pp. 39-45.*

ARBITRATION

Treaty interpretation—International Air Transport Services Agreement, U. S.-France, March 27, 1946¹—informal agreements

DECISION OF THE ARBITRATION TRIBUNAL ESTABLISHED PURSUANT TO THE ARBITRATION AGREEMENT SIGNED AT PARIS ON JANUARY 22, 1963, BETWEEN THE UNITED STATES OF AMERICA AND FRANCE.

Decided at Geneva, December 22, 1963.²

* Digested by Ken Tsunematsu.

¹ 61 Stat. 3445, T.I.A.S., No. 1679, as amended, T.I.A.S., Nos. 2106, 2257, 2258, 4336, and 5135.

² Digested and excerpted by Wm. W. Bishop, Jr., from mimeographed copy of decision. The full text of the decision appears in 3 Int. Legal Materials 668 (July, 1964).

Arbitration tribunal³ consisting of Professor Roberto Ago (Italy),⁴ Professor Henry P. deVries (U.S.A.),⁵ and Professor Paul Reuter (France).

The Agreement asked the Tribunal to decide:

1. Under the provisions of the Air Transport Services Agreement between the United States of America and France, and in particular the terms of Route 1 of Schedule II of the Annex to that Agreement, does a United States airline have the right to provide international aviation services between the United States and Turkey via Paris and does it have the right to carry traffic which is embarked in Paris and disembarked at Istanbul, Ankara or other points in Turkey, or embarked at Istanbul, Ankara or other points in Turkey and disembarked at Paris?

2. Under the provisions of the Air Transport Services Agreement between the United States of America and France, and in particular the terms of Route 1 of Schedule II of the Annex to that Agreement, does a United States airline have the right to provide international aviation services between the United States and Iran via Paris and does it have the right to carry traffic which is embarked in Paris and disembarked at Tehran or other points in Iran, or embarked in Tehran or other points in Iran and disembarked at Paris?⁶ . . .

[In the Agreement of March 27, 1946, the United States and France granted "to each other the rights specified in the Annex hereto for the establishment of the international air services set forth in that Annex";

³ The submission to arbitration was in conformity with Art. X of the Air Transport Services Agreement, as amended, which provided for an advisory opinion of three arbitrators; the Agreement provided that the contracting parties "will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report." By letters exchanged Dec. 8, 1962/Jan. 9, 1963, the governments agreed to consider the decision of the Arbitration Tribunal in this dispute as binding on the parties.

⁴ The arbitrators chosen by the parties being unable to agree on the third member, Prof. Ago was chosen by the President of the International Court of Justice after consultation with the President of the Council of ICAO.

⁵ Prof. Milton Katz was first designated by the United States, but had to resign due to other commitments; he was replaced by Prof. deVries prior to the oral arguments.

⁶ The Tribunal's decision states: "During their oral arguments both Parties expressed the opinion that the Tribunal should determine its jurisdiction on the basis of a broad interpretation of the Arbitration Agreement. In this connection, at the conclusion of the oral argument, the President asked the Agents, on behalf of the Tribunal, if the Parties were prepared formally to confirm their agreement on this point, and that if, consequently, the terms employed by the Arbitration Agreement to indicate the questions that the Tribunal had been requested to decide, should be interpreted to mean that the Tribunal would be free if it deemed proper to do so, to consider not only the terms of Route 1 of Schedule II of the Annex, but also the Agreement and the Annex as a whole, as well as all the formal and informal understandings which followed, as well as the practice of the Parties. The question was also asked whether, with the agreement of the Parties, the Tribunal would be free, if it so deemed proper, either to give a single answer to the two questions appearing in the Arbitration Agreement or to reverse the order of the said questions. The replies of the Agents of the Parties were affirmative on both points."

the Annex could be amended by agreement of the parties. In the Annex the French Government granted to the United States "the right to conduct air transport services by one or more air carriers of United States nationality designated by the latter country on the routes, specified in Schedule II attached, which transit or serve commercially French territory."⁷ Schedule II read in part:]

ROUTES TO BE SERVED BY THE AIR CARRIERS OF THE UNITED STATES

(Points on any of the routes listed below may, at the option of the air carrier, be omitted on any or all flights.)

1. The United States via intermediate points over the North Atlantic to Paris and beyond via intermediate points in Switzerland, Italy, Greece, Egypt, the Near East, India, Burma and Siam to Hanoi, and thence to China and beyond; in both directions.

2. The United States via intermediate points over the North Atlantic and Spain to Marseille and beyond via Milan, Budapest and points south of the parallel of Budapest to Turkey and thence via intermediate points to a connection with Route 8 and beyond on said route; in both directions.

3. The United States via intermediate points over the North Atlantic, and Spain to Algiers, Tunis, and beyond via intermediate points in Egypt, and beyond via Route 1; in both directions. . . .

Section VII of the Annex provided:

Changes made by either Contracting Party in the routes described in the Schedules attached except those which change the points served by these airlines in the territory of the other Contracting Party shall not be considered as modifications of the Annex. The aeronautical authorities of either Contracting Party may therefore proceed unilaterally to make such changes, provided, however, that notice of any change is given without delay to the aeronautical authorities of the other Contracting Party. . . .

[The Tribunal said in part:]

In the opinion of the Tribunal, it would not be possible to arrive at a satisfactory interpretation of those clauses of the United States-France Aviation Agreement involved in the disputes submitted to the present Arbitration, nor at a proper definition of the rights and obligations deriving therefrom, if a given expression such as "Near East", which appears in the description of route 1 of Schedule II of the Annex to the Agreement, were to be isolated. The sense in which this expression was employed at the place referred to cannot be determined without reference to the context.

The Tribunal is in effect convinced—and in this it is in line with case law and doctrine of international law—that it is only against its context

⁷ The Annex further specified that: "One or more air carriers designated by each of the Contracting Parties under the conditions provided in this Agreement will enjoy, in the territory of the other Contracting Party, rights of transit, of stops for non-traffic purposes and of commercial entry and departure for international traffic in passengers, cargo and mail at the points enumerated and on each of the routes specified in the schedules attached at all airports open to international traffic."

that the meaning of a term employed in a clause of a treaty should be sought.* . . .

Interpretation, as a logical operation that seeks to establish with the maximum possible certainty what the common intention of the Parties was, can only succeed in determining the meaning to be attributed to a term appearing in a clause of the treaty, in the framework and as a function of the clause as a whole. In its turn, a clause should be interpreted with reference to the content of the treaty considered in its entirety; and, if the Agreement comprises other instruments which complete or modify it, all these instruments should, if necessary, be taken into consideration in the interpretation of the clause.

In the view of the Tribunal, this is all the more indispensable because, in this specific case, the expression "Near East" is not an expression which in current speech has a unique meaning that is generally agreed upon and clearly defined. As is evident from an examination of the abundant documentation furnished by the Parties, neither in geographical, historical nor diplomatic language, nor in the administrative practice of States, nor in general civil aviation usage can a clear and uniform use of this term be found. . . .

In the sequence describing route 1, the term "Near East" is placed between the term "Egypt" and the term "India", the latter single term having been replaced in 1959, by the three successive terms, "Pakistan", "India", and "Ceylon". Since the general description of the route follows a more or less uniform direction and progression from west to east, and because this fundamental notion of direction is confirmed by the use of the expression "in both directions" at the end of the description, the Tribunal considers that there is to be found here, from a mere reading of the text, an initial indication that the Parties, in speaking in this place of the "Near East", must have had in mind an area situated *grosso modo*, to the east of Egypt and to the west of Pakistan and India. . . .

When, on the contrary, the indication of an area is given in the intermediate portion of a route, it seems that it can only be understood if it is accepted that the area in question constitutes a geographical region in which a point or a series of different points ought to be situated, but all of them equally characterized, in the actual terms employed in the Schedule of Routes, by the fact that they are "intermediate points" between those in the country mentioned before them and those in the country listed after. And however broad a meaning be given to the adjective "intermediate", it seems evident that one could not so qualify a point which involves a turn around in relation to points designated by the term immediately preceding, nor a clear deviation from that notion of a "reasonably direct route" which set forth in Article 1 of the International Air Transport Agreement proposed by the Chicago Conference of December 7, 1944,

* Here the Tribunal referred to the Advisory Opinion of Aug. 12, 1922, regarding Competence of the International Labor Organization, P.O.I.J., Ser. B, Nos. 2 & 3, p. 22; and the Advisory Opinion of May 16, 1925, regarding Polish Postal Service in Danzig, *ibid.*, No. 11, pp. 39-40.

certainly inspired the conclusion of the subsequent bilateral agreements, as a general principle indispensable to the orderly development of air traffic.

In all cases, including the one submitted to the Tribunal for arbitration, where the description of an international air route is effected by using a series of terms which, with certain exceptions represented by various obligatory points, designate not specific places, but entire States or even regions comprising several States, the resulting configuration of the route to some extent resembles a vast air corridor. The latter represents what may be called the general path of the route, as opposed to the specific path or itinerary formed by the series of points lying within the general path, that will in fact be stops for the air carriers of the country to which the route has been assigned. Because, whatever the system used to describe a given air route, the latter must, in the last analysis, necessarily constitute a series of "points" and not States or regions. It is "points" that are in fact served by air carriers, and, what is more, it is in connection with the service of points such as Tehran, Istanbul or Ankara, that the present dispute has arisen. . . .

In any event, it cannot be denied that the system used in the United States-France Agreement of March 27, 1946, is characterized as particularly flexible. The general path of the route in effect comprises the bundle of possible lines, the choice of the specific itinerary or itineraries being left, within certain limits, to the State whose air carriers are authorized to serve the route. Under the Agreement, this State appears to be the holder of a series of potential rights in air traffic to the various points situated on the general path of the route.

However, as the Tribunal sees it, even without reference to subsequent restrictions possibly imposed by specific clauses of the Agreement, the rights mentioned here and the possibility of a choice between itineraries touching different points, are already in themselves subject to a double limitation. The first, a purely practical one, stems from the fact that the choice of points that can be served within the corridor is necessarily limited to places possessing airports open to international traffic. The second, of a legal nature, results from the fact that, unless a different agreement has been concluded between the interested parties, the outer limits of the corridor representing the general path of the route cannot be exceeded. And wherever these outer limits are not clearly established because, instead of a State with given boundaries, a region with imprecise frontiers has been indicated, the criterion for determining these limits can only be furnished by consideration of the fundamental direction of the route, and by the requirement that the area indicated contain points which can reasonably be considered as "intermediate" between those in the country listed before them and those in the country listed after them.

A general conclusion of this kind cannot to any extent be weakened by the sole fact that the route Schedules appearing in the Annex to the Agreement of March 27, 1946, are prefaced, in brackets, by the so-called omission of stops clause, by virtue of which any point on a route enumerated

may, at the option of the air carrier authorized to operate it, be omitted on any or all flights operated by that carrier. This clause, which was conceived with the aim of permitting a diversification of services on a given route, does no more than provide the possibility for the carrier operating a route to omit certain points of call scheduled on the route, either on some or all flights. But it is obvious that a simple measure of this kind could not modify the general path of the route as it appears in the route description listed in the Agreement: the power to effect a modification of this kind is certainly not included in the powers granted to carriers. A change of such importance as the alteration or extension of the general path of an international air route can only be effected by appropriate consensual action of the Governments concerned.

A further element may, in the opinion of the Tribunal, prove likely to throw more light on the matter for the purposes of a direct interpretation of the text of the 1946 Agreement: this is the comparison of the respective paths of certain of the routes described in Schedule II of the Annex. . . .

A merger of route 2 with route 1 is not expressly provided for, although it would certainly have been logical to plan for it in preference to the connection with route 8, if the two routes were to be linked in a region situated to the west of India. Provision is made, on the other hand, for a link between route 1 and route 3, which after running the length of Spain and North Africa, goes precisely to "Egypt and beyond on route 1". Thus, where the merger of a route with route 1 is to be effected, it is expressly indicated.

This leads to the conclusion that the Parties did not intend the area traversed by route 2 via Turkey and intermediate points between Turkey and Pakistan or India, to be part of the general path assigned to route 1, whatever its geographical definition. The intention of the Parties in describing in this manner the two basic routes serving different points of French territory seems to have been to maintain these routes quite separate until they reached India. In the vast area separating Europe from the Indian subcontinent, each of them would have been assigned a general path, in both cases oriented from north-west to south-east, the first however being situated more to the north so as to cover above all Turkey and Iran, while the other, less broad, was more to the south.

The various elements that can be taken into consideration for the purpose of interpretation of the text of the Agreement of March 27, 1946, and in particular of Schedule II of the Annex thereto, lead the Tribunal to the conviction that this text does not authorize a conclusion that it was the intention of the Contracting Parties, at the time when they concluded the Agreement, to include the areas in which are situated respectively the Istanbul and Ankara stops and the Tehran stop in the general path of the route described as route 1 in Schedule II of the Annex, and in particular in the portion of this general path which is indicated by the term "Near East". . . .

After seeking to determine the intention of the Parties on the basis of a direct interpretation of the Agreement itself and of the Annex thereto,

the Tribunal must verify whether the results obtained by this means are or are not confirmed by an examination of the history of the negotiations leading up to the Agreement in question, as it appears in the documentation provided by the Parties.

The documentary history of the negotiations, or as it is generally called, the "legislative history", is in fact rightly considered by case law and doctrine to be a proper subsidiary guide for the interpretation of treaties.⁹

. . .
In these circumstances, the Tribunal is of the opinion that, even in the case where a doubt had remained as to the merit of the conclusion that seeks to attribute—on the basis of a simple examination of the text of the United States-France Agreement of 1946—a limited meaning to the term "Near East" employed therein, a restrictive interpretation of the term in question must also be applied because of its coincidence with the idea conveyed by the American negotiators to the French during the negotiations leading up to the Agreement. This is a case in which, of two possible interpretations, the choice of that which involves less extensive obligations for the obligated Party seems to be especially justified.¹⁰

Consequently, the Tribunal believes that it can terminate the examination of this point with the finding that the analysis of the preliminary negotiations strengthens the indications that the Tribunal had found from the analysis of the text of the Agreement of March 27, 1946, and the Annex thereto, and thus leads it to conclude that the Istanbul and Ankara as the Tehran stops cannot be considered to have been included by the Contracting Parties, at the time of the Agreement, in the region designated by the term "Near East" in the description of route 1 of Schedule II.

Having reached this conclusion, the Tribunal cannot, moreover, follow the view that the Contracting Parties, through not granting the path of route 1 breadth enough to include the stops in question, could at the same time have intended to agree that these points of call could be added to the path of route 1 by the special unilateral procedure provided for in Section VII of the Annex. . . .

In the view of the Tribunal, the essential consideration in this matter is that the special unilateral modification procedure provided for in Section VII regarding the path of routes in territories other than those of the Contracting States only seems to have been intended—despite some obscurities in the text and even a number of differences between the English and French texts—to permit of modifications of the specific path or paths lying within the general path of the route, and not for the purpose of unilaterally changing the general path itself. . . .

⁹ Here the Tribunal discussed and quoted from the Case concerning Treatment of Polish Nationals in Danzig, P.C.I.J., Ser. A/B No. 44, p. 33 (1932); and the Light-houses Case between France and Greece, *ibid.*, No. 62, p. 13 (1934).

¹⁰ Here the Tribunal referred in a footnote to the 1929 Case relating to the Territorial Jurisdiction of the International Commission of the River Oder, P.C.I.J., Ser. A, No. 23, p. 26; and the arbitral decision of July 18, 1932, between the United States and Sweden concerning the vessels "Kronprinz Gustaf Adolf" and "Pacific," 2 Int. Arb. Awards 1254.

The interpretation according to which Section VII cannot be utilized to change the general path of a route, is above all suggested by the wording itself of the English text of the clause in question, which is without doubt the original text, and which speaks of "changes *in* the routes". At the same time, this interpretation is the one which appears best to correspond to the spirit of the provision as a whole, which is to provide for a procedure of a rather exceptional nature, hardly suitable for such serious modifications as changes of the general path of the route. . . .

In the opinion of the Tribunal, a careful examination of the conduct of the Parties subsequent to the conclusion of the Agreement can be of great importance for the purposes of the present Arbitration, but each of its different aspects should be taken into consideration quite separately.

In the first place, account has to be taken of the practice of the Parties in the application of the Agreement, as a supplementary means of interpreting this instrument. This method may be susceptible of either confirming, or contradicting, and even possibly of correcting the conclusions furnished by the interpretations based on an examination of the text and the preparatory work, for the purposes of determining the common intention of the Parties when they concluded the Agreement.¹¹ . . .

In this connection, however, the Tribunal cannot do otherwise than remark that the practice followed in the application of the Agreement of March 27, 1946, does not appear to furnish elements which contradict the conclusions of the Tribunal as to the scope of the description of route 1 of Schedule II, and in particular of the meaning of the term "Near East". . . .

5. *The subsequent conduct of the Parties*

A. *The concession from 1955 of the right to serve Tehran*

As the Tribunal sees it, it is from another aspect that careful consideration must be given to the conduct of the Parties and to the attitude adopted by each of them, in particular from the time when the first differences of opinion as to principle arose regarding the application of the Agreement.

This course of conduct may, in fact, be taken into account not merely as a means useful for interpreting the Agreement, but also as something more: that is, as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the Parties and on the rights that each of them could properly claim.

. . . What the Tribunal particularly has in mind are cases where express or implied consent has been given to a certain claim or the exercise

¹¹ The Tribunal discussed and quoted from the Advisory Opinion of Aug. 12, 1922, concerning Competence of the International Labor Office, P.C.I.J., Ser. B, Nos. 2 & 3, p. 39; Advisory Opinion of March 3, 1928, regarding Jurisdiction of the Courts of Danzig, *ibid.*, No. 15, p. 18; and the Case concerning the Temple of Preah Vihear, [1962] I.C.J. Rep. 32-33.

of a certain activity, or cases where an attitude—whether it can rightly or not be described as a form of tacit consent—certainly has the same effects on the resulting juridical situation between the Parties as consent properly speaking would have. The Tribunal is referring in particular to assumptions such as the following: the interested party has not in fact raised an objection that it may have had the possibility of raising, or it has abandoned, or not renewed at a time when the opportunity occurred, the objection that it raised at the outset; or while objecting in principle, it has in fact consented to the continuance of the action in respect of which it has expressed the objection; or again, it has given implied consent, resulting from the consent expressed in connection with a situation related to the subject matter of the dispute.

The conduct of the authorized French authorities herein, especially between 1950 and 1955, reveals, in effect, many examples of this kind.

The history of the events of this period shows above all that the objection initially raised by the French representative to PAA's right to serve Beirut via Paris-Rome was not renewed at the time when the Minutes of the consultations of March 19, 1951, were drawn up, during which the question of Beirut had been discussed. This attitude, it is true, may have resulted from assurances given by the American negotiators of respect for the special French interests in the Levantine States; it may also have resulted from an uncertainty that existed as to the actual exclusion of Beirut from the path of route 1; in point of fact, these doubts had not been entirely eliminated by the examination of the maps forwarded by the CAB, and had already emerged in the expression "open to discussion" used by the French side at the time the objection was formulated. However, it is a fact that as a result of this attitude, an agreement was reached between the two Governments concerning both a renunciation by the French side of discussions as to whether Beirut was included in route 1, and the special consideration that the Americans undertook to give to French interests in this region. Thus the French Government no longer continued to contest the rights of American air carriers to serve Beirut via Paris in the conditions agreed upon; and it must have been considered the consent so given as being also valid for neighbouring States, since later on it raised objections neither to the free transfer services from Beirut to Damascus operated by PAA in 1951 and 1952, nor to the regular service, on Tehran flights, of the Damascus stop, inaugurated in 1955, nor to the Baghdad service from Ankara started in 1959. It should be noted that neither Syria nor Lebanon were listed among the areas allocated to the general path of the southern route by the CAB Decision of June 1, 1945, whereas Iraq was on this list, although the annexed map only included in the said path the southern part of this country (Basra). But whatever the status of these three countries may have been in the original framework of the 1946 Agreement, insofar as the path of route 1 was concerned—a question which the Tribunal is not called upon to consider—what is certain is that as a result of the attitude adopted by the Parties from 1951 on, the right of American carriers to serve the points in question via Paris had been

definitively vested and could no longer be contested, at least while the American side did not depart from the assurances given.

More delicate and more important aspects of the question, for the purpose of the present arbitration, are to be found in the attitude adopted towards the problem raised by the Tehran service. The history of events shows that PAA's claim to serve Tehran via Paris, Rome, Beirut and Damascus, had been brought to the knowledge of the French authorities by the letter of April 5, 1955, transmitting this company's summer timetables; the new service was to be inaugurated on April 24. It also shows that the Secrétaire Général à l'Aviation Civile et Commerciale had clearly formulated his objections to the Tehran service, giving juridical reasons for these objections, in an initial conversation with the American Civil Air Attaché of the United States Embassy. However, he had also stated that a note would probably be transmitted to the United States Embassy on this subject, and this note never appeared. In addition, although it is true that the same high official was to have another conversation with the Civil Air Attaché a few days later in the presence of the Director for France of PAA, it is also true that, in the first letter written subsequently to the latter, dated May 14, 1955, he limited himself to stating that:

"En ce qui concerne la desserte de Damas et Téhéran, j'ai pris note des explications que vous m'avez données à ce sujet dans notre récent entretien."

It should be noted that in the same letter, the Secrétaire Général à l'Aviation Civile et Commerciale approved the timetables transmitted on April 5 and by so doing, gave his implicit consent to the PAA Tehran service via Paris. It was only in a second letter sent to the same person on June 4, that is to say nearly a month and a half after the New York-Paris-Tehran service via Rome, Beirut and Damascus had started operations, that the French official considered it necessary to recall that:

"Téhéran n'étant pas prévu au Tableau II (Route 1), c'est seulement à titre temporaire et compte tenu des assurances que vous avez bien voulu me donner que votre compagnie éviterait, sur cette route, de porter préjudice aux compagnies françaises, que j'avais approuvé votre desserte de Téhéran."

Apart from the clear and unequivocal reaffirmation of the refusal, in principle, to admit that Tehran was situated on the path of route 1 as described in Schedule II of the Annex to the Agreement, the French aviation authorities confirmed in fact once again the consent that had already been given previously for PAA to operate the New York-Paris-Rome-Beirut-Damascus-Tehran line, albeit with certain conditions as to itineraries and flight frequencies. He added, it is true, that this consent was given "à titre temporaire".

Nevertheless, in the view of the Tribunal, it seems very difficult to admit that, in making a reservation of this nature, the French official could have meant to say that he reserved the right to withdraw the consent given at

his own discretion whenever he saw fit to do so. Because of his experience and his position at the head of civil and commercial aviation services, he knew very well that one cannot take the responsibility of granting an air carrier the authorization to operate a new service requiring important installations and investments, one day, only to withdraw it the next without a weighty reason. The reservation concerning the temporary character of the authorization granted could thus only have another meaning, namely that it stressed on the one hand, that this authorization did not signify the abandonment of the position of principle, that it was not by virtue of a right deriving from the 1946 Agreement that the Tehran service was allowed, but only by virtue of the authorization itself; and on the other hand that the permission to operate the new service was being given within certain limits and under certain conditions. The possibility of suspending the authorization granted was thus only envisaged in the exceptional hypothesis where it would have been necessary to resort to it either to ensure that the limitations and conditions set were respected, or to defend legitimately the principle that the French were anxious to safeguard.

All possible doubt as to what was in fact the permanent nature of the consent given, disappears, moreover, when we consider the attitude adopted by the French authorities in the years that followed. Neither at the time when it periodically transmitted its timetables, nor when the capacity on the line was increased (three services in 1957, four in 1959), did PAA receive any reminder from the French authorities of the temporary nature of the authorization granted. Such a series of similar attitudes, reiterated over a period of seven years, throws decisive light on the true scope of the initial consent given by the French authorities when the question of the Tehran service arose for the first time. In 1955, France indisputably undertook to permit the operation of aviation services on the Paris-Tehran via Beirut route, with exercise of commercial rights, subject to certain capacity limitations which were, by the way, liberally extended later on. The only real reservation that conditioned this undertaking was that the operations envisaged could be suspended in the event that this measure became necessary for safeguarding, in a more extensive framework and in exceptional circumstances, the position of principle that France had adopted regarding the scope of the 1946 Agreement. In reality, it was only to be a reason of this nature that was to lead the French authorities to suspend the exercise of commercial rights on the Paris-Tehran service, effective October 31, 1962. At this time, and in connection with the Turkish stops, the renewal of the dispute of principle concerning route 1 rights deriving from the 1946 Agreement appeared once again to call into question—when the Paris-Rome-Istanbul-Ankara-Tehran service was inaugurated—the matter of the source of PAA's right to serve the Iranian stop. In spite of this measure, taken after a series of successive delays and with arbitration imminent, the services to Iran nevertheless were maintained, although without commercial rights between Paris and Tehran; this confirms that the French authorities were aware of the impossibility of completely going back on what had so long been granted, even in de-

fence of their position of principle; they were also aware of the need to respect, at least in some measure, the rights that had undeniably been granted and sanctioned by prolonged use. Moreover, it seems evident that the suspension measure could only be temporary, and above all could not be maintained in force after the question of principle had been decided by arbitration.

Thus an analysis of the conduct of the Parties leads the Tribunal to conclude that, as a result of the attitude adopted by the French authorities from and after May 14, 1955, the right to serve Tehran via Paris, Rome, Beirut and Damascus had been established and could no longer be contested save in exceptional circumstances. But the Tribunal also believes that it should once again state that, in its opinion, it was not by virtue of the Agreement of 27 March, 1946, but rather by virtue of an agreement that implicitly came into force at a later date, that the right in question was in fact accorded; and precisely by the effect of the consent given by the French authorities from and after May 14, 1955, to the timetables proposed by PAA, which made provision for the Tehran service, consent which was constantly confirmed by the attitude of these authorities in the course of the years that followed.

B. The authorization to serve the Turkish stops without commercial rights

With regard to the question that arose in the autumn of 1955 when PAA put forward its claim initially to serve Istanbul and later on Ankara as well, the elements which can be gleaned from an examination of the conduct of the Parties differ appreciably from those found in connection with Tehran. They are, in fact, from all points of view, more precise and more immediate.

When first notified by PAA of its project to serve Istanbul, the Secrétaire Général à l'Aviation Civile et Commerciale formulated, in his letter of October 11, 1955, a legal objection that Turkey was not included in the path of route 1, but only in that of route 2, which could not serve Paris. Nevertheless, the execution of PAA's project was not completely stopped. The operation of the New York-Paris-Rome-Istanbul line was authorized, but subject to the proviso that it should include no commercial traffic between Paris and Istanbul. This attitude was confirmed shortly afterwards by the Minister of Foreign Affairs. To the note from the United States Embassy of October 21, 1955, which claimed that Turkey should be included in the term "Near East" and to the letter of October 27 from the Civil Air Attaché, proposing that the question be resolved by recourse to the modification procedure provided for in Section VII of the Agreement, the Ministry replied as early as November 3 by a double refusal to accept the American points of view, and by the request that no commercial activity be exercised between Paris and Istanbul. On the other hand he admitted the possibility of solving the problem raised by the American company's request by concluding a new agreement to be negotiated be-

tween the competent authorities of the two countries. But this could not be achieved during the consultations which followed, the counterpart requested by the French as the price of their consent to the Istanbul service being considered too high by the Americans. The French position was thus reaffirmed unchanged on several occasions, and particularly in the letter of May 16, 1956, at the time of the extension of the line to Ankara, and in the letter of May 3, 1957. During the Franco-American meetings of 1958 and 1959, the attempt to obtain commercial rights between Paris, Turkey and the Near East, was once again made by the American negotiators, but once more no agreement on an exchange of reciprocal benefits that could include the granting of the said rights, could be reached. In 1960, when the American authorities refused to grant France the possibility of making a stop at Montreal, subject to conditions similar to those France had granted for Istanbul, the French authorities even threatened to interrupt PAA's service to Turkey completely. Finally, by the Exchange of Notes of April 5, 1960, which recorded certain mutual concessions, France, which in the meantime had also opposed the American request for at least "stopover" rights between Paris and Istanbul, in the end gave a formal undertaking not to interrupt PAA's service between Paris and Istanbul on the terms in which it had operated up to that time. Since then the situation of the Turkish stops remained unchanged, and it was, rather, the substitution of Tehran for Baghdad as the terminal point of the New York-Paris-Rome-Istanbul-Ankara line that set off the crisis which was to lead the Parties to resort to arbitration on the questions arising out of both the Turkish and the Iranian stops.

Therefore, in the conduct of the Parties with regard to the Istanbul and Ankara question, the Tribunal is obliged to point out, above all, the absence of any weakening in the French position regarding the refusal either to admit that the Turkish stops come within the path of route 1, or could be added to it by the mechanism of Section VII, or to grant anything more than mere "blind sector rights" on the flights in question, unless they obtained an adequate counterpart from the United States. On the other hand, although it can certainly not be maintained that the American authorities have ever abandoned their thesis of principle, even when the Exchange of Notes of April 5, 1960, took place, it must at the same time necessarily be recognized that they have not insisted on following up the application of Section VII that they proposed in 1955, and that their subsequent efforts have above all been deployed in two directions:

- a) to attempt to reach a new agreement comprising commercial rights, or at least stopover rights between Paris, Istanbul and Ankara; and
- b) in any event to consolidate the authorization that they had obtained to serve the Turkish stops, even without commercial rights, and to convert this authorization into a permanent right.

It was this second objective that the American authorities attained by the Exchange of Notes of 1960.

. . . On the other hand, the conduct subsequently followed by the Parties does permit the Tribunal to conclude that by virtue of a subsequent agreement, for which the way had already been paved by the authorization given by the French authorities on October 11, 1955, and definitively confirmed by the Exchange of Notes of April 5, 1960, American carriers have acquired the right to serve the Istanbul and Ankara stops, although without commercial rights between Paris and the aforesaid stops, and that this right can no longer be contested at the present time.

[The Tribunal unanimously replied to question 1:]

With regard to the first point

Considering that the interpretation of the provisions of the Agreement of March 27, 1946, and in particular of the terms of route 1 of Schedule II of the Annex to that Agreement, does not permit of the conclusion that the right to provide international aviation services between the United States and Turkey via Paris was granted to a United States airline under the provisions of the said Agreement and of the Annex thereto; . . .

Considering that the right in question has been recognized in a United States airline by the Exchange of Notes of April 5, 1960, between the two Governments, which definitively confirmed the authorization for the exercise of the said right already granted by the French authorities on October 11, 1955;

Decides that the answer to be given on this point is that a United States airline *has* the right to provide international aviation services between the United States and Turkey via Paris;

With regard to the second point

. . .

Decides that the answer to be given on this point is that a United States airline *has not* the right to carry traffic which is embarked in Paris and disembarked at Istanbul, Ankara or other points in Turkey, or embarked at Istanbul, Ankara or other points in Turkey and disembarked at Paris.

[As to question 2, the Tribunal gave the same affirmative answer as to the first point, relying on the "implicit agreement ensuing from the consent given by the French authorities on May 14, 1955, and constantly confirmed by the attitude of the said authorities throughout the years that followed." As to point 2 of question 2, the Tribunal said:]

Considering that a United States airline has the right in question, subject to certain limitations regulating services and flight frequencies, by virtue of the implicit agreement ensuing from the consent given by the French authorities on May 14, 1955, and constantly confirmed by the attitude of the said authorities throughout the years that followed;

Considering that the interruption of the exercise of this right required by the French authorities, effective October 31, 1962, appears to have been

dictated solely by the concern of the French Government, above all in view of the imminence of arbitration, to safeguard its position of principle as to the foundation of the right in question, and that, consequently, it can only be of a temporary nature and could not be prolonged after the termination of the present arbitration;

Decides that the answer to be given on this point is that a United States airline *has* the right to carry traffic which is embarked in Paris and disembarked at Tehran or other points in Iran, or embarked in Tehran or other points in Iran and disembarked at Paris.

BOOK REVIEWS AND NOTES

LEO GROSS

Book Review Editor

The Public Order of the Oceans. A Contemporary International Law of the Sea. By Myres S. McDougal and William T. Burke. New Haven and London: Yale University Press, 1962. pp. xxviii, 1226. Index. \$15.00.

In no field of human relationships does one find more tradition, more honored phrases and yet greater recent change in the pattern of relationships than in the law of the sea. The notion of one marine league, visit and search, continuous voyage, and Mahan's doctrine of sea power have greatly changed relevance to power relationships in the course of this century. During these same sixty years the oceans are increasingly seen as the last important reservoir of food. Current conflicts include notions of territorial waters, defense zones, offshore fisheries, continental shelf, and the nationality of ships. The oceans themselves, but for the possibility of contamination by atomic waste and fall-out, remain the same as ever, but the thinking about them and decisions affecting relationships to them have basically changed (except possibly for the theory of the aerodynamics of sails).

In an important volume Myres McDougal and William T. Burke have set themselves the task of presenting a new policy-oriented approach to the law of the sea¹ which draws heavily on history and the thinking of the past. This is one of four volumes in which McDougal and associates approach the entire field of international law; and he has come to be regarded as founding a new school of international law.

The first task of the reader is to understand the conceptual framework which the work follows. If he claims differences of opinion with the writers, then he owes it to them to understand their approach. Yet the authors themselves have not been slow to express sharply their differences with other writers whose approach they compare with their own, in deciding on its relevance or value. The authors' language may provide some difficulties. While it lacks elegance and simplicity, it is a sincere attempt to get beyond the confusion of words to the ideas which they attempt to convey. Thus, to browse in the twelve hundred pages of this volume without serious consideration of the initial chapter "Community Context and Fundamental Policies" is to read the book at an episodic level.

McDougal and Burke begin with the historic function of the law of the

¹ Original version of Chapter 1 appeared in 67 Yale Law Journal 438 (1958); of Chapter 5, in 45 Cornell Law Quarterly 171 (1960); and of Chapter 8, in 54 A.J.I.L. 25 (1960).

sea, protecting and balancing the common interests, inclusive and exclusive, of all peoples in the use and enjoyment of the oceans, while rejecting all egocentric assertions of special interests in contravention of general community interest.

Here, then, is the theme of the book. The authors note in a later chapter that Max Sørensen² has challenged this formulation as an over-simplification because he felt that a wide measure of freedom may well serve the interests of one group or category of states, whereas the opposite tendency may serve the interests of others. The authors consider this criticism a "blunt denial of community interest, in favor of exaggerated emphasis upon exclusive national interest," based upon profound and dangerous misconceptions, because it underestimates the interdependence of states, and does not take adequate account of the most comprehensive long-term interests of all states (pp. 561-562). This reader sees in this exchange a difference on what the community policy is, which will base the study which follows.

McDougal and Burke begin their first chapter by firing a few rounds across the bows of those with other views. Thus, it is "clearly irrational" to challenge the exclusive competence accorded states to confer their national character upon ships (p. 5). The International Law Commission in 1958 and 1960 was one most significant source of confusion in failing to perceive and understand the complementary nature of two sets of competing interests—those of coastal and non-coastal states. They then warn that the internationalization of a great common resource is endangered by adherents of both of these sets of competing interests. There is, on the one hand, an "internationalist myopia" which they diagnose as clinically present in several text-writers noted (p. 11); and on the other hand, a "provincial myopia" of "suicidal character" to be found in others (p. 12). Perhaps this opening is to be taken as reflecting a personal style, since, as McDougal has observed, he is best on the attack.³

After thus discovering the shortcomings of these approaches, McDougal and Burke proceed with their own policy-oriented approach. Its purpose is rational clarification of the general community interest. They consider that to be the true method and function of the law of the sea. This purpose of clarification involves an understanding of three different processes which are applied to the specifics in each chapter which follows. They form a framework of inquiry intended to provide insight into the process of decision of particular issues.

First of all there is the *process of interaction* by which the oceans are enjoyed. The outcomes of this enjoyment, they conclude, have in recent centuries been genuinely integrative, with all peoples gaining and none losing in the production of goods and services for all mankind (Preface, p. vii; p. 14).

The second procedure is the *process of claim* by which people invoke

² "Law of the Sea," International Conciliation, No. 520 (November, 1958), pp. 195, 199.

³ Annual Meeting, American Society of International Law, April 23, 1964.

authority for the regulation of their interactions upon the oceans. These people include all actors in the world social process, such as nation states, international organizations and private individuals. The authority invoked is the world process of authoritative decision. This process involves one of the two aspects of what is traditionally called state practice. The authors analyze and apply the process of claim-making to a whole spectrum of specifics from claims to authority over internal waters, authority over the territorial sea, to claims to shared use and competence upon the high seas. One may agree or disagree with the authors on the extent to which these are no more than claims, that is, the assertions of positions, and the extent to which they are the statement of recognized community objectives. The authors are themselves entirely clear about the several factors which enter into the evaluation and interpretation of a foreign office state paper as a claim or as a recognized community policy. Thus they observe:

Clarity about the process of claim may aid an observer in distinguishing the events to which decision-makers respond from such response (the confusion which permeates all the traditional terms) and in categorizing controversies in a way best to facilitate the study and comparison of trends in decision. It may enable him also to assess the importance, in trend, of the factors giving rise to the multiple contemporary controversies. (Footnote 34, p. 14.)

The third procedure is the essence of their approach, *the process of authoritative decision* to resolve claims about the enjoyment of the oceans. They describe this process as certain decision-makers seeking to promote certain common community objectives, and then proceed to analyze it more in detail (p. 36).

Who are the decision-makers? They include government officials, judges of international tribunals, and other officials of international governmental organizations. Here the authors return to the dual function of the government official who is on some occasions the authoritative decision-maker for world public order, the second aspect of what is traditionally known as state practice, and on other occasions a claimant (pp. 36-37). The authors analyze the process of decision:

Clarity about the process of decision may enable an observer to distinguish, and hence more effectively to perform, the very different intellectual tasks of describing past trends in decisions, of studying the factors which have in fact affected decisions, of projecting probable decisions into the future and of recommending what decisions should be—a set of inquiries much too often compressed into a simple question of what “the law is.” (Footnote 35, p. 14.)

What are the factors influencing authoritative decision-makers? The authors analyze what they consider relevant factors in their topical chapters. But at the outset they emphasize that when they refer to the law of the sea and its effective power they mean not only the expectations derived from past practice, but also economic, sociological and political factors which decision-makers are observed to take into account. To attempt a narrower notion of the law of the oceans as an inherited formu-

lation to be applied by the decision-maker without reference to such factors is, in their view, "a suicidal illusion" (footnote 131a, p. 58). The range of relevant factors the authors group into three categories: the claim to authority asserted, the counter-claim to authority, and the significant features of the community context.

The process of the authoritative decision-maker, it will be recalled, is intended to result in a decision about what is reasonable in any particular context of conflicting uses, with due regard for the relevant factors mentioned above, and as a clarification of community policies and consensus. They are equally explicit about the community policy which they themselves support in the detailed chapters which follow:

. . . All the factors which have in the past made the internationalization of the oceans important in maximizing the values of states would thus seem, when projected into the future, to make a similar consensus and process of decision indispensable. The alternative to such consensus—the unrestrained exercise of naked power, so dramatically illustrated in all the recent unilateral assertions and enforcements of exclusive claims against general consent—should be carefully considered, or reconsidered, by any state, and this might include all states, not certain in the contemporary world arena of its ability to assert more effective power than any possible rival claimant.

* * * * *

The choice before the states of the world in the present crisis of the law of the sea is whether, for the illusory mess of pottage obtainable in an uneconomic extension of exclusive right, they will forego their heritage of inclusive rights and its promise of even greater future achievement in community and particular values. (p. 88.)

Readers may differ about the extent to which this reference to preferred community policy and reasonableness may represent a subjective element in the conceptual structure. Certainly the authors are not to be understood as intending to urge their personal preference; rather they are analyzing ways of making this determination by the techniques of social science which the decision-maker will employ. The extent to which the decision-maker does or does not apply these techniques is yet another question.⁴ However, this approach is not to be taken as an alternative to the study and understanding of history and state practice, and this can be seen from the sections of the substantive chapters which deal with this material.

The seven chapters which follow cover all the basic problems which were seen at the two Geneva conferences on the Law of the Sea. The debates at these conferences and the preparatory work for the conventions which emerged from them are fully documented, with the texts of the conventions themselves as appendixes. Looking at the substantive material of these chapters as a whole, they form an over-all approach to a law of the sea which does not attempt to examine and reformulate, in the light of the authors' analysis and the United Nations Charter, problems which arise

⁴ See generally: "McDougal and Feliciano's Law and Minimum World Public Order," review article by Richard A. Falk, 8 *Natural Law Forum* 171, at 175 (1968).

during the course of hostilities, or what traditionally used to be called the law of war. Thus the Table of Contents and Index refer to submarines only in connection with their duty to surface in territorial waters, and their possible use of the sea bed of the continental shelf. The only mention of blockade is in connection with the Egyptian use of that term to describe actions against Israel. There is no mention of that popular nineteenth-century topic, the law of prize.

As illustrative of the structure and approach of the substantive chapters, the nationality of ships is considered in Chapter 8. The authors begin by placing the greatest emphasis upon the authority of each state over its own vessels. They see this threatened by the genuine link theory, especially as contained in Article 5 of the Convention on the High Seas, which they find full of uncertainties and potential dangers. The genuine link theory, they conclude, imperils many still-cherished policies, and is uneconomic in relation to the admitted evils to which it is addressed.

After this initial attack on the theory as well as some of its proponents, the authors proceed to apply their three key processes of interaction, claims and decision-making. As to interaction, they conclude that a state's enjoyment and participation in shared competence over the oceans is exercised by control of a vessel.

A long and detailed section on competing claims forms the bulk of the chapter. One section strongly criticizes the preliminary work of the International Law Commission, as well as the subsequent debates in the Second Committee of the U.N. General Assembly. In commenting on a statement of one delegate in the Second Committee with some reputation in international law, the authors describe him as disregarding all history and his own views about the *Nottebohm* decision. However, the plain reader is not told what these views were, and how specifically his view of history offended (p. 1131). Another section harbors such familiar vessels as the *Virginus* and the *Schooner Exchange*.

From this detailed and documented catalogue of claims the authors conclude that the high degree of conclusiveness which states have accorded to the attribution of national character to ships remains indispensable to securing shared use of, and competence over, the oceans. Therefore, the states of the world should reject the genuine link provision in Article 5 of the convention.

The chapter on the width of the territorial sea (Chapter 5) proceeds to weigh inclusive and long-term exclusive interests. Putting to one side the question of military security, which they conclude is wholly irrelevant to the width of the territorial sea, the authors next assert that the enlarging of exclusive access by coastal states to fishery resources will not increase production or further conservation. They therefore support the narrowest claims of territorial waters, which will thus have the least undesirable effect on communications and transport. As documentation of these appraisals they then examine at length the factual background of coastal fisheries.

The authors next turn to the whole negotiating history of this most

controversial of issues which the two Geneva conferences were unable to resolve. This is a valuable section. They are not optimistic about prospects for resolving the question at a new international conference. They conclude that on the facts it has not been demonstrated "that an expansion of the territorial sea will serve any realistic, exclusive interest of particular states" (p. 563).

The Public Order of the Oceans is an impressive, provocative and scholarly book, reflecting the personal style of McDougal. A short seventeen years ago, attending his first meeting of the American Society of International Law, he stated his interest in trying to bring some of the best contemporary critical thought from other social sciences to bear on law. He mentioned the importance of studying how people use words, how the human mind works and the variables that affect public behavior.⁵ This volume is tangible evidence of what he and his associates have been doing since that time.

He and Burke insist on avoiding traditional phrases, which often carry with them their hidden implications or major premises. They have thus postulated a new vocabulary which for the plain reader is not always an easy one. In formulating their entirely justifiable insistence on avoiding the value judgment phrases, they describe them as "inherited prescriptions in dogmatic, normative-ambiguous terms" (p. 11). After the first chapter of some ninety pages formulating the basic approach and introducing the authors' vocabulary as well, the seven chapters which follow are knit together by a common analytical framework. But each is essentially an independent essay, and thus also contains the essential analysis which makes for a degree of repetition.

The dialogue between McDougal, supported by his associates, and certain other observers will continue, thus testifying to the freshness and vitality of his approach. There is the issue of how far emphasis on the *process* of decision-making involving the constant making and remaking of rules, is more accurate and helpful in understanding law and its application than a study of the *rules* themselves as existing or projected norms. This reader does not see these approaches as alternatives, one of which is to be adopted and applied, and finds important precision in analysis in McDougal's approach. There are differences about the extent of the subjective element in the policy-oriented approach on the one hand, and how far it reflects current developments in the social sciences on the other. Also, different observers and decision-makers may reach differing results when applying this approach in a specific case. These questions will involve continuing debate.

This reader, as a practitioner, first examined one chapter of this volume without, as here recommended, attempting to master its over-all analysis. Even when thus approached, the scholarly research contained in the sections on trends of decisions was important and helpful. Certainly it would be a handicap to an advocate to suspect that his opponent was

⁵ 1947 Proceedings, American Society of International Law 47.

basically familiar with this volume, and not attempt to understand it in equal depth.

McDougal's personal style, including his love for the attack, enlivens many pages. In short, this is an important part of the broad study of McDougal and his associates, with many insights tucked within its pages in addition to the grand lines of its approach and the depth of its scholarship.

JAMES N. HYDE

Cases and Materials on the Law and Institutions of the Atlantic Area.

Preliminary edition. By Eric Stein and Peter Hay, editors. pp. xix, 457. \$6.00.

Documents for Use with Cases and Materials on the Law and Institutions of the Atlantic Area. By Eric Stein and Peter Hay, editors. pp. 183.

\$4.00. Ann Arbor: The Overbeck Company, 1963. \$10.00 per set.

The Common Market gradually penetrates the American law school's classroom. Indeed, so novel an experiment in international organization could not long remain stranger to it. Bound together by the Rome Treaty of 1957, the six countries composing the European Economic Community and the Common Market evolving within it attract attention in various fields. An obvious example is a course treating international trade or investment. A course so oriented tends to view the Community primarily as a trading bloc, or as a region developing unified legal principles relevant to American business. Its selective approach to the study of the Common Market would likely stress such matters as tariffs, anti-trust laws or establishment rights. The focus of the course remains international transactions, and the Common Market sporadically intervenes.

But of itself, without regard to the challenge which it directs to American interests, the new Community offers a splendid subject for study. As an effort to impose common rules upon six nations and to foster common planning for matters as "political" in complexion as they are "economic," it intrigues both statesman and lawyer. To explore the Common Market from such a perspective, to stress what has been termed the "peculiar symbiosis" between Community and national laws and the allocations of competence between national and Community institutions, is to study constitutionalism and the process of federation in a distinctive setting.

Such is the setting developed by Professors Stein and Hay in their casebook. The book is unique, a first effort to capture the novelty and variety of the "European movement" in materials suitable for law students. These materials are so arranged and so permeated with the editors' questions as to enable the student to sense the complexity of the Community and to explore the larger issues that it evokes. Both editors have written frequently on the Common Market. Their combined experience and the imagination which they have brought to this venture have produced this preliminary edition of a casebook that promises to be of distinctly high quality.

Faithful to the editors' promise appearing in the preface, the book critically examines this "search for new institutions to serve new needs which can no longer be satisfied in a national context alone . . ." (p. iii). To this examination Professors Stein and Hay have applied a comparative method. Their materials are rich in references to analogous problems that have arisen within the federal structure of the United States or within other regional or global organizations. Aspects of civil law and Anglo-American law, of public and private international law, become relevant to the student's inquiry. There are selections from books about non-legal disciplines, primarily economics, which explain the occasion for, and impart significance to, the Community's legal innovations. In brief, the casebook has impressive scope and high purposes. Some suggestions below may help to bring these purposes nearer to fruition in the definitive edition.

Nine chapters compose four major groupings. To introduce their subject, the editors present a variety of materials (excerpts from national statutes and constitutions, excerpts from books and articles, decisions of national courts and of the Community's Court of Justice, acts of the Community's "legislative" and "executive" organs) exploring the relationship between national and Community law and institutions. I might add that this ingenious marshaling of such diverse materials, addressed to a common inquiry, characterizes the entire book. The two succeeding chapters examine briefly the Community's institutions: Commission, Council, Assembly and Court of Justice. There follow four chapters which approach the work of the Community from a functional rather than institutional perspective: tariffs and commercial policy; protection of competition; establishment and free movement of persons and capital; and coordination of economic and social policy. Two concluding chapters consider distinct but related themes of the broader movement towards European unity: the protection of civil rights and the nexus between common military planning (NATO) and political unification. Although the E.E.C. is the dominant subject of Chapters I through VII, several sections incorporate relevant experiences within the European Coal and Steel Community.

The study of "Community law" of course pervades the book. By that law, I refer to the institutional arrangements or procedures and to the substantive principles or rules expounded in the treaty, or developed by the Community's organs within the constitutional framework established by the treaty. With particular skill the editors first lead the student to consider aspects of different national constitutional structures and the varying juristic techniques by which Community law is absorbed into the six legal systems. The task was not easy. Thirty-seven pages contain lean expositions of the constitutional problems posed within many countries when treaties confine a nation's sovereign prerogatives. The risks of such slender treatment are obvious, here and in later portions of the casebook tersely addressing other basic themes. But these sections, while not finished portraits of their subjects, are more than casual snapshots. They

do evoke the major legal issues underlying the Community's origin and growth. By treating these issues in a comparative dimension, the book treats them the more meaningfully.

I do suggest an expansion of these introductory materials to present through text rudimentary aspects of certain areas of international law, conventional and customary. Recent years have witnessed a continuing proliferation in the courses offered by major law schools in international or "transnational" or foreign law. Whether students enrolled in these electives have the time or inclination to select more than one among them seems to me at present highly problematic. If I am correct (and I do not include seminars), this situation raises vexing pedagogical problems for a course treating as specialized a topic as the Common Market. Probably most students, whatever their academic background, are aware that the Community achieves far more than was possible under a system of customary law or under limited bilateral treaty arrangements. But would not an awareness of the nature of prior efforts to accommodate the interests of different nations for the common good lend historical perspective and depth to this course? I refer particularly to some textual discussion of the painfully slow means by which customary law has developed, and of the limited scope of its doctrines expressed in the notion of "domestic jurisdiction"—tariffs, immigration, establishment rights, and so on. I refer also to some description of the limited agencies for international adjudication, arbitral or judicial, of the "national" character of claims or litigation, and of the consensual basis to the jurisdiction of any international tribunal. With such background, the student could more richly appreciate the inventiveness of the Community in its institutions and doctrines. The Common Market could better be seen as part of a spectrum extending from the freedom of choice reserved to nations under the permissive structure of customary international law to the tightly welded federalism of the United States.

I would suppose that the chapters on the Community's institutions seek to inform the student how the Community functions and to illustrate the originality of its structure. They appear too sparse to realize adequately this purpose. To be sure, much information in the later chapters concerning different substantive problems reveals the relations among, and complex tasks of, the institutions. To a considerable degree, this approach to the study of the Community's structure and processes appears sound, indeed preferable. But more explicit consideration of certain problems at the outset, abstracted from particular functional settings, would serve to distinguish the Community from its less ambitious predecessors and to convey a fuller sense of its organic composition. Case histories could pungently describe the evolving pattern of co-operation between the Commission and Council. Particular attention could be directed to the various forms through which the institutions act—the regulation, directive or decision defined in Article 189 of the treaty. Consideration of the utility of each form within the treaty and of the reasons for differentiating among them in particular articles would illumine some of the Community's

strengths and weaknesses and the distinctive nature of its "law-making" powers.

The study of the Community's Court of Justice should yield particularly rewarding results. To this inquiry, the American law student brings a familiarity with dual systems of courts and with a Constitutional structure permitting review by the Federal judiciary of all matters of Federal concern. The problems before the Community therefore become the more apparent, the easier to explore in depth. The casebook seems to me to accord them too scant attention. It offers brief descriptions of aspects of the court systems in some of the member countries, particularly the administrative courts in France and the Constitutional Court in Germany. These are useful, indeed essential to illustrate the sources for many jurisdictional concepts in the treaty. They should be expanded to show (for example) the analogies in the French system to the "evocation" procedure of Article 177. But in addition, I suggest that some comparison with our own judiciary would be provocative. What are the salient distinctions between the jurisdictional grants to the Court of Justice and the certiorari or appellate jurisdiction of the Supreme Court? In what respects are the powers of the Court of Justice more confined than those of the Supreme Court in its review of State court decisions? How do the grounds for review by the Court of Justice of action of the Council or Commission compare with our Administrative Procedure Act? To illustrate these questions and suggest tentative answers, the casebook could usefully employ excerpts from several of the Court of Justice's opinions. These appear to some extent, accompanied by helpful text, in later sections (pp. 195-197, 228-229, 235). Again I feel that a more systematic consideration of structure and institutions at the outset will better reveal the dimensions of the undertaking and better prepare the student for the later "functional" approaches. The distinctive rôle played by this Court in an international organization should be fully exploited by the materials.

To reveal how effective the fresh approach of the editors can be, one could select the chapter on free movement of goods and payments. Tariffs and the theoretical arguments for free trade are not among the elusive mysteries of our contemporary world, but to the average law student they are relatively arcane subjects. Probably with this in mind, Professors Stein and Hay have introduced succinct excerpts from the writings of such distinguished economists as Kindleberger, Meade and Viner which suffice to open debate over the merits of free trade or protectionism and the consequences of a customs union. The student has some theoretical framework within which to evaluate basic goals of the Community. After the discussion of commercial policy and safeguard clauses within the E.E.C., there appears a brief section treating analogous problems within the United States: Constitutional restrictions on State powers to tax and résumés of the Trade Expansion Act of 1962 and allied legislation. Again the developments in Europe can be more critically appraised when placed beside the practices of a developed federal state. The chapter includes brief, almost cryptic, descriptions of GATT and the International Monetary

Fund, the latter too frugal in developing the important distinctions in the Fund Agreement, also relevant to the Rome Treaty, between current transactions and capital movements.

One of the fascinating aspects of the Community is the variety of techniques by which it develops a more cohesive market among its members. There may be resort to Community law, as with tariffs or anti-trust doctrines. There may be efforts to reconcile divergent national laws, through multilateral conventions or through "uniform law" movements. This theme of harmonization of national laws is potentially of great significance, and well suited to classroom study. I feel that the casebook understates it. There are brief textual summaries of plans in certain fields, but the materials could well include a case study in some depth in one field—a study of the problems generated by diverse national laws, the difficulties in resolving diversity into uniformity and the relevance of the whole undertaking to a functioning and truly common market. Ample source materials exist in such fields as sales taxation. By the time the definitive edition appears, examples could be drawn from other fields now under debate, such as judicial jurisdiction and enforcement of judgments.

This possibility of a far richer choice from which to cull materials for the next edition is endemic to any casebook heavily reliant upon Common Market materials. The Market is in its infancy, its personality and prospects still dimly perceived. The "percentage growth" each year in learning and experience is correspondingly high. To attempt to present a comprehensive and balanced view of the law and institutions of the Community in 1963 is comparable to an effort to prepare in 1802 a definitive treatise on American Constitutional law. Acts of the Community's organs or a change in the spirit in which they function could significantly modify the Common Market's legal complexion. Political dissension increasingly manifest within the Community alerts us to the possibility of radical changes or perhaps atrophy in certain channels of development. This is not to suggest that a casebook is premature. On the contrary, it assumes added color and excitement, as the student is made aware of the tentative and formative nature of this period. It does suggest that careful reconsideration is an essential as succeeding editions appear.

The book of documents accompanying the casebook is, if anything, comprehensive. It embraces among other materials translations of the treaties of the three European communities, key regulations and "general programs," GATT and the Trade Expansion Act of 1962. I find the translation of the Rome Treaty (the same form appearing in the *United Nations Treaty Series*) often inadequate, particularly by comparison with that prepared by the British Foreign Office and published in the *CCH Common Market Reporter*. One further basic criticism: The minuscule type in which most of the text is set strains credulity as well as eyesight, and provides a jarring setting for treaties writ so large on modern European history.

My suggested changes in this casebook are in one sense substantial, in

another marginal. They would involve expansion of certain sections but would not affect the basic structure of the book or clash with its basic concepts. Obviously other criticism could be directed to this effort in so uncharted a field. Certain of the materials, such as excerpts from commodity agreements, defy adequate comprehension without explanation of their economic background and practical operation. Certain sections have a somewhat chaotic character and require refinement before their materials are successfully integrated. But this book has high prospects and merits high praise. It evidences what imagination and care can fashion in bringing exotic subjects and foreign laws into the domestic classroom. It relates law to economics and politics in a challenging setting and points a path towards the effective use of the comparative method in a variety of courses. I await eagerly the definitive edition.

HENRY J. STEINER

Objective International Personality of Intergovernmental Organisations. Do Their Capacities Really Depend upon Their Constitutions? By Finn Seyersted. Copenhagen: 1963. pp. 112.¹

The great increase of international organizations has led, in the literature, to the emergence of a "general theory" of international organizations. To this theory the Scandinavian author makes a far-reaching and challenging contribution, the topic of which is clearly indicated by the title and sub-title. He starts from the advisory opinion on *Reparation for Injuries* (1949), in which the International Court of Justice pronounced the objective international personality of the United Nations. While some international lawyers accepted this statement, the United Nations being a very special case, the majority attacked it. The prevailing doctrine is that international organizations, unlike states, do not come into existence directly by international law, as soon as certain facts, determined by international law, are present, but must be created by treaty, which is not binding on non-member states. Hence they have international personality only insofar as the treaty confers it on them; it is only this treaty, which forms their constitution, which delegates to them such powers as they may exercise; unlike states, they are not original, necessary, but derived subjects of international law; not general, but limited, subjects with no objective personality, and therefore need recognition, which, in this case, has constitutive effect, by non-member states. The prevailing doctrine can invoke many dicta of the Court in the above-cited advisory opinion.

In contradiction to this doctrine, and contrary to that of the International Law Commission, the author develops his own opposite doctrine. In doing so, he takes into account a great deal of the literature, and a wealth of quotations from the constitutions and the practice of many international organizations. He gives a tentative definition of international organizations. Actually only one condition is necessary but also

¹ This book is a pre-print of the study which is being published as Fasc. 1-2 (Vol. 34, 1964) of the *Nordisk Tidsskrift for International Ret og Jus Gentium*.

sufficient: international organs (i.e., established by two or more states), which are not all subject to the jurisdiction of any one state and which are not authorized by all their acts to assume obligations merely on behalf of the several participating states (that would not be an international, but a joint organ), must have been created. This definition excludes international private organizations and those with no independent organs, but includes the "intergovernmental" organizations.

While most international organizations have been created by a preceding international treaty, this is no legal requirement. There are international organizations which have come into existence by a mere resolution of an international conference or, e.g., by parallel decisions of the Parliaments of the participating states (Nordic Council). What is legally important is not how they were established, but that they exist. While many founding treaties contain clauses on their organs, distribution of competences, procedures, and powers, these are not necessary; there may be no treaty. As soon as international organizations, fulfilling the one above-named condition, exist, they all have full objective international personality by virtue of international law, not through their constitutions. They are authorized directly by international law to perform any international act which they are in a practical position to perform. The prevailing doctrine speaks of delegated and implied powers, and that is also the starting-point of the reasoning of the Court; but the Court even in 1949 considerably broadened the interpretation of the "implied" powers and has gone much farther in its advisory opinion on *Certain Expenses of the United Nations* (1962). In the face of the overwhelming practice, the author states that the powers of international organizations are not delegated by, nor derived from their constitutions, but are inherent by virtue of international law.

The powers do not depend on the constitutions. The respective clauses have rather a negative significance, insofar as they exclude the exercise of certain capacities, or by rules on the distribution of competences between the various organs and on the procedures under which they shall act, so that the violation of these rules may entail the internal invalidity of their decisions. International organizations also need special authority to make decisions binding on their member states, or to exercise jurisdiction over the territory, nationals or organs of the latter, as well as to make decisions binding on non-member states. But for the exercise of all these capacities the states, too, need a special legal basis. This authority can be given to international organizations by the constitution, but also by treaty or otherwise.

The author admits that international organizations are different from states, but, according to him, the difference is a factual rather than a legal one. From a legal point of view, international organizations are, like states, directly by international law, general international persons. The prevailing doctrine, he claims, is untenable in the face of practice, except by fictions. His whole theory is based on practice, but he holds that this practice is constant and far-reaching enough to constitute general custom-

ary international law. It will be interesting to watch the reaction of prevailing doctrine to this challenge.

JOSEF L. KUNZ

Canadian Yearbook of International Law. Vol. I, 1963. Published under the auspices of the Canadian Branch, International Law Association. Vancouver, B. C.: Publications Centre, University of British Columbia, 1963. pp. 325. Index. \$8.50.

The appearance of this volume is an event of major importance in the development of international legal study and research in North America. In his foreword Professor N. A. M. MacKenzie, Q. C., President Emeritus of the University of British Columbia and honorary editor of the *Yearbook*, usefully recounts the history of a successful effort. He mentions progress toward the organization of Canadian scholars professionally interested in the study of international law and in the type of publication which has now become a reality. The Editor-in-Chief, Professor Charles B. Bourne of the University of British Columbia, refers to the "growing feeling among members of the Executive Committee of the Canadian Branch of the International Law Association that the time was ripe for a Canadian publication devoted exclusively to international legal matters."

The importance of the new enterprise is underlined by the high quality of the contributions to this first volume. Two of the leading articles are in the French language. One of the contributors writes that some Canadian practitioners and teachers "are becoming technically bi-systemal" and refers to the "lenses of our special relations with the common and the civil law" (pp. 16, 17).

In the opening article, on "Some Main Directions of International Law: A Canadian Perspective," Professor Maxwell Cohen characterizes the launching of the new *Yearbook* as "a desirable national effort to provide a forum for the data and the ideas of international law derived both from Canadian experience and from general theory and practice" (p. 15). He elsewhere refers to the "lingering parochialism of an ex-colonial society turned sovereign" (p. 17). While there may be some disagreement south of the international border on some points, such as that concerning the sector principle (p. 23), the study sets a high standard of scholarship.

In his study of "Soviet and Western International Law and the Cold War in the Era of Bipolarity," Professor Edward McWhinney refers to the realist view that international law reflects the balance of power relationships (p. 47). In the confrontation concerning Cuba he sees a "sort of nuclear age Due Process" (p. 67), and submits that a new "balance of power" may be the best practical guarantee of peace under present conditions (p. 75).

Discussing Canada's territorial waters from the point of view of international law, Professor Jacques-Yvan Morin explains how Canada has asserted her full competence with respect to such waters, following English

tradition (p. 86). He notes at least five distinct laws which define the extent of Canada's territorial sea for different purposes (p. 101), comments on the positions which Canada has taken at recent international conferences (as at pp. 118 and 119), and foresees (p. 148) a community régime which would protect the interests of all while safeguarding the *jus communicationis* which Francisco de Vitoria regarded as one of the foundations of international law.

Writing on "Canadian Inland Waters of the Atlantic Provinces and the Bay of Fundy Incident," G. V. LaForest of the Faculty of Law at the University of New Brunswick sharply criticizes the decision of Umpire Bates in *The Washington* and notes that Great Britain never accepted the correctness of the decision (pp. 162, 164-165). He finds that Canada has overlooked "for certain purposes" its claim over the Bay of Fundy (p. 165), and feels that recent developments, such as the Geneva Convention on the Territorial Sea and the Contiguous Zone, as also the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries* case, would justify even more extensive claims by Canada to inland waters in the Atlantic region (p. 169).

In his study, "Le régime des cours d'eau internationaux," Professor André Patry, Professor in the Faculty of Law and in the Faculty of Social Sciences at Laval University, considers the régime of international waterways and foresees the time when states may recognize the principle of unity of river basins (p. 173). Noting that only one American state (Chile) has ratified the Barcelona Convention, he observes that the latter provides rules that are widely applied (p. 183). In the absence of an international convention defining rules on the exploitation of waterways, the rules of law of the *voisinage* seek to fill this lacuna (p. 211).

From his first-hand acquaintance with the settlement, Judge John E. Read, former Canadian member of the International Court of Justice, has contributed a valuable account of the Trail Smelter dispute between the United States and Canada. He also discusses (at pp. 228-229) the constitutional power of the Canadian Parliament to enact law that might be necessary to ensure compliance with a convention such as that under which this arbitration occurred.

Gerald F. Fitzgerald, Senior Legal Officer, International Civil Aviation Organization, and Lecturer at the Institute of Air and Space Law at McGill University, has contributed to the *Yearbook* a timely article on "The Development of International Rules Concerning Offences and Certain Other Acts Committed on Board Aircraft." He considers, for example, the situation which arises when a person has been placed under restraint on board an aircraft and a state on whose territory the aircraft lands (being a non-contracting state) does not allow his disembarkation (p. 246). The author envisages a convention on offenses and certain other acts on board aircraft which will mark the culmination of almost half a century of effort (p. 251).*

* See Convention signed at Tokyo, Sept. 14, 1963, 58 A.J.I.L. 566 (1964).

Writing on "The European Economic Community and the Most-Favored-Nation Clause," L. G. Jahnke of the Faculty of Law, University of British Columbia, discusses the compatibility of a free trade area with members' commitments under the GATT (p. 269). On the question of whether the E.E.C. countries have departed from their most-favored-nation commitments, some readers of the article might conceivably feel that the evidence is not yet complete and that a final conclusion might well await further developments.

To a "News and Comments" section of the new *Yearbook* Donat Pharand of the Faculty of Law at the University of Ottawa has contributed a useful analysis of the advisory opinion of the International Court of Justice in the *Expenses* case. Geoffrey N. Pratt, Lecturer and Assistant to the Director of the Institute of Air and Space Law, McGill University, has a brief but informative note on the Institute; there is, he submits, "every expectation that the Institute may become a significant agent in the future development of air and space law research and teaching."

Members of the American Society of International Law have every reason to congratulate their Canadian colleagues on the auspicious beginning of the *Canadian Yearbook*.

ROBERT R. WILSON

International Control of Sea Resources. By Shigeru Oda. Leyden: A. W. Sythoff, 1963. pp. 215. Index. Fl. 29.50.

This book by Dr. Oda, Professor of International Law at Tohoku University, is not a comprehensive unified treatment of the subject, but a series of three essays: the first and longest on fundamental problems of international fisheries, the second on the continental shelf, and the third on sedentary fisheries. Each piece shows wide acquaintance with the history of the topic and the relevant literature, and recounts in almost painful detail the manner in which it was dealt with in the International Law Commission and at the Geneva conferences of 1958 and 1960. In addition to this familiar matter, however, the book also contains other material less readily accessible, including interesting data on the working of Japanese fishery arrangements with the U.S.S.R. and with Communist China.

The author views with concern the inroads which he believes to have been made by developments of recent years on the traditional freedom of the seas. With respect to fisheries, he is particularly critical of two doctrines currently in favor with substantial numbers of states: the principle of preferential rights for the coastal state, which appeals especially to underdeveloped countries, and the principle of abstention, which operates to exclude newcomers from a fishery already being scientifically exploited at an optimum level of yield. On the former, he questions whether a geographically privileged position should automatically confer on a coastal state a legal benefit to the detriment of other states to which the fishery

may be in fact more important. On the latter, he points out that the requirement of abstention can easily develop from a conservation measure into a means to preserve a monopoly in high seas which should be open to all. In this connection he emphasizes that the real problem is not conservation *per se*—which is universally granted to be desirable and in most cases scientifically feasible—but the allocation among competing states of equitable shares in a fishery. This problem, he suggests, was not adequately dealt with in the Geneva conferences, although he commends the Conservation Convention for affirming the need of conservation and for its provisions for settling fishery disputes.

Similar misgivings mark Professor Oda's views on the continental shelf, although he admits that the Continental Shelf Convention has probably confirmed a legal pattern which (like the late Professor Scelle) he finds potentially harmful to other maritime interests. He fails, however, to suggest what an acceptable alternative might have been: a hope for "joint usage and common access" was not a practical answer to the pressing need for a legal régime to govern shelf development. He also deplores the decision at Geneva to subject sedentary fisheries to the shelf régime, and effectively points out the difficulties and opportunities for abuse which this creates. It is difficult for this reviewer at least to disagree with his conclusion that there is no good reason for separating sedentary from other fisheries, and that the duty of conservation should apply to all fisheries in the high seas alike.

The volume is a useful reminder that the international control of sea resources involves deeply conflicting interests which are not to be reconciled by any easy formulas. Whether or not one agrees with the author on particular issues, he is clearly right in saying that legal technique alone is not sufficient to produce permanent solutions.

RICHARD YOUNG

Der Europäische Beamte und Sein Disziplinarrecht. Europäische Aspekte. (Eine Schriftenreihe zur Europäischen Integration.) By Adrian Clemens. Geleitwort von Hans Furler. Leyden: A. W. Sythoff, 1962. pp. xxxvii, 392. Fl. 32.25.

The European civil servant and his legal status, with special reference to "disciplinary law," are the principal subject of this study, which aims at a uniform code of disciplinary rules, applicable as a minimum to the European Atomic Energy Community (EURATOM), European Coal and Steel Community (E.C.S.C.) and to the European Economic Community (E.E.C.), but preferably to all European institutions based on inter-governmental agreement. To this end the author examines in Part I (pp. 1-67) in considerable detail the European civil servant in the broader sense (pp. 11-52) and the European civil servant as defined in Article 212 of the E.E.C. agreement and Article 186 of the EURATOM agreement. Part II, in its first section (pp. 68-153), deals with substantive dis-

ciplinary law, and in its second section (pp. 154-254), with procedural disciplinary law.

The author in presenting his views pays due regard to the literature relating to international civil servants in general and to the European civil servant in particular. From the viewpoint of comparative law the treatment of substantive disciplinary law is of special interest; it combines a comparative analysis of the internal law on the subject adopted by Belgium, France, Federal Republic of Germany, Italy, The Netherlands, and Luxembourg with that of corresponding provisions, if any, adopted by world-wide international organizations (League of Nations, United Nations, UNESCO, and I.L.O.) and by the following European institutions: Council of Europe, European Council for Nuclear Research, European Defense Community, European Economic Community, European Free Trade Association, Organization for European Economic Cooperation, North Atlantic Treaty Organization, and Western European Union. The documentary Appendix (pp. 257-392) contains the complete texts, or relevant excerpts, of the substantive and procedural rules adopted by the above-mentioned countries and international organizations.

Because of limitations of space it is not possible to take up the numerous questions relating to the theory and practice of international administration touched upon in this work, which constitutes a systematic, well-documented and in many respects original contribution to the growing literature on the status of international civil servants. Having said this, the reviewer should like to record the following reservations to the principal objectives and conclusions of this book: (1) Although a high degree of uniformity of the terms of service, pension rights, and staff regulations for international civil servants is probably desirable, the arguments advanced by the author in favor of virtually complete uniformity of the substantive and procedural disciplinary law of European institutions are not completely persuasive; (2) as evidenced both in the text and in the Appendices, there is already considerable consensus as to the essential features of the disciplinary law of international organizations; however, the author's proposals *de lege ferenda* to replace what he considers primarily French legal principles by certain German legal principles, including provisions for a disciplinary court, are likely, if acted upon, to necessitate cumbersome and expensive machinery whose beneficial effects on European institutions and civil servants are by no means self-evident.

However this may be, the author has clearly and in great detail presented his views and recommendations (see especially the principles on substantive disciplinary law on pp. 149-153 and on procedural disciplinary law on pp. 252-254) and has thereby furnished a well-reasoned basis for constructive discussion of, and policy decisions on, the future disciplinary law of the European civil servant.

HANS AUFRICHT *

* Counselor, Legal Department, International Monetary Fund, Washington, D. C. The views expressed are those of the author and not necessarily those of the International Monetary Fund.

The Inquiry: American Preparations for Peace, 1917-1919. By Lawrence E. Gelfand. New Haven and London: Yale University Press, 1963. pp. xv, 387. Appendices. Index. \$8.75; 65 s.

This is a study that should be of interest and value both to the historian of the first World War and the making of the peace treaties and to the political scientist who is concerned with the process of decision-making and particularly with the rôle of the academic expert in the making of foreign policy decisions. Professor Gelfand has done a very thorough and well-documented job of telling the story of the Inquiry, a pioneer experiment in the mobilization of academic experts to help a government shape a new world order at the conclusion of a devastating war, and has given us a judicious and balanced evaluation of the success of this effort.

The study is illuminating on many counts. It shows the inadequacy of the organization and staffing of the Department of State to meet the demands placed upon the United States by the assumption of a rôle of leadership in World War I. It also shows the unpreparedness of the academic community to meet the challenge offered by the need of experts to assist in preparations for peace. Few members of the Inquiry—almost wholly composed of leading scholars—could rightly be regarded as experts in their assigned areas. As Charles Seymour observed, "Very few regional experts were available." (p. 315.) If the American Government was not prepared to meet the challenge of world leadership, it was equally true that the American scholarly community was not ready. And yet in spite of all its defects—loose organization, unavailability of recognized experts, and personal tensions and frustrations, of which there were many, the Inquiry may be judged to have been a substantial success. Territorial arrangements advocated by the Inquiry were accepted at Paris to a large extent, and this was the area of its principal activity. Also with regard to international peace organization, colonial problems and problems of labor, the Inquiry's recommendations had substantial acceptance. Its work in the economic and financial fields was less well developed and less seriously undertaken. It was therefore not surprising that its contribution in these areas was minimal. In Professor Gelfand's words, "[l]acking the Inquiry, however inadequate it seemed at times, the Wilsonian cause at Paris might easily have suffered to a greater extent than was actually the case." (p. 333.)

Professor Gelfand calls attention to the frustrations and disappointments that members of the Inquiry—especially those who went to Paris—suffered as the result of the failure of American negotiators on numerous occasions to accept their recommendations and insist on their acceptance. Samuel Eliot Morison, one of those who experienced bafflement at the time, later observed that "there were considerations of international politics, strategy and common courtesy to our allies which in many instances, perhaps the majority of cases, prevented President Wilson from following his experts' advice." (p. 332.) Accepting this limitation in the expert's rôle, we can more readily accept Professor Gelfand's evaluation of the rôle of the Inquiry.

LELAND M. GOODRICH

Propaganda and the Cold War. Edited by John Boardman Whitton. Washington, D. C.: Public Affairs Press, 1963. pp. vii, 119. \$3.50.

Has the United States an attractive message, and has it organized to present it adequately? Dr. Whitton and his thirteen colleagues, in reports submitted to a Princeton conference in 1962, address themselves to these questions. The result is a wide-ranging discussion, with food for thought, but no real consensus.

Frederick C. Barghoorn opens with a measure of the Soviet challenge seeking to associate itself with mankind's aspirations and, above all, peace. To match this he favors a frontal attack on Soviet controls over intellectual endeavor and secrecy. Murray Dwyer says absence of plans and policies cannot be compensated by whatever psychological instrument. His formula is "partnership with the free world" as having the greatest appeal, especially since Western Europe has repudiated strong United States leadership. Gallup favors trying to match Russian efforts in ideological warfare. The men in the private agencies trying to do so give their thoughts on this. Lewis Galantieri says that the quality of our civilization and not techniques have won us friends in Western Europe. He suggests that the real focus of our efforts must now be the East. Gene Sosin would pinpoint it on the skeptical youth of the Eastern Europeans. Allen Dulles favors a hardheaded line seeking not to gain love but respect. Karl Mundt wants a National Freedom Academy to train Americans dispensing information.

No one mentions the quiet effect gained by mingling American specialists with their counterparts throughout the world, either at international congresses or in individual exchange. Since intellectuals are the primary instigators of policy, especially in Asia and Africa where the United States' image requires major attention, more should be done to facilitate exchange of persons. Probably it should be conducted through international specialized agencies, and notably UNESCO. Regrettably the Department of State's misunderstanding of the value of supporting UNESCO budget requests for subsidization of professional organizations, on the assumption that penurious intellectuals can support themselves, hampers the exchange. Why not put our money on élites, and watch the masses follow their leaders? Some of this has been done by exchanging top officials, but the thrust must go deeper. If our desired image is one of partnership, our hoped-for friends will probably be readier to believe it, if they see it as a living thing through their relationships with specialists of all types mingling constantly in multilateral exchange, expanded on the initiative of the specialists themselves but with government aid. France has learned this method, and it is a primary element of their effort to win friends around the world. The United States could use the method too.

JOHN N. HAZARD

BRIEFER NOTICES

Die allgemeinen Regeln des völkerrechtlichen Fremdenrechts und das deutsche Verfassungsrecht. By Karl Doebling. (Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, No. 39. Cologne and Berlin: Carl Heymanns Verlag, 1963. pp. xii, 205. DM. 30.) Aliens, and the international and the West German law relating to them, are in this book a vehicle for a study of the relations between international law and municipal law resulting from the inclusion in the Bonn Constitution of Article 25, especially its second sentence allowing rights and duties to arise directly from general rules of international law. The author begins by treating Article 25 as changing the status of general rules of international law from that either of a method of expressing national law or of a message from the international community to the state into an immediate source of law. He is unhappy about exposing German law to the uncertain future content of international law and about imposing upon the citizen rules of which he can have no knowledge and the content of which he cannot influence through elected representatives. International custom is likened to an absolute monarch, isolated and unresponsive to citizens' influence. Solace is taken in the somewhat imprecise thoughts that, except in the special case of general human rights, international law does not intrude between state and citizen and that the circumstance in which mistreatment of an alien is *uno actu* a violation of both international and German law exists only because German law so wills it.

Despite evident love of things German that might have overly colored the body of the study, the author skillfully develops a conceptual progression through the uncertainties left by the makers of the Fundamental Law that led Dr. Jahrreiss in 1952 to remark that "No one knows what today to call binding." Judicial guidance is still limited, although Doebling certainly makes use of judicial utterances to date in the process of obtaining a ranking that places the general rules of international law between statutes and the Fundamental Law. He also gets a measure of more specific judicial help on some points, for instance, in attempting to reconcile Article 3, Section 1, declaring all men to be equal before the law (*Gesetz*), with the principle of the "minimum standard" insofar as introduced into German law by Article 25. But, skillful as the study is, its author must be among those who hope for the occurrence of cases requiring further judicial clarification of West German Constitutional ambiguities—to read a value for scholars into disputes.

WESLEY L. GOULD

Australia in World Affairs 1956-1960. Edited by Gordon Greenwood and Norman Harper. (Issued under the auspices of the Australian Institute of International Affairs. Vancouver: Publications Centre, University of British Columbia, 1963. pp. viii, 430. Index. \$8.50.) An objective evaluation of the national policy of Australia has not been left by the Australian Institute of International Affairs to foreigners. In this second volume of *Australia in World Affairs*, covering the period 1956-1960, Professors Gordon Greenwood and Norman Harper bring together papers on nine international topics of recent importance to Australia by themselves and seven other members of the academic profession. The initial section on "The Australian Community" describes Australian foreign policy in action and its overseas economic relations. A brief second section describes Australian participation in the United Nations. A final section

on regional affairs contains chapters on Australian relations with the United States, Japan, Indonesia and India, and the problems of Australian trust areas and Antarctic claims. The last section is especially recommended to those who seek a reliable evaluation of the situation in the Pacific and Asiatic community.

The defense position of Australia is a continuing theme in the separately authored studies. Australians recognized the change in their international position that began after the second World War. During the period upon which his book focuses, the changing relations of Australia with the United States, the Commonwealth and the Asiatic area remained of primary interest.

The matter-of-fact way in which these writers assess their nation's strengths and weaknesses may be a key to understanding the considerable influence that a state of this size has in international councils.

An installment in a series may not be confined easily to the period to be covered. The topics that are of significance for 1956-60 were not necessarily of sufficient importance to have a forerunner in the previous volume. The result in this case is a rather large proportion of space allotted to background. Most of the contributors are historians and they have gone into details of earlier times to a degree somewhat more than might be expected in a volume labeled as this one is. This is mentioned, not to detract, but to describe the scope of an excellent study.

JOHN M. HOWELL

The Future of the Atlantic Community. By Kurt Birrenbach. (New York: Frederick A. Praeger, 1963. pp. xii, 94. \$3.50.) This is an excellent survey of the Atlantic Community—its problems and its prospects for the future. The author takes as his theme the conviction that if the West is to survive as a free society, a united Europe must join hands with the United States in a truer partnership. The one great hope for the free world in the future, he contends, is the creation of a forward-looking Atlantic Community of nations dedicated to the great goals of human progress and the preservation of liberty.

The book combines all the virtues of brevity, logical organization, and clarity of expression. In short compact chapters the author deals successively with the nature of the Atlantic Community, the strengthening of NATO, the economic problems facing the Community, ties between the Community and other regional groups, and the difficult problems of European unity. He does not confine himself to an analysis of existing problems. Drawing on his own rich experience as a member of the Parliament of the Coal and Steel Community and of the Common Market, as well as the Foreign Relations Committee of the German Bundestag, he has a number of concrete suggestions to offer to help solve the difficult problems that must be faced if the Atlantic Community is ever to become a reality.

Most students of world affairs will probably agree with many of Dr. Birrenbach's basic assumptions which include the following: (1) that close ties between Germany and France are essential for the unity of continental Europe; (2) that the fate of the future Europe is bound to a close alliance with the United States; (3) that the United States cannot carry out its global tasks without the help of Western Europe; (4) that further steps towards European unification are necessary prior to the development of an effective Atlantic partnership; and (5) that the exclusion of Great Britain from the Common Market would have extremely serious consequences for the future of the Atlantic Community. Unfortunately the book was written prior to General de Gaulle's famous press conference in which he vetoed Britain's participation in the Common Market, and the

reader is left wondering how much of the author's persistent optimism would be retained if he were asked to re-write his original manuscript. Even so, the fundamentals are sound and the events of 1963 do not detract seriously from the usefulness of the volume.

Despite the limitations referred to above, this reviewer has no hesitation in recommending Dr. Birrenbach's book as an excellent primer for the intelligent laymen interested in Atlantic Community developments. In addition to its educational value it should also make a significant contribution to the thinking of those individuals—both in and out of government—who are actively engaged in the building of an effective Atlantic Community relationship.

FRANCIS O. WILCOX
*Dean, Johns Hopkins School of
Advanced International Studies*

Human Rights in Europe. By A. H. Robertson. (Manchester, England: Manchester University Press; Dobbs Ferry, N. Y.; Oceana Publications, 1963. pp. ix, 280. Index. \$7.00.) Every student of the European institutions, in particular of the Council of Europe and of the European Convention on Human Rights, is indebted to Dr. A. H. Robertson for the contribution which, over the years, he has made to the literature on the significant developments and, in part, pioneering enterprises of the countries of non-Communist Europe. The present book adds another valuable item to the list. The author is Head of the Directorate of Human Rights in the Secretariat General of the Council of Europe. His account of the European Convention on Human Rights (Rome, 1950) and of the working of its machinery of implementation is an authoritative and reliable guide to the by no means uncomplicated institutions and procedures established by it. In a series of short chapters the reader is presented with a succinct description of the origins and the history of the Rome Convention, with a definition of the rights which the convention and two of its four additional Protocols guarantee, and with reports on the six groups of cases which had been declared admissible by the end of 1962 (*Greece v. United Kingdom*, *Austria v. Italy*, *Lawless v. Ireland*, *DeBecker v. Belgium*, *Nielsen v. Denmark*, and *Ofner and three others v. Austria*). One chapter each is devoted to the working of the Commission, to the rôle of the Committee of Ministers, to the jurisdiction and procedure of the Court and to the general provisions of the Convention. A fuller account is given of the *Lawless* case from the admissibility proceedings of the Commission to the judgments of the Court (preliminary objections, procedure, merits).

Of particular value is the chapter on the European Social Charter of 1961, which is the economic and social counterpart of the Rome Convention in the same way in which, by virtue of a General Assembly decision of 1952, the United Nations draft Covenant on Economic, Social and Cultural Rights will be the counterpart of the United Nations draft Covenant on Civil and Political Rights. The documentation relating to the legislative history of the European Social Charter is not easily accessible elsewhere and the chapter devoted to it therefore fills a special need.

While the book is an account of the convention and of the machinery it has created, the author does not hesitate to express his own well-founded opinions on many of the important questions involved. To give an example: The practical importance of the European Court of Human Rights is very often over-estimated, even in official quarters. This is illustrated by the recent (April, 1964) report by the United Nations Group of Experts on Human Rights in South Africa, which suggests as one of the alternatives to ensure the rights of all inhabitants that in the new South

Africa which the experts envisage "something on the lines of the European Court of Human Rights" be established. This would mean a court to which aggrieved individuals do not have access. In such a situation Mr. Robertson's emphasis on the fact that the jurisdiction of the Court is "very much of a contingent remedy" (p. 98) is of particular value. Among the appendices we find, in addition to the earlier instruments, the full text of the European Social Charter and also the texts of the three Protocols to the Rome Convention which were opened for signature in 1963 and which have also been reprinted in this JOURNAL.¹

EGON SCHWELB

International Non-Governmental Organizations and Economic Entities. A Study in Autonomous Organizations and Jus Gentium. By J. J. Lador-Lederer. (Leyden: A. W. Sythoff, 1963. pp. 403. Fl. 38.50.) This volume is an important contribution to the study of an important subject matter. The significance for current international relations of non-governmental organizations has been officially recognized in Article 71 of the United Nations Charter, which authorizes the Economic and Social Council to grant non-governmental organizations, international and national, consultative status within the world body, but it actually reaches far beyond this provision. International non-governmental organizations nevertheless have so far received only little attention both in American and European literature. True, Lyman Cromwell White, in his two monographs on "The Structure of Private International Organizations" and "International Non-Governmental Organizations," published in 1933 and 1951, respectively, has done valuable pioneering work in the field, but it was largely of a more descriptive kind. Lador-Lederer's treatise is the first systematic analysis of international non-governmental organizations. It deeply probes all their aspects, historical, political, legal, sociological, and economic.

Lador-Lederer pursues in his book both practical and theoretical purposes. He wants to show, first of all, the rôle non-governmental organizations can and should play in the future development of human rights. He speaks, with a lucky phrase, of the "tribunical" function of these organizations. International non-governmental bodies, cutting across national boundary lines, are apt to strengthen centripetal forces in the evolving world community. One may wonder, however, whether the author does not overrate the present and future efficacy of what he calls the "non-territorial forces of integration."

Lador-Lederer's chief theoretical concern is to clarify the legal basis and nature of international private organizations. He forcefully argues that the existence and continuous growth of these bodies requires the abandonment of the traditional notion that the international community is a society only of states, and international law a law only of and between nations. Lador-Lederer's philosophy on non-governmental organizations within the international community recalls the ideas of the pluralists on private associations within the national community.

The book, unfortunately, has been edited very poorly. But the involved presentation of facts and arguments should deter no student of international law and relations from reading the treatise.

ERICH HULA

Peace-Keeping by U.N. Forces: From Suez to the Congo. By Arthur Lee Burns and Nina Heathcote. (Princeton Studies in World Politics, No. 4. New York and London: Frederick A. Praeger, 1963. pp. ix. 256.) This is an interesting book about one of the most important problems of

¹ 58 A.J.I.L. 331, 333, 334 (1964).

our times. As the authors point out in their preface, their intention has been "to digest the experience from Suez to the Congo, so as to bring to light some of the limitations and possibilities of the United Nations' forces as means for the preservation of international peace and, in the Congo instance, of internal law and order." What are the political, military and administrative powers of United Nations forces that have been established since 1956? What is their jurisdiction? To what extent have they fulfilled the mandate of the United Nations in each situation? What bearing do their activities have on the ultimate success of the United Nations in the maintenance of world peace? These and other related questions are examined in this detailed analysis of the United Nations operations in the Middle East and the Congo.

By far the greater portion of the book deals with the Congo. At the outset the authors pass quickly in review the story of the U.N. forces in Suez, Lebanon and Jordan, where experience was a valuable teacher and where important precedents were established. Then they turn to the day-to-day operations of the United Nations in the Congo, looking into such problems as the recruitment, organization, equipment, deployment, discipline and command structure of UNOC, the relationship between the Secretary General and the other principal organs of the United Nations, the rôle of the headquarters staff, et cetera. Most of their conclusions appear to this reviewer sound; some are certainly open to question.

With respect to the Katanga episode the writers are inclined to be critical of the United States, the United Nations and the Secretary General. The United States, they believe, devalued the reputation of the United Nations "in order to win a round in the Cold War." U Thant departed from Hammarskjöld's careful impartiality and objectivity, in some cases ignoring the Security Council and the General Assembly, in other cases going beyond their mandate. The United Nations, on its part, "certainly lost its name for impartial arbitration and scrupulous adherence to the principles of its own charter."

Despite the legal arguments that can be made, many people close to the Katanga story are quite convinced that both the Secretary General and the United Nations, in the face of extreme provocation, acted with commendable patience and restraint. Whatever view one may take about this sorry dénouement, the book is well written and well documented and merits the careful attention of all students of United Nations affairs.

FRANCIS O. WILCOX

Linjekonferanser og Kartell-Lovgivning. By Arvid Frihagen. (Oslo: Oslo University Press, 1963. Summary in English. pp. 490. Index. N.Kr. 45.) This is a model handbook on *Shipping Conferences and Anti-trust Laws*, subtitled *Public Control and Regulation of Shipping Conferences and Other Private Restrictive Business Agreements in International Maritime Transport*. The author lectures on restraint of trade at the University of Oslo. His book treats with the 300 or so restrictive agreements, called "Shipping Conferences," which regulate traffic on almost all major trade routes by setting rates, controlling sailings, and pooling profits. To discourage outsiders, the Conferences use dual rates and deferred rebates. The maritime shipping industry stands firmly on that definition of free competition which Frihagen ironizes in his Introduction: freedom from public regulation and freedom from private cartelization.

The writer describes in detail the workings of Shipping Conferences, and presents an apologetic viewpoint. He then turns to a country-by-country analysis of the attempts (or lack thereof) made to place the Conferences under public control.

There is no direct international control. International law is permissive in allowing any state to regulate the shipping to and from its own ports. So far, only the United States has exercised this authority extensively. Frihagen argues that the intrusion of national interest into American anti-monopoly regulation will lead other countries to follow suit, and that the shippers will suffer from the conflict which follows. He feels that international control would be preferable to multiple national control.

The 25-page English summary presents the salient ideas of the book, but the Norwegian text is additionally serviceable to its readers as a reference work by virtue of its systematic presentation and thorough documentation. The author writes in straightforward, uncluttered style.

The Norwegian shipping industry and the Norwegian Government should find the signposts in this book to be useful in their attempts to keep the country's merchant fleet from foundering on the rocks of discriminatory treatment, whether of international or competing national origin.

STANLEY V. ANDERSON

La Cuestión del Río Lauca. República de Chile, Ministerio de Relaciones Exteriores. (Santiago: Instituto Geográfico Militar, 1963. pp. iv, 327. Index.) Bolivia's objections to Chile's use of the waters of the Lauca River provide yet another episode in the current series of international disputes between co-riparian states and another instance of the degree of international political animosity that can grow out of an essentially economic issue which is capable of settlement by negotiation or juridical means. The Lauca rises at an elevation of 13,000 feet in northeastern Chile and terminates in the salt marshes of Coipasa in Bolivia, two-thirds of the course being in Bolivia. Climatically infelicitous, the Lauca region supports a limited population engaged in herding. Chile has sought to divert water from the Lauca through a tunnel, canal, and dam system into the San José River which flows through the Azapa Valley and enters the Pacific at Arica. The development of the Azapa Valley with a view to supplying the agricultural needs of Arica requires a steady source of water for irrigation purposes.

The dispute between the two countries began in 1939, when Chile announced the initiation of a study of the diversion scheme, and Bolivia reserved its co-riparian rights. As the San José is not part of the Lauca basin, it could be argued that the Chilean project violated the principle of equitable distribution between riparian states of the waters of a common river basin. In the following two decades, Bolivia protested Chilean activity three times and two Mixed Commissions studied the situation. In 1962 Bolivia brought charges of aggression against Chile before the Council of the Organization of American States, which urged both parties to peaceful settlement of the dispute. Neither can agree on method, Bolivia preferring mediation, and Chile, arbitration or judicial settlement.

In its "White Book" the Chilean Government presents an analysis of the geographical objectives of the Lauca diversion scheme and an extensive examination of the dispute, including the texts of exchanges of notes between the two governments. This volume constitutes the Chilean brief in the controversy.

ALONA E. EVANS

The Taxation of Patent Royalties, Dividends, Interest in Europe. International Bureau of Fiscal Documentation. (Guides to European Taxation, Vol. I. Amsterdam: 1963. pp. xxiv, 334 (loose-leaf). \$30.00; service through Dec. 31, 1964, \$10.00, air mail.) The International Bureau of

Fiscal Documentation, with headquarters in Amsterdam, has published the first volume in its new series—*Guides to European Taxation*, a continuing series in loose-leaf form, which, the Bureau states, "will provide comprehensive analyses of significant problems involving the taxation of international business." The series is intended to provide in succinct, systematic and readily accessible form information regarding the tax laws of the Western European countries which is of use to scholars, governments, corporation lawyers, and tax consultants. Changes in rates, liability, and basis will be reported periodically through supplements supplied to subscribers by air mail. The first supplement was issued under date of December, 1963.

The volume covers taxation of the indicated types of income flowing into and out of the 18 Western European countries. It also covers the tax liability of such income flowing between United States and Canadian companies and companies in each of the countries treated. The tax structure of each country is outlined in a chapter divided into five sections covering, respectively, taxation of resident and non-resident companies, foreign source income, patent royalties, dividends and interest received by non-resident companies, and taxation of holding companies. This volume should prove valuable to all those whose work entails ready and accurate knowledge of the tax laws and practices of foreign countries.

The information contained in the *Guides* and their supplements is compiled by the Bureau with the assistance of co-operating tax experts in each country. The Bureau, of which Mr. J. van Hoorn, Jr., is Managing Director, states that if the present volume appears to be useful, further studies will be prepared in conjunction with other institutions, scholars, governments and practitioners. Some topics being considered for similar treatment are turnover taxes, net worth taxes, the concept of permanent establishment, corporation taxes, and taxation of know-how royalties.

ELEANOR H. FINCH

Common Market Antitrust. A Guide to the Law, Procedure and Literature. By David Kent Waer. (The Hague: Martinus Nijhoff, 1964. pp. viii, 67. Gld. 7.25; \$2.00.) Anti-trust law, which has developed as an important branch of domestic law in the United States and other leading countries in Europe, has become international law as between the members of the European Economic Community because of the provisions in Articles 85 and 86 of the Treaty of Rome to assure free competition. This treaty constitutes the fundamental law of the Common Market, and the principles in these two articles are implemented by Regulations 17, 27, and 153, which have been issued by the competent organs of the Community. Article 85 prohibits agreements and practices that restrict trade within the Common Market, and Article 86 prohibits the abuse by an enterprise of a dominant position therein.

Mr. Waer seeks to chart a path through the literature, the sources of law and procedure relating to the application of these treaty provisions. He explains the functions and powers of the institutions created by the Rome Treaty, such as the Council of Ministers, the Executive Commission, the Economic and Social Committee, the European Parliament, and the Court of Justice. Lawyers will be interested in his brief but comprehensive statement on the sources of the law that will be applied in enforcing the said articles.

Being an American lawyer practicing in Brussels, the author has had the advantage of watching at the seat of the E.E.C. the growth of this new branch of international law which blends the principles in the anti-trust

law of the United States with those in national laws of the member countries of the Community, principally in Germany and The Netherlands.

After having perused this simple but extensive synthesis of the purport of the treaty provisions and administrative regulations, the reader is tempted to broaden his knowledge by studying the cited texts, which are not only in English but also in the languages of the member countries, namely, French, Italian, Dutch and German. It is a blue book of the outstanding lawyers, professors and Common Market officials who have contributed or are contributing through their writings to the development of this important field of law. The book is of interest to any American enterprise that is carrying on business relations with companies in the Common Market, or has subsidiaries in various member countries that enter into licensing, distribution, or other types of agreements with companies in other countries of the Community that might affect competition.

MITCHELL B. CARROLL

Inter-American Bar Association. Proceedings of Twelfth Conference, Bogotá, Colombia, January 27–February 3, 1961. (Oxford, N. H.: Equity Publishing Corp., 1963. pp. xx, 376. Index.) The Inter-American Bar Association provides through its conferences an opportunity for lawyers of the Western Hemisphere to exchange views about problems of international and comparative law of concern in this area. The English edition of the proceedings of the Twelfth Conference, held at Bogotá in 1961, and attended by representatives of fourteen countries, contains some two dozen papers which were read in committees or sections in English, or submitted with English translations, ten reports, as well as recommendations and resolutions. The topics before the Conference included the protection of industrial and intellectual property, comparative studies of adoption laws, housing laws, and tax laws, together with extradition law, state responsibility, the Latin American free-trade movement, agrarian reform, control of narcotics traffic, legal rights of indigenous peoples, and compulsory bar integration.

Among the topics of interest to international lawyers were discussions of state responsibility by John Laylin and of extradition practice by M. R. Wilkey and W. A. Dobrovir. Mr. Laylin argued for "an unqualified international standard" of state responsibility to aliens and nationals alike. In suggesting revisions in the Draft Convention on Extradition of the Inter-American Council of Jurists, Mr. Wilkey recommended that the requesting state be enabled to obtain evidence in the asylum state for submission in the asylum state's determination of whether extradition should be granted (*cf.* the Pérez Jiménez case). Mr. Dobrovir would eliminate the "probable cause" hearing in the asylum state where the requesting state can certify that it has established probable cause in a competent judicial proceeding. Both authors would protect the accused by allowing the asylum state to measure against its own concepts of individual rights and guarantees the relevant penal laws of the state requesting extradition.

The volume presents a varied and informative collection of papers. It includes the minutes of the Council meetings and a list of participants at the Conference.

ALONA E. EVANS

Pravo na Samoopredjeljenje u Društvu Naroda i Ujedinjenim Nacijama (1917–1962). [*Self-Determination of Nations in the League of Nations and United Nations 1917–1962.*] By Milan Bulajić. (Belgrade: Servis Saveza udruženja pravnika Jugoslavije, 1963. pp. iii, 262.) This book, published

in the Serbo-Croatian language, is a history of the struggle for self-determination of nations during the activities of the League of Nations and United Nations. It includes a short period of time prior to the establishment of the League of Nations at the end of World War I.

The book is based on Marxist political philosophy, and the author takes care to bring his writing in harmony with the fundamentals of Marxist and Leninist doctrines. He starts with an explanation of the teachings of Lenin on nationality matters, with the achievements of the Bolshevik Revolution, and with the results of President Woodrow Wilson's demands for self-determination of nations at the Peace Conference in Versailles. In continuation, the author describes the activities of the League of Nations in the field of International Mandates for certain territories and dependencies of the German, Japanese and Turkish empires.

After having given a synopsis of the developments during World War II (the Act of Havana, the Atlantic Charter, the Charter of the United Nations, et cetera), the author gives an account of the struggle for independence ("national liberation struggle" in Marxist parlance) of India, Lebanon, Syria, Egypt, Libya, and of numerous other African and Asian nations, including Tunis, Morocco, Cyprus, Algeria, Congo and West Irian. He dedicates considerable space to the Conference of Bandung (1955) and the Meeting of the Uncommitted Nations at Belgrade (1961), which, in his opinion, were landmarks in the struggle for the liberation of all these countries.

The author's conclusion can be summarized as follows: Among the major undertakings of the United Nations is the application of the principle of self-determination for nations still living under colonial or semi-colonial rule. Dr. Bulajic concedes that some very small, isolated and underdeveloped countries may not be ready for full independence, but the large territories of Africa, still under foreign rule, and certain areas in Central and South America apparently do not fall into this category. Their liberation, however, cannot be delayed for a very long time and the United Nations should try to help accomplish this trend. However, the liberation of these nations and their self-determination are only the first important phase of the political and social development of the human race. The second and decisive phase will be the re-unification of all these nations after the final and definitive liquidation of imperialism.

This remarkable book of a very gifted writer is a good example of the application of Marxist political philosophy on the question of self-determination of nations, and also on the questions of imperialism and colonialism.

ZVONKO R. RODE

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NOTE: Many of the documents reprinted in this section also appear in *International Legal Materials: Current Documents*, another publication of the American Society of International Law. In the thought that readers of the JOURNAL may be interested in the range of documentation available in this publication, the tables of contents of Volume III, No. 3 (May, 1964), No. 4 (July, 1964) and No. 5 (September, 1964) are reproduced below.

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FINAL ACT OF THE EUROPEAN FISHERIES CONFERENCE

*London, December 3, 1963, to March 2, 1964*¹

At the invitation of the Government of the United Kingdom of Great Britain and Northern Ireland, an international conference was convened to discuss the solution of certain fisheries problems.

The Conference met at Lancaster House, London S.W.1. from 3rd December to 6th December, 1963, from 8th January to 17th January, 1964, and from 26th February to 2nd March, 1964.

The governments of the following sixteen states were represented at the Conference: Austria, Belgium, Denmark, France, the Federal Republic of Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom of Great Britain and Northern Ireland; the Commission of the European Economic Community was also represented.

The Conference elected Mr. Peter Thomas, M.P., Minister of State for Foreign Affairs, as Chairman of the Conference and Professor W. Riphagen as Chairman of the Convention Drafting Committee.

On the basis of the deliberations, as recorded in the summary records of the meetings, the Conference unanimously adopted the following resolutions, appended as Annexes 1 to 3 to this Final Act:

Resolution on Fisheries Policing (adopted on 17th January, 1964)

Resolution on Conservation (adopted on 17th January, 1964)

Resolution on Access to Markets (adopted on 29th February, 1964).

In addition, the Delegations of Austria, Belgium, Denmark, France, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom of Great Britain and Northern Ireland adopted, *ad referendum*, the text of a Fisheries Convention, together with a Protocol of Provisional Application, both of which are to be opened for signature in London from 9th March to 10th April, 1964, appended as Annexes 4 and 5 to this Final Act.

During the Conference the texts were adopted, *ad referendum*, of the following Agreements on the transitional arrangements provided for in

¹ Reproduced from a text provided by the Ministry of Agriculture, Fisheries and Food of the United Kingdom.

Article 9(1) of this Fisheries Convention, appended as Annexes 6 and 7 to this Final Act:

Agreement as to Transitional Rights between the Government of the United Kingdom of Great Britain and Northern Ireland on the one hand, and the Governments of Belgium, France, the Federal Republic of Germany, Ireland and the Netherlands on the other.

Agreement as to Transitional Rights between the Government of Ireland on the one hand, and the Government of Belgium, France, the Federal Republic of Germany, the Netherlands, Spain and the United Kingdom of Great Britain and Northern Ireland on the other.

IN WITNESS WHEREOF the Delegates have signed this Final Act:

DONE at London, this second day of March, One thousand nine hundred and sixty-four, in a single copy in the English and French languages, each text being equally authentic. The original texts shall be deposited in the archives of the Government of the United Kingdom of Great Britain and Northern Ireland, which will send certified copies of the Final Act to each of the governments represented at the Conference and to the Commission of the European Economic Community:

[signatories omitted]

ANNEX 1

RESOLUTION ON FISHERIES POLICING

Adopted on 17th January, 1964

THE CONFERENCE REQUESTS the Government of Great Britain and Northern Ireland

To invite the governments of all countries participating in the North-East Atlantic fisheries to send representatives to a technical conference to be held as soon as possible to prepare for the consideration of the governments concerned a draft Convention, on the general lines of the 1882 Convention for regulating the police of the North Sea Fisheries, embodying a modern code for the conduct of fishing operations and of related activities in the North-East Atlantic;

And to invite the Governments of the United States of America and Canada to send representatives to the Conference so that the extension of the provisions of any such Convention to the North-West Atlantic Fisheries may be considered.

ANNEX 2

RESOLUTION ON CONSERVATION

Adopted on 17th January, 1964

Recognising that all efforts to promote the stability and prosperity of the fishing industry ultimately depend on effective conservation measures to

ensure the rational exploitation of the resources of the sea, and that the Commission recently established under the North-East Atlantic Fisheries Convention is the body internationally responsible for these matters,

THE CONFERENCE urges the governments represented on the Commission to intensify their efforts

To secure the introduction of such measures as may be necessary, not only to prevent over-fishing, but to ensure the profitable exploitation of the fisheries for the benefit of all the countries concerned;

And for this purpose to ensure that the Commission is enabled to employ the full range of measures envisaged in the Convention, including measures of national and international control to ensure the effective observance of the regulations.

ANNEX 3

RESOLUTION ON ACCESS TO MARKETS

Adopted on 29th February, 1964

Considering that trade in fish and fish products play an important role for many European countries,

Recognising that the Organisation for European Economic Co-operation (O.E.E.C.) in its report of 1960 on Fishery Policies in Western Europe and North America has in particular established a set of principles in order to bring about more liberal conditions for trade in fish and fish products,

Noting that conditions are still prevailing which hamper a sound development of trade in fish and fish products,

THE CONFERENCE urges all governments represented to frame their policies with regard to fisheries in such a manner as to safeguard *inter alia* the interests of countries concerned with the development of trade in fish and fish products along the lines envisaged in the O.E.E.C. Report.

ANNEX 4

DRAFT FISHERIES CONVENTION

The Governments of Austria, Belgium, Denmark, France, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland

Desiring to define a régime of fisheries of a permanent character;
Have agreed as follows:

ARTICLE 1

(1) Each Contracting Party recognizes the right of any other Contracting Party to establish the fishery régime described in Articles 2 to 6 of the present Convention.

(2) Each Contracting Party retains however the right to maintain the fishery régime which it applies at the date on which the present Conven-

tion is opened for signature, if this régime is more favourable to the fishing of other countries than the régime described in Articles 2 to 6.

ARTICLE 2

The coastal state has the exclusive right to fish and exclusive jurisdiction in matters of fisheries within the belt of six miles measured from the baseline of its territorial sea.

ARTICLE 3

Within the belt between six and twelve miles measured from the baseline of the territorial sea, the right to fish shall be exercised only by the coastal state and by such other Contracting Parties, the fishing vessels of which have habitually fished in that belt between 1st January, 1953 and 31st December, 1962.

ARTICLE 4

Fishing vessels of the Contracting Parties, other than the coastal state, permitted to fish under Article 3, shall not direct their fishing effort towards stocks of fish or fishing grounds substantially different from those which they have habitually exploited. The coastal state may enforce this rule.

ARTICLE 5

(1) Within the belt mentioned in Article 3 the coastal state has the power to regulate the fisheries and to enforce such regulations, including regulations to give effect to internationally agreed measures of conservation, provided that there shall be no discrimination in form or in fact against fishing vessels of other Contracting Parties fishing in conformity with Articles 3 and 4.

(2) Before issuing regulations, the coastal state shall inform the other Contracting Parties concerned and consult those Contracting Parties, if they so wish.

ARTICLE 6

Any straight baseline or bay closing line which a Contracting Party may draw shall be in accordance with the rules of general international law and in particular with the provisions of the Convention on the Territorial Sea and the Contiguous Zone opened for signature at Geneva on 29th April, 1958.

ARTICLE 7

Where the coasts of two Contracting Parties are opposite or adjacent to each other, neither of these Contracting Parties is entitled, failing agreement between them to the contrary, to establish a fisheries régime beyond the median line, every point of which is equidistant from the nearest points on the low water lines of the coasts of the Contracting Parties concerned.

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ARTICLE 8

(1) Once a Contracting Party applies the régime described in Articles 2 to 6, any right to fish which it may thereafter grant to a state not a Contracting Party shall extend automatically to the other Contracting Parties, whether or not they could claim this right by virtue of habitual fishing, to the extent that the state not a Contracting Party avails itself effectively and habitually of that right.

(2) If a Contracting Party which has established the régime described in Articles 2 to 6 should grant to another Contracting Party any right to fish which the latter cannot claim under Articles 3 and 4, the same right shall extend automatically to all other Contracting Parties.

ARTICLE 9

(1) In order to allow fishermen of other Contracting Parties, who have habitually fished in the belt provided for in Article 2 to adapt themselves to their exclusion from that belt, a Contracting Party which established the régime provided for in Articles 2 to 6, shall grant to such fishermen the right to fish in that belt for a transitional period, to be determined by agreement between the Contracting Parties concerned.

(2) If a Contracting Party establishes the régime described in Articles 2 to 6, it may, notwithstanding the provisions of Article 2, continue to accord the right to fish in the whole or part of the belt provided for in Article 2 to other Contracting Parties of which the fishermen have habitually fished in the area by reason of "voisinage" arrangements.

ARTICLE 10

Nothing in the present Convention shall prevent the maintenance or establishment of a special régime in matters of fisheries:

(a) as between States Members and associated States of the European Economic Community,

(b) as between States Members of the Benelux Economic Union,

(c) as between Denmark, Norway and Sweden,

(d) as between France and the United Kingdom of Great Britain and Northern Ireland in respect of Granville Bay and the Minquiers and the Ecrehous,

(e) as between Spain and Portugal and their respective neighbouring countries in Africa,

(f) in the Skagerrak and the Kattegat.

ARTICLE 11

Subject to the approval of the other Contracting Parties, a coastal state may exclude particular areas from the full application of Articles 3 and 4 in order to give preference to the local population if it is overwhelmingly dependent upon coastal fisheries.

ARTICLE 12

The present Convention applies to the waters adjacent to the coasts of the Contracting Parties listed in Annex I. This Annex may be amended with the consent of the governments of the Contracting Parties. Any proposal for amendment shall be sent to the Government of the United Kingdom of Great Britain and Northern Ireland which shall notify it to all Contracting Parties, and inform them of the date on which it enters into force.

ARTICLE 13

Unless the parties agree to seek a solution by another method of peaceful settlement, any dispute which may arise between Contracting Parties concerning the interpretation or application of the present Convention shall at the request of any of the parties be submitted to arbitration in accordance with the provisions of Annex II to the present Convention.

ARTICLE 14

(1) The present Convention shall be open for signature from 9th March, 1964 to 10th April, 1964. It shall be subject to ratification or approval by the signatory governments, in accordance with their respective constitutional procedures. The instruments of ratification or approval shall be deposited as soon as possible with the Government of the United Kingdom of Great Britain and Northern Ireland.

(2) The present Convention shall enter into force upon the deposit of instruments of ratification or approval by eight signatory governments. If, however, on 1st January, 1966, this condition is not fulfilled, those governments which have deposited their instruments of ratification or approval may agree by special protocol on the date on which the Convention shall enter into force. In either case the Convention shall enter into force with respect to any government that ratifies or approves thereafter on the date of deposit of its instrument of ratification or approval.

(3) Any state may at any time after the Convention has come into force accede thereto upon such conditions as may be agreed by it with the Contracting Parties. Accession on the conditions agreed shall be effected by notice in writing addressed to the Government of the United Kingdom of Great Britain and Northern Ireland.

(4) The Government of the United Kingdom of Great Britain and Northern Ireland shall inform all signatory and acceding governments of all instruments of ratification or approval deposited and accessions received and shall notify signatory and acceding governments of the dates on which and the governments in respect of which the present Convention enters into force.

ARTICLE 15

The present Convention shall be of unlimited duration. However at any time after the expiration of the period of twenty years from the initial

entry into force of the present Convention, any Contracting Party may denounce the Convention by giving two years' notice in writing to the Government of the United Kingdom of Great Britain and Northern Ireland. The latter will notify the denunciation to the Contracting Parties.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Convention.

DONE at London this ninth day of March 1964, in the English and French languages, each text being equally authoritative, in a single original which shall be deposited in the archives of the Government of the United Kingdom of Great Britain and Northern Ireland, which shall transmit a certified true copy to each signatory and acceding government.

ANNEX I

The coasts of the Contracting Parties to which the Convention applies are the following:

Belgium

All coasts.

Denmark

The coasts of the North Sea, the Skagerrak and the Kattegat (*i.e.* the area lying to the north and west of lines drawn from Hasenore Head to Gniben Point, from Korshage to Spodsbierg, and from Gilbjerg Head to the Kullen).

France

The Atlantic, the North Sea and the English Channel coasts.

Federal Republic of Germany

The North Sea coast.

Ireland

All coasts.

Netherlands

The North Sea coast.

Portugal

The Atlantic coast, north of the 36th Parallel, and the coast of Madeira.

Spain

The Atlantic coast, north of the 36th Parallel.

Sweden

The west coast, north of a line drawn from the Kullen to Gilbjerg Head.

United Kingdom of Great Britain and Northern Ireland

All coasts, including those of Northern Ireland, the Isle of Man and the Channel Islands.

ANNEX II

ARBITRATION

ARTICLE 1

(1) Within three months of the signature of the Convention, or of accession thereto, each signatory or acceding government shall nominate five persons prepared to undertake the duties of arbiters and being nationals of a member state of the Organisation for Economic Cooperation and Development.

(2) The persons thus nominated shall be included in a list, which shall be notified by the Government of the United Kingdom to all signatory and acceding governments.

(3) Any change in the list of arbiters shall be notified in the same manner.

(4) The same person may be nominated by more than one government.

(5) The arbiters shall be nominated for a term of six years, which may be renewed.

(6) In the event of death or resignation of an arbiter he shall be replaced in the manner fixed for his nomination and for a new period of six years.

ARTICLE 2

(1) The party requesting arbitration in accordance with this Annex shall inform the other party of the claim which it intends to submit to arbitration, and give a summary statement of the grounds on which such claim is based.

(2) The Arbitral Tribunal shall consist of five members. The parties shall each nominate one member, who may be chosen from among their respective nationals. The other three arbiters, including the President, shall be chosen by agreement between the parties from among the nationals of third states whose names appear in the list mentioned in Article 1.

ARTICLE 3

If the nomination of the members of the Arbitral Tribunal is not made within a period of one month from the date on which arbitration was first requested, the task of making the necessary nominations shall be entrusted to the President of the International Court of Justice. Should the latter

be a national of one of the parties to the dispute, this task shall be entrusted to the Vice-President of the Court or to the next senior judge of the Court who is not a national of the parties.

ARTICLE 4

The arbiters to be nominated by the President of the International Court of Justice shall be chosen from among the nationals of the states members of the Organisation for Economic Cooperation and Development and preferably from the list provided for in Article 1. The President of the International Court of Justice shall consult beforehand the parties to the dispute, and may consult the Director General of the Food and Agriculture Organisation and the President of the International Council for the Exploration of the Sea. The arbiters shall be of different nationalities.

ARTICLE 5

The parties may draw up a special agreement determining the subject of the dispute and the details of procedure.

ARTICLE 6

In the absence of sufficient particulars in a special agreement or in the present Annex regarding the questions mentioned in Article 5 of the present Annex, the provisions of Articles 59-82 of the Hague Convention for the Pacific Settlement of International Disputes of 18th October, 1907² shall apply as far as possible.

ARTICLE 7

The parties shall facilitate the work of the Arbitral Tribunal, and in particular shall supply it to the greatest possible extent with all relevant documents and information. They shall use the means at their disposal to allow it to proceed in their territory, and in accordance with their law, to the summoning and hearing of witnesses or experts and to visit the localities in question.

ARTICLE 8

In the absence of agreement to the contrary between the parties, the decisions of the Arbitral Tribunal shall be taken by majority vote and, except in relation to questions of procedure, decisions shall be valid only if all members are present. The voting shall not be disclosed, nor any dissenting or separate opinions.

ARTICLE 9

(1) During the proceedings, each member of the Arbitral Tribunal shall receive emoluments, the amount of which shall be fixed by agreement between the parties, each of which shall contribute an equal share.

² 2 A.J.I.L. Supp. 43, 68 (1908).

(2) The expenses of the Arbitral Tribunal shall be divided in the same manner.

ARTICLE 10

The validity of legal measures which entered into force before the date on which the Convention was opened for signature shall not be questioned in proceedings before the Arbitral Tribunal.

ARTICLE 11

(1) In the case of a dispute based on an allegation of injury to private interests which, according to the municipal law of one of the parties, falls within the competence of its judicial or administrative authorities, the party in question may object to the dispute being submitted for settlement by the procedure laid down in this Annex until a decision with final effect has been pronounced, within a reasonable time, by the competent authority.

(2) If a decision with final effect has been pronounced in the state concerned, it will no longer be possible to resort to the procedure laid down in this Annex after the expiration of a period of five years from the date of the aforementioned decision.

ARTICLE 12

If the execution of an award of the Arbitral Tribunal would conflict with a judgment or measure enjoined by a court of law or other authority of one of the parties to the dispute, and if the municipal law of that party does not permit, or only partially permits, the consequences of the judgment or measure in question to be annulled, the Arbitral Tribunal shall, if necessary, grant the injured party equitable satisfaction.

ARTICLE 13

(1) In all cases where a dispute forms the subject of arbitration, and particularly if the question on which the parties differ arises out of acts already committed or on the point of being committed, the Arbitral Tribunal shall lay down within the shortest possible time the provisional measures to be adopted. The parties to the dispute shall be bound to accept such measures.

(2) The parties shall abstain from all measures likely to react prejudicially upon the execution of the award of the Arbitral Tribunal and, in general, shall abstain from any sort of action whatsoever which may aggravate or extend the dispute.

ARTICLE 14

(1) As soon as the Arbitral Tribunal is constituted, the President shall inform the Contracting Parties of the dispute submitted to it.

(2) Any Contracting Party may intervene, within a month from the date of receipt of this notification if it establishes a legitimate interest in

the settlement of the dispute. Intervention shall be with the sole object of supporting or contesting the contentions, or part of the contentions, of the original parties to the dispute. An intervention shall not lead to modification of the original composition of the Arbitral Tribunal.

ARTICLE 15

Each of the Contracting Parties shall comply with the award of the Arbitral Tribunal in any dispute to which it is a party.

ANNEX 5

DRAFT PROTOCOL OF PROVISIONAL APPLICATION OF THE FISHERIES CONVENTION

The Governments of Austria, Belgium, Denmark, France, the Federal Republic of Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom of Great Britain and Northern Ireland

Have agreed as follows:

ARTICLE 1

The Contracting Parties will raise no objection if a government which has ratified or approved the Fisheries Convention opened for signature at London on 9th March, 1964, applies provisionally the provisions of the Convention, having first notified its decision to the Government of the United Kingdom of Great Britain and Northern Ireland.

ARTICLE 2

(1) The provisional application of the provisions of the Fisheries Convention by a Contracting Party will entail the establishment of the list of arbiters provided for in Article 1 of Annex II of the Convention.

(2) A Contracting Party which has provisionally applied the provisions of the Convention shall be bound by its provisions, in particular Article 13, and shall not object if they are invoked by a government which has signed the present Protocol and the Convention, even if the latter government has not yet ratified or approved the Convention, with a view to settling a dispute raised by this provisional application.

ARTICLE 3

The present Protocol shall be open for signature from 9th March, 1964 to 10th April, 1964. It shall enter into force, when it has been signed by two governments as between those governments, and in respect of any government which signs it thereafter on the date of signature by that government.

ARTICLE 4

(1) Upon the entry into force of the Convention, the present Protocol shall automatically cease to have effect as between governments which have become parties to the Convention.

(2) The present Protocol will cease to have effect in respect of any government which notifies the Government of the United Kingdom of Great Britain and Northern Ireland of its decision not to ratify or approve the Convention.

ARTICLE 5

The Government of the United Kingdom of Great Britain and Northern Ireland shall immediately inform all the signatories of the present Protocol of each notification received in accordance with Article 1 or with paragraph 2 of Article 4.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Protocol.

DONE at London this ninth day of March 1964, in the English and French languages, each text being equally authoritative, in a single original which shall be deposited in the archives of the Government of the United Kingdom of Great Britain and Northern Ireland, which shall transmit a certified true copy to each signatory and acceding government.

ANNEX 6

AGREEMENT AS TO TRANSITIONAL RIGHTS

The Government of the United Kingdom of Great Britain and Northern Ireland on the one hand, and the Governments of Belgium, France, the Federal Republic of Germany, Ireland, and the Netherlands on the other, Hereby agree as follows:

ARTICLE 1

The provisions of Article 9(1) of the Fisheries Convention opened for signature on 9th March, 1964, shall apply as follows:

(a) Until 31st December, 1965, Belgian, French, German, Irish and Netherlands fishing vessels shall continue to have the right to fish off the coasts of the United Kingdom of Great Britain and Northern Ireland, up to a limit of three miles measured from the baselines of the territorial sea;

(b) Until 31st December, 1966, Belgian, French, German, Irish and Netherlands fishing vessels shall also continue to have the right to fish up to a limit of three miles measured from the baselines of the territorial sea off those parts of the coasts of the United Kingdom and Northern Ireland where straight baselines or bay-closing lines in excess of 10 miles are drawn.

ARTICLE 2

The provisions of Articles 4 and 5 of the Fisheries Convention shall during the transitional periods be applicable in the zones laid down in Article 1.

ARTICLE 3

The present Agreement shall be open for signature from 9th March, 1964 to 10th April, 1964. It shall enter into force, when it is signed by the Government of the United Kingdom of Great Britain and Northern Ireland, as between that government and any other government which then signs, or has signed, it. In respect of any government which signs the present Agreement thereafter, the date of entry into force shall be the date of signature by that government.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Agreement.

DONE at London this ninth day of March 1964, in the English and French languages, each text being equally authoritative, in a single original which shall be deposited in the archives of the Government of the United Kingdom of Great Britain and Northern Ireland, which shall transmit a certified true copy to each signatory government.

ANNEX 7

AGREEMENT AS TO TRANSITIONAL RIGHTS

The Government of Ireland on the one hand, and the Governments of Belgium, France, the Federal Republic of Germany, the Netherlands, Spain and the United Kingdom of Great Britain and Northern Ireland on the other,

Hereby agree as follows:

ARTICLE 1

The provisions of Article 9(1) of the Fisheries Convention opened for signature on 9th March, 1964, shall apply as follows:

(a) Until 31st December, 1965, Belgian, British, French, German, Netherlands and Spanish fishing vessels shall continue to have the right to fish off the coasts of Ireland, up to a limit of three miles measured from the baselines of the territorial sea;

(b) Until 31st December, 1966, Belgian, British, French, German, Netherlands and Spanish fishing vessels shall also continue to have the right to fish up to a limit of three miles measured from the baselines of the territorial sea off those parts of the coasts of Ireland where straight baselines or bay-closing lines in excess of 10 miles are drawn.

ARTICLE 2

The provisions of Articles 4 and 5 of the Fisheries Convention shall during the transitional periods be applicable in the zones laid down in Article 1.

ARTICLE 3

The present Agreement shall be open for signature from 9th March 1964 to 10th April 1964. It shall enter into force, when it is signed by the Government of Ireland, as between that government and any other government which then signs, or has signed, it. In respect of any government which signs the present Agreement thereafter, the date of entry into force shall be the date of signature by that government.

IN WITNESS WHEREOF the undersigned, being duly authorised thereto, have signed the present Agreement.

UNITED NATIONS DECLARATION ON THE ELIMINATION
OF ALL FORMS OF RACIAL DISCRIMINATION

RESOLUTION ADOPTED BY THE UNITED NATIONS GENERAL ASSEMBLY AT ITS
1261ST PLENARY MEETING, NOVEMBER 20, 1963¹

The General Assembly,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality of all human beings and seeks, among other basic objectives, to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out in the Declaration, without distinction of any kind, in particular as to race, colour or national origin,

Considering that the Universal Declaration of Human Rights proclaims further that all are equal before the law and are entitled without any discrimination to equal protection of the law and that all are entitled to equal protection against any discrimination and against any incitement to such discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, and that the Declaration on the granting of independence to colonial countries and peoples proclaims in particular the necessity of bringing colonialism to a speedy and unconditional end,

Considering that any doctrine of racial differentiation or superiority is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination either in theory or in practice,

Taking into account the other resolutions adopted by the General Assembly and the international instruments adopted by the specialized agencies, in particular the International Labour Organisation and the

¹ Res. 1904 (XVIII), U.N. Doc. A/RES/1904 (XVIII), 1963; adopted on the report of the Third Committee (U.N. Docs. A/5603 and Corr. 1, A/L.435) (1963).

United Nations Educational, Scientific and Cultural Organization, in the field of discrimination,

Taking into account the fact that, although international action and efforts in a number of countries have made it possible to achieve progress in that field, discrimination based on race, colour or ethnic origin in certain areas of the world none the less continues to give cause for serious concern,

Alarmed by the manifestations of racial discrimination still in evidence in some areas of the world, some of which are imposed by certain governments by means of legislative, administrative or other measures, in the form, *inter alia*, of *apartheid*, segregation and separation, as well as by the promotion and dissemination of doctrines of racial superiority and expansionism in certain areas,

Convinced that all forms of racial discrimination and, still more so, governmental policies based on the prejudice of racial superiority or on racial hatred, besides constituting a violation of fundamental human rights, tend to jeopardize friendly relations among peoples, co-operation between nations and international peace and security,

Convinced also that racial discrimination harms not only those who are its objects but also those who practise it,

Convinced further that the building of a world society free from all forms of racial segregation and discrimination, factors which create hatred and division among men, is one of the fundamental objectives of the United Nations,

1. *Solemnly affirms* the necessity of speedily eliminating racial discrimination throughout the world, in all its forms and manifestations, and of securing understanding of and respect for the dignity of the human person;

2. *Solemnly affirms* the necessity of adopting national and international measures to that end, including teaching, education and information, in order to secure the universal and effective recognition and observance of the principles set forth below;

3. *Proclaims* this Declaration:

ARTICLE 1

Discrimination between human beings on the grounds of race, colour or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a fact capable of disturbing peace and security among peoples.

ARTICLE 2

1. No state, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in

the treatment of persons, groups of persons or institutions on the grounds of race, colour or ethnic origin.

2. No state shall encourage, advocate or lend its support, through police action or otherwise, to any discrimination based on race, colour or ethnic origin by any group, institution or individual.

3. Special concrete measures shall be taken in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups with the object of ensuring the full enjoyment by such individuals of human rights and fundamental freedoms. These measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups.

ARTICLE 3

1. Particular efforts shall be made to prevent discrimination based on race, colour or ethnic origin, especially in the fields of civil rights, access to citizenship, education, religion, employment, occupation and housing.

2. Everyone shall have equal access to any place or facility intended for use by the general public, without distinction as to race, colour or ethnic origin.

ARTICLE 4

All states shall take effective measures to revise governmental and other public policies and to rescind laws and regulations which have the effect of creating and perpetuating racial discrimination wherever it still exists. They should pass legislation for prohibiting such discrimination and should take all appropriate measures to combat those prejudices which lead to racial discrimination.

ARTICLE 5

An end shall be put without delay to governmental and other public policies of racial segregation and especially policies of *apartheid*, as well as all forms of racial discrimination and separation resulting from such policies.

ARTICLE 6

No discrimination by reason of race, colour or ethnic origin shall be admitted in the enjoyment by any person of political and citizenship rights in his country, in particular the right to participate in elections through universal and equal suffrage and to take part in the government. Everyone has the right of equal access to public service in his country.

ARTICLE 7

1. Everyone has the right to equality before the law and to equal justice under the law. Everyone, without distinction as to race, colour or ethnic origin, has the right to security of person and protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

2. Everyone shall have the right to an effective remedy and protection against any discrimination he may suffer on the ground of race, colour or ethnic origin with respect to his fundamental rights and freedoms through independent national tribunals competent to deal with such matters.

ARTICLE 8

All effective steps shall be taken immediately in the fields of teaching, education and information, with a view to eliminating racial discrimination and prejudice and promoting understanding, tolerance and friendship among nations and racial groups, as well as to propagating the purposes and principles of the Charter of the United Nations, of the Universal Declaration of Human Rights, and of the Declaration on the granting of independence to colonial countries and peoples.

ARTICLE 9

1. All propaganda and organizations based on ideas or theories of the superiority of one race or group of persons of one colour or ethnic origin with a view to justifying or promoting racial discrimination in any form shall be severely condemned.

2. All incitement to or acts of violence, whether by individuals or organizations, against any race or group of persons of another colour or ethnic origin shall be considered an offence against society and punishable under law.

3. In order to put into effect the purposes and principles of the present Declaration, all states shall take immediate and positive measures, including legislative and other measures, to prosecute and/or outlaw organizations which promote or incite to racial discrimination, or incite to or use violence for purposes of discrimination based on race, colour or ethnic origin.

ARTICLE 10

The United Nations, the specialized agencies, states and non-governmental organizations shall do all in their power to promote energetic action which, by combining legal and other practical measures, will make possible the abolition of all forms of racial discrimination. They shall, in particular, study the causes of such discrimination with a view to recommending appropriate and effective measures to combat and eliminate it.

ARTICLE 11

Every state shall promote respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations, and shall fully and faithfully observe the provisions of the present Declaration, the Universal Declaration of Human Rights and the Declaration on the granting of independence to colonial countries and peoples.

GREAT BRITAIN

CONTINENTAL SHELF ACT 1964¹

Entered into force April 15, 1964²

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1.—(1) Any rights exercisable by the United Kingdom outside territorial waters with respect to the sea bed and subsoil and their natural resources, except so far as they are exercisable in relation to coal, are hereby vested in Her Majesty.

(2) In relation to any coal with respect to which those rights are exercisable the Coal Industry Nationalisation Act 1946 shall apply as it applies in relation to coal in Great Britain, but with the modification that the National Coal Board shall not engage in any operations for the purpose of working or getting the coal without the consent of the Minister of Power, which may be given on such terms and subject to such conditions as he thinks fit.

(3) In relation to any petroleum with respect to which those rights are exercisable sections 2 and 6 of the Petroleum (Production) Act 1934 (which relate to the granting of licences to search and bore for, and get, petroleum) shall apply as they apply in relation to petroleum in Great Britain, and section 3 of that Act (which enables persons holding licences under that Act to acquire ancillary rights) and section 5 of that Act (which makes provision as to receipts and expenditure under that Act) shall have effect as if this subsection were part of that Act.

¹ 1964 Ch. 29.

² In the Petroleum (Production) (Continental Shelf and Territorial Sea) Regulations 1964, made on May 12, 1964, Stat. Instr., 1964, No. 708, the Minister of Power promulgated regulations in implementation of the above act, pursuant to Sec. 1(3) of the Act. Production and exploration licenses may, under Regulation 4, be issued only to "persons who are citizens of the United Kingdom and Colonies and are resident in the United Kingdom or who are bodies corporate incorporated in the United Kingdom." These licenses apply to areas of the continental shelf ("blocks," in the language of the Regulations) which will subsequently be designated. Production licenses will be valid for six years, at the termination of which the licensee has an option to retain not more than one half of the block for a further forty years. The part not so retained will be surrendered. Exploration licenses are to be valid for three years.

The area outside territorial waters in which the United Kingdom is to exercise rights with respect to the sea bed and subsoil and their natural resources has been defined by the Continental Shelf (Designation of Areas) Order 1964, made on May 12, 1964, Stat. Instr., 1964, No. 697.

On May 11, 1964, Great Britain deposited its instrument of ratification of the Convention on the Continental Shelf, signed at Geneva, April 29, 1958, U. N. Doc. A/CONF. 13/L.55 (1958), 52 A.J.I.L. 858 (1958). The Convention entered into force as to Great Britain on June 10, 1964 (50 Dept. of State Bulletin 882 (1964)).

(4) Model clauses prescribed under section 6 of the Petroleum (Production) Act 1934 as applied by the preceding subsection shall include provision for the safety, health and welfare of persons employed on operations undertaken under the authority of any licence granted under that Act as so applied.

(5) The Minister of Power shall for each financial year prepare and lay before Parliament a report stating

- (a) the licences under the said Act of 1934 granted in that year in respect of areas beyond low-water mark and the persons to whom and the areas in respect of which they were granted, and the like information as respects such licences held at the end of that year;
- (b) the total amount of natural gas and of other petroleum gotten in that year in pursuance of licences held in respect of such areas; and
- (c) the method used for arriving at the amounts payable by way of consideration for such licences.

(6) The general duty of the Minister of Power of securing the effective and co-ordinated development of such resources in Great Britain as are mentioned in section 1(1) of the Ministry of Fuel and Power Act 1945 shall extend to any such resources outside Great Britain with respect to which the said rights are exercisable.

(7) Her Majesty may from time to time by Order in Council designate any area as an area within which the rights mentioned in subsection (1) of this section are exercisable, and any area so designated is in this Act referred to as a designated area.

(8) In this section "coal" has the same meaning as in the Coal Industry Nationalisation Act 1946 and "petroleum" has the same meaning as in the Petroleum (Production) Act 1934.

2.—(1) The Minister of Power may for the purpose of protecting any installation in a designated area by order made by statutory instrument prohibit ships, subject to any exceptions provided by the order, from entering without his consent such part of that area as may be specified in the order.

(2) If any ship enters any part of a designated area in contravention of an order under this section its owner or master shall be liable

- (a) on summary conviction, to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding three months, or to both;
- (b) on conviction on indictment, to a fine, or to imprisonment for a term not exceeding one year, or to both;

unless he proves that the prohibition imposed by the order was not, and would not on reasonable inquiry have become, known to the master.

(3) Any order under this section may be varied or revoked by a subsequent order, and any statutory instrument containing such an order shall

be subject to annulment in pursuance of a resolution of either House of Parliament.

3.—(1) Any act or omission which

- (a) takes place on, under or above an installation in a designated area or any waters within five hundred metres of such an installation; and
- (b) would, if taking place in any part of the United Kingdom, constitute an offence under the law in force in that part,

shall be treated for the purposes of that law as taking place in that part.

(2) Her Majesty may by Order in Council make provision for the determination, in accordance with the law in force in such part of the United Kingdom as may be specified in the Order, of questions arising out of acts or omissions taking place in a designated area, or in any part of such an area, in connection with the exploration of the sea bed or subsoil or the exploitation of their natural resources, and for conferring jurisdiction with respect to such questions on courts in any part of the United Kingdom so specified.

(3) Any jurisdiction conferred on any court under this section shall be without prejudice to any jurisdiction exercisable apart from this section by that or any other court.

(4) Any Order in Council under this section may be varied or revoked by a subsequent Order in Council and any statutory instrument containing such an Order shall be subject to annulment in pursuance of a resolution of either House of Parliament.

4.—(1) Part II of the Coast Protection Act 1949 (which requires the consent of the Minister of Transport to the carrying out of certain works on the sea shore if obstruction or danger to navigation is likely to result) except section 34(1)(b) (which restricts the deposit of material) shall apply in relation to any part of the sea bed in a designated area as it applies in relation to the sea shore; and section 46 of that Act (local inquiries) shall extend to any matter arising under this section.

(2) Any person guilty of an offence under the said Part II as applied by this section shall be liable, on summary conviction to a fine not exceeding one hundred pounds, and on conviction on indictment to a fine.

5.—(1) If any oil to which section 1 of the Oil in Navigable Waters Act 1955 applies or any mixture containing not less than one hundred parts of such oil in a million parts of the mixture is discharged or escapes into any part of the sea

- (a) from a pipe-line; or
- (b) (otherwise than from a ship) as the result of any operations for the exploration of the sea bed and subsoil or the exploitation of their natural resources in a designated area,

the owner of the pipe-line or, as the case may be, the person carrying on the operations shall be guilty of an offence unless he proves, in the case of

a discharge from a place in his occupation, that it was due to the act of a person who was there without his permission (express or implied) or, in the case of an escape, that he took all reasonable care to prevent it and that as soon as practicable after it was discovered all reasonable steps were taken for stopping or reducing it.

(2) A person guilty of an offence under this section shall be liable, on summary conviction to a fine not exceeding one thousand pounds, and on conviction on indictment to a fine.

6. An Order in Council under section 3 of this Act may make provision for treating for the purposes of the Wireless Telegraphy Act 1949 and any regulations made thereunder any installation in an area or part with respect to which provision is made under that section and any waters within five hundred metres of such an installation as if they were situated in such part of the United Kingdom as may be specified in the Order.

7. An Order in Council under section 3 of this Act may make provision for treating for the purposes of the Radioactive Substances Act 1960 and any orders and regulations made thereunder any installation in an area or part with respect to which provision is made under that section and any waters within five hundred metres of such an installation as if they were situated in such part of the United Kingdom as may be specified in the Order, and for modifying the provisions of that Act in their application to such an installation or waters.

8.—(1) Section 3 (punishment for damaging cables) of the Submarine Telegraph Act 1885 and Article IV and paragraph 1 of Article VII (liability to pay compensation for damage to cables and for loss of gear sacrificed to avoid such damage) of the Convention set out in the Schedule to that Act (which by virtue of section 2 thereof has the force of law) shall apply in relation to all submarine cables under the high seas (and not only to those to which that Convention applies) and to pipe-lines under the high seas; and the said section 3 shall be construed as referring to telephonic as well as telegraphic communication, and, in relation to high-voltage power cables and to pipe-lines, as if the words from "in such manner" to the end of subsection (1) were omitted.

(2) Sections 6(3) (limitation of proceedings) and 13 (cesser of Act on cesser of Convention) of that Act are hereby repealed.

9.—(1) The following provisions of this section shall have effect with respect to the use and supply of any natural gas gotten in pursuance of a licence under the Petroleum (Production) Act 1934 as applied by section 1(3) of this Act, and section 52 of the Gas Act 1948 shall not apply to any such gas.

(2) The holder of the licence shall not without the consent of the Minister of Power use the gas in Great Britain and no person shall without that consent supply the gas to any other person at premises in Great Britain.

(3) The Minister of Power shall not give his consent under this section to the supply of gas at any premises unless satisfied

- (a) that the supply is for industrial purposes and that the Area Board in whose area the premises are situated has been given an opportunity of purchasing the gas at a reasonable price; or
- (b) that the supply is for such purposes as are mentioned in subsection (4) of this section;

but shall give his consent under this section to the supply or use of any gas if satisfied that it is for the purposes mentioned in that subsection.

(4) The said purposes are industrial purposes which do not consist of or include the use of the gas as a fuel except in so far as the gas is used to provide heat or other energy required

- (a) for a process in which the gas is used otherwise than as a fuel; or
- (b) where such a process is one of a series, for any further process in the same series, not being a process in which a bulk product is converted into manufactured articles;

and in determining whether any industrial purposes are as mentioned in this subsection the use of any gas derived, otherwise than as a by-product, from any natural gas shall be treated as the use of that natural gas.

(5) For the purposes of this section gas provided by a company for the use of any subsidiary or holding company thereof, or of any subsidiary of such a holding company shall be deemed to be used by that company.

(6) This section shall not affect the supply of gas by any person otherwise than through pipes or the supply of gas by or to an Area Board.

(7) In this section "Area Board" has the same meaning as in the Gas Act 1948 and "holding company" and "subsidiary" have the same meanings as in the Companies Act 1948.

10. [This section, dealing with the making of regulations by the Minister of Pensions and National Insurance with respect to employment in connection with the exploitation or exploration of the sea bed and subsoil, is omitted.]

11.—(1) Proceedings for any offence under this Act (including an offence under another Act as applied by or under this Act and anything that is an offence by virtue of section 3(1) of this Act) may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in the United Kingdom.

(2) Where a body corporate is guilty of such an offence and the offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity he, as well as the body corporate, shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

In this subsection, "director" in relation to a body corporate established for the purpose of carrying on under national ownership any industry or part of an industry or undertaking, being a body corporate whose affairs are managed by its members, means a member of that body corporate.

(3) A constable shall on any installation in a designated area have all the powers, protection and privileges which he has in the area for which he acts as constable.

12. Nothing in this Act shall be taken to restrict the powers of the Parliament of Northern Ireland to make laws; and any laws made by that Parliament with respect to any matter with respect to which it has that power shall have effect notwithstanding anything in this Act.

13. This Act may be cited as the Continental Shelf Act 1964.

UNITED STATES

ACT TO PROHIBIT FISHING BY FOREIGN VESSELS IN THE TERRITORIAL WATERS OF THE UNITED STATES AND IN CERTAIN OTHER AREAS¹

Approved May 20, 1964

It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States, its territories and possessions and the Commonwealth of Puerto Rico, or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or to engage in the taking of any Continental Shelf fishery resource which appertains to the United States except as provided in this Act or as expressly provided by an international agreement to which the United States is a party. However, sixty days after written notice to the President of the Senate and the Speaker of the House of Representatives of intent to do so, the Secretary of the Treasury may

¹Public Law 88-308, 78 Stat. 194.

The reports on this Act are S. Rep. No. 500, 88th Cong., 2d Sess. (1963), and H.R. Rep. No. 1356, 88th Cong., 2d Sess. (1964).

In signing the above Act, the President of the United States stated that "Since the waters over the continental shelf are high seas, efforts will be made to work out in advance with foreign countries procedures for enforcement there." On the same date, the Department of State issued a statement reporting that the Governments of Japan and the United States had discussed the effect of the Act and that assurances had been given to Japan that there would be consultations with that country before the implementation of the legislation with respect to fishery resources of the continental shelf. Full consideration would be given to the views of the Japanese Government and to Japan's long-established king crab fishery.

In the statement, the positions of the two governments were summarized as follows:

"The United States Government has explained to the Japanese Government that this legislation would not, of itself, constitute the assertion of any right to jurisdiction over resources that does not already exist and that it is concerned primarily with providing meaningful protection to such rights as now exist or which might be acquired at some time in the future.

"The position of the Government of Japan is that it is not bound by the convention on the continental shelf, to which Japan is not a party, and that therefore the rights of the Government of Japan will not be affected by the provisions of S. 1988 relating to fishery resources of the continental shelf. The Government of the United States has taken note of this position." (50 Dept. of State Bulletin 936 (1964).)

authorize a vessel other than a vessel of the United States to engage in fishing for designated species within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters or for resources of the Continental Shelf which appertain to the United States upon certification by the Secretaries of State and of the Interior that such permission would be in the national interest and upon concurrence of any State, Commonwealth, territory, or possession directly affected. The authorization in this section may be granted only after a finding by the Secretary of the Interior that the country of registry, documentation, or licensing extends substantially the same fishing privileges for a fishery to vessels of the United States. Notwithstanding any other provision of law, the Secretary of State, with the concurrence of the Secretaries of the Treasury and of the Interior, may permit a vessel, other than a vessel of the United States, owned or operated by an international organization of which the United States is a member, to engage in fishery research within the territorial waters of the United States or within any waters in which the United States has the same rights in respect to fisheries as it has in its territorial waters, or for resources of the Continental Shelf which appertain to the United States and to land its catch in a port of the United States in accordance with such conditions as the Secretary may prescribe whenever they determine such action is in the national interest.

Sec. 2. (a) Any person violating the provisions of this Act shall be fined not more than \$10,000, or imprisoned not more than one year, or both.

(b) Every vessel employed in any manner in connection with a violation of this Act including its tackle, apparel, furniture, appurtenances, cargo, and stores shall be subject to forfeiture and all fish taken or retained in violation of this Act or the monetary value thereof shall be forfeited.

(c) All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of a vessel, including its tackle, apparel, furniture, appurtenances, cargo, and stores for violation of the customs laws, the disposition of such vessel, including its tackle, apparel, furniture, appurtenances, cargo, and stores or the proceeds from the sale thereof, and the remission or mitigation of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this Act, insofar as such provisions of law are applicable and not inconsistent with the provisions of this Act.

Sec. 3. (a) Enforcement of the provisions of this Act is the joint responsibility of the Secretary of the Interior, the Secretary of the Treasury, and the Secretary of the Department in which the Coast Guard is operating. In addition, the Secretary of the Interior may designate officers and employees of the States of the United States, of the Commonwealth of Puerto Rico, and of any territory or possession of the United States to carry out enforcement activities hereunder. When so designated, such officers and employees are authorized to function as Federal law enforcement agents for these purposes, but they shall not be held and considered as employees

of the United States for the purposes of any laws administered by the Civil Service Commission.

(b) The judges of the United States district courts, the judges of the highest courts of the territories and possessions of the United States, and United States commissioners may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue such warrants or other process, including warrants or other process issued in admiralty proceedings in Federal District Courts, as may be required for enforcement of this Act and any regulations issued thereunder.

(c) Any person authorized to carry out enforcement activities hereunder shall have the power to execute any warrant or process issued by any officer or court of competent jurisdiction for the enforcement of this Act.

(d) Such person so authorized shall have the power—

(1) with or without a warrant or other process, to arrest any person committing in his presence or view a violation of this Act or the regulations issued thereunder;

(2) with or without a warrant or other process, to search any vessel and, if as a result of such search he has reasonable cause to believe that such vessel or any person on board is in violation of any provision of this Act or the regulations issued thereunder, then to arrest such person.

(e) Such person so authorized may seize any vessel, together with its tackle, apparel, furniture, appurtenances, cargo and stores, used or employed contrary to the provisions of this Act or the regulations issued hereunder or which it reasonably appears has been used or employed contrary to the provisions of this Act or the regulations issued hereunder.

(f) Such person so authorized may seize, whenever and wherever lawfully found, all fish taken or retained in violation of this Act or the regulations issued thereunder. Any fish so seized may be disposed of pursuant to the order of a court of competent jurisdiction pursuant to the provisions of subsection (g) of this section, or if perishable, in a manner prescribed by regulations of the Secretary of the Treasury.

(g) Notwithstanding the provisions of section 2464 of title 28 when a warrant of arrest or other process in rem is issued in any cause under this section, the United States marshal or other officer shall discharge any fish seized if the process has been levied, on receiving from the claimant of the fish a bond or stipulation for the value of the fish with sufficient surety to be approved by a judge of the district court having jurisdiction of the offense, conditioned to deliver the fish seized, if condemned, without impairment in value or, in the discretion of the court, to pay its equivalent value in money or otherwise to answer the decree of the court in such cause. Such bond or stipulation shall be returned to the court and judgment thereon against both the principal and sureties may be recovered in event of any breach of the conditions thereof as determined by the court. In the discretion of the accused, and subject to the direction of the court, the fish may be sold for not less than its reasonable market value and the pro-

ceeds of such sale placed in the registry of the court pending judgment in the case.

Sec. 4. The Secretaries of the Treasury and Interior are authorized jointly or severally to issue such regulations as they determine are necessary to carry out the provisions of this Act.

Sec. 5. (a) As used in this Act, the term "Continental Shelf fishery resource" includes the living organisms belonging to sedentary species; that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil of the Continental Shelf.

(b) The Secretary of the Interior in consultation with the Secretary of State is authorized to publish in the Federal Register a list of the species of living organisms covered by the provisions of subsection (a) of this section.

(c) As used in this Act, the term "fisheries" means the taking, planting, or cultivation of fish, mollusks, crustaceans, or other forms of marine animal or plant life by any vessel or vessels; and the term "fish" includes mollusks, crustaceans, and all other forms of marine animal or plant life.

(d) As used in this Act, the term "Continental Shelf" refers (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters, or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

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[Abbreviations: *AJIL*, American Journal of International Law; *ASIL*, American Society of International Law; *BN*, Book Note; *BR*, Book Review; *CN*, Notes and Comments; *Ed*, Editorial Comment; *I.C.J.*, International Court of Justice; *I.L.C.*, International Law Commission; *JD*, Judicial Decision; *LA*, Leading Article]

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